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715	Verammal *v.* Subbu Singh ...	8	745
716	Sennayan Chetty *v.* Sinnappan Servai	7	901
717	Raman *v.* Manech ...	8	746
719	Nagalla Kotayya *v.* Nagalla Mallayya	8	337
722	Collector of Kistna *v.* Lakshmi Devamma ...	8	414
727	Arumuga Nadar *v.* Emperor ...	8	757
729	Anaikutti Udayan *v.* Solaimutha Udayan ...	8	758
731	Rangaswamy Mudaliar *v.* Srinivasa Mudaliar ...	8	349
733	Kuthalalingam Pillay *v.* Packiyam Fernandez ...	8	17
734	Arone *v.* Kali ...	8	759
735	Abdul Aziz *v.* King-Emperor ...	8	721
735	Govindasami Pillai *v.* Dakshinamurthi Poosari ...	8	760
737	Official Assignee of Madras *v.* Madras Equitable Assurance Society ...	8	761
740	Public Prosecutor *v.* Kaliaperumall Naidu ...	8	148
741	Sa laya Pillai *v.* Amurthachari ...	8	157
743	Narayana Chetty *v.* Muthiah Servai	8	520
753	Ramanathan Chettiar *v.* Karuppayee	8	156
754	Sivasami Pillai *v.* Emperor ...	8	719
755	Rangiah Chetty *v.* Subramania Chetty ...	8	512
762	Narayana Patter *v.* Thethi Brahmani Amah ...	8	679
766	Syed Ajam Sahib *v* Meenatchi Sundareswaral Devastanam ...	8	668
776	Chinnaswami Iyengar *v.* Emperor...	8	668
777	Podia *v.* Abdul Raiman ...	8	525
779	Vebudhapriya Thirthaswamy *v.* Esoof Sahib ...	8	175
782	Machana Uajhala Dikshatulu *v.* Gorogantulu Yaggamma ...	8	1066
784	Maddur Veerareddi *v.* Madam Subbanna Chetty ..	8	339
785	Venkatachariar *v.* Sadagopa Chariar	8	517
789	Official Assignee of Madras *v.* Abu Bucker Rahim Tulla ...	8	1067
791	Peria Perumal Muthirian *v.* Pichan	8	268
792	Muhomed Ibrahim *v.* Muhomed Abiz Kroshi ...	8	1068
794	Kelu *v.* Mamad Kutti ...	8	362
796	Kunjayee *v.* Chinnasamy Udayan ...	8	1069
798	Rukmani Ammal *v.* Krishnamachary	8	1071
799	Veerabadra Aiyar *v.* Marudaga Nachiar ...	8	1072
817	Venkata Narasimma Row *v.* Kuram Venkanna ...	8	1085
818	Sivagurunatha Pillay *v.* Emperor ...	7	895
819	Arakal Bastian Ausup *v.* Narayana Iyer ...	8	351
819	Bhami Luxuman Shanbaga *v.* Emperor ...	8	145
821	Annasamy Goundan, *In re* ...	8	845
821	Subadramma *v.* Satyan Swami ...	7	895
822	Flora Cronan *v.* Official Assignee of Madras ...	8	1085
824	Chandana Venkatadri *v.* Majati Laximinarasimma Row ...	8	33
825	Kaveri Ammal *v.* Kali Ammal ...	8	130
826	Musili Naidu *v.* Nataraja Chettiar ...	8	132
827	Kowuri Basivireddy *v.* Tallaparagada Nagamma ...	8	1087
829	Chinthalapudi Kotiah *v.* Emperor ...	8	943
831	Singaram Pillai *v.* Gulam Ghouse Shah	8	1091
833	Vedachella Mudaliar *v.* Chinnia Mudaliar ...	8	1099
834	Ramachandra Aiyar *v.* Primathi Ammal ...	8	1100
835	Muthappa Nadar *v.* Kula Sankara Nadar ...	8	1101
836	Paramasivam Pillai *v.* Sankaraya Chitravalliar ...	8	352
838	Rangasawmi Aiyangar *v.* Krishna Goundan ...	8	844
839	Marrivada Chinna Ramayya *v.* Veerapurani Venkattappiah ...	8	1102
841	Gorakala Kanakayya *v.* Janardana Padhi ...	8	736
852	Jamal Mahomed *v.* Moideen Sa ...	8	1103
853	Meesala Ramanna *v.* Akkalabotu Chinna Appal Naidu ...	8	805
853	Balla *v.* District Magistrate of South Canara ...	8	163

Table 7

NAGPUR JUDICIAL COMMISSIONER'S COURT.

6 NAGPUR LAW REPORTS, AUGUST TO DECEMBER, 1910.

Page of Vol. 6 N. L. R. 1910.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. 1910. V. P.	Page of Vol. 6 N. L. R. 1910	Names of Parties.	Corresponding Vol. and page of Ind. Cas. 1910. V. P.
114	Narayan *v.* Emperor ...	8 274	156	Hanumansingh *v.* Mannulal ...	8 1121
117	Ramchandra *v.* Chindhoo ...	8 276	160	Baliram *v.* Sitia ...	8 1123
123	Karansingh *v.* Kanhailal ...	8 279	161	Meer Jangoo *v.* Chote Sahib ...	8 1124
125	Gokuldas *v.* Parmanand ...	8 281	164	Dhirajsingh *v.* Rajaram ...	8 1125
129	Kolhatkar, *In re* ...	8 282	168	Emperor *v.* Umerkhan ...	8 1127
140	Dhirajsingh *v.* Dinanath ...	8 288	171	Basorey *v.* Ballabhdass ...	8 1146
145	Daulat *v.* Saheblal ...	8 1115	177	Tukaram *v.* Sonaji ...	8 1179
146	Bhagwant *v.* Munimkhan ...	8 1115	180	Ganpati *v.* Emperor ...	8 1181
148	Chhatrapal *v.* Fundilal ...	8 1117	185	Mansingh *v.* Rampiare ...	8 1184
152	Ajab *v.* Mangal ...	8 1119	190	Dadu *v.* Chamru ...	8 1186

Table 8

OUDH JUDICIAL COMMISSIONER'S COURT.

13 OUDH CASES, FROM OCTOBER TO DECEMBER, 1910.

Page of Vol. 13 O. C. 1910.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. 1910. V. P.	Page of Vol. 13 O. C. 1910.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. 1910-11. V. P.
282	Ikbal Husain *v.* Jafar Ali Khan ...	8 368	332	Kedar Nath *v.* Ratan Singh ...	7 648
286	Sakhawat Ali *v.* Thakur Baldeo Sahai ...	8 370	335	Thomas Bradshaw *v.* Emperor ...	8 873
289	Gada Husain *v.* Janki ...	8 371	337	Khub Singh *v.* Emperor ...	8 874
291	Mohan Lal *v.* Humayun Jah ...	8 372	341	Kundan Lal *v.* Chainu Lal ...	8 876
295	Shubrati *v.* Emperor ...	8 373	347	Muhammad Idris Khan *v.* Iftikhar Ahmad ..	8 717
297	Chauharja Bakhsh *v.* Kaniz Fatima Bibi ...	8 374	352	Ram Dulare *v.* Misri Lal ...	8 878
302	Inayat-ul-Rahman *v.* Aziz-ul-Rahman	8 376	354	Puttu *v.* Emperor ...	8 879
303	Momhammad Abdul Karim Khan *v.* Nawaz Singh ...	8 377	357	Manohar Lal *v.* Gabardhan Prasad	9 60
309	Aman Ali *v.* Emperor ...	8 379	366	Harpal Singh *v* Jagwant Singh ...	8 1092
316	Debi Bakhsh Singh *v.* Chandrabhan Singh ...	7 724	369	Thakur Ram *v.* Saiyed Sadik ...	8 1159
			375	Daryai Singh *v.* Narpat Singh ...	9 71
			388	Padarath Pathak *v.* Maharaji ...	8 1149

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PUNJAB CHIEF COURT.

(A)—11 PUNJAB LAW REPORTER, FROM FEBRUARY TO DECEMBER, 1910.

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25	Crown *v.* Fateh Din ...	4	863
26	Harji Mal *v.* Receiver of the Insolvent Debtor's Estate ...	8	222
27	Harnam Singh *v.* Harnam Singh ...	8	222
28	Malo *v.* Crowr ...	8	223
29	Ram Kaur *v.* Multani Chand ...	8	224
30	Sassoon & Co. *v.* Kishen Chand ...	8	1104
31	Karim Bakhsh *v.* Jattu Ram ...	8	224
32	Fatteh Din *v.* Ram Rakha ...	8	225
33	Rasul Khan *v.* Emperor ...	8	226
34	Shankar Das *v.* Narain Das ...	8	226
35	Muhammad Bakhsh *v.* Faiz Bakhsh	8	227
36	Wasawa Singh *v.* Emperor ...	8	229
37	Mangi Ram *v.* Crown ...	4	611
38	Hira *v.* Crown ...	3	580
49	Bala Bakhsh *v.* Lohri ...	8	229
40	Pala *v.* Beant Singh ...	8	230
41	Udhe Singh *v.* Puran Chand ...	4	1020
42	Nabi Bakhsh *v.* Rahim Bakhsh ...	3	595
43	Ido *v.* Rulia ...	6	663
44	Hoa Ram *v.* Paliya ...	6	648
45	Bishen Das, *In the matter of* ...	6	640
46	Inayat Ali Shah *v.* Wilayat Shah ...	8	231
47	Dial Singh *v.* Allah Ditta ...	8	232
48	Kirpa *v.* Jiwa ...	5	840
49	Muhammad Khan *v.* Sardar ...	5	249
50	Jhanda Singh *v.* Kesar Singh ...	6	712
51	Bhagwan Dass *v.* Bhagat Ram ...	6	983
52	Bahadar Ali *v.* Biwi ...	6	734
53	Muhammad Hussain *v.* Muhammad	6	653
54	Rukn Abdulla Shah *v.* Dayala Mal ...	8	233
55	Ali Gauhar *v.* Mahanda ...	6	984
56	Nur Ilahi *v.* Umar Bakhsh ...	6	715
57	Bahadur Shah *v.* Ram Singh ...	6	655
58	Sardul Singh *v.* Karm Singh ...	5	990
59	Chiranji Lal Shah *v.* Bankta Chari ...	5	835
60	Jhangi *v.* Ramzan ...	5	808
61	Shahzada Suraya Jah *v.* Azim ...	5	888
62	Diwan Singh *v.* Amir Singh ...	5	814
63	Jiwani *v.* Nathu Mal ...	5	890
64	Har Nihal *v.* Shamji Mal ...	5	809
65	Oakes & Co., Ltd., of Madras *v.* J. P. Discarcia ...	5	802
66	Muhammad Bakhsh *v.* Bhagwan Das	3	498
67	Gopal Das *v.* Hari Singh ...	3	619
68	Rup Narain *v.* Gopal Devi ...	3	382
69	Pleader, *In the case of* ...	6	736
70	Amolak Ram *v.* Maula Bakhsh ...	8	236
71	Jahana *v.* Crown ...	8	239
72	Sant Ram *v.* Ram Chand ...	6	659
73	Ram Chand *v.* Chatar Singh ...	6	645
74	Suchet Singh *v.* Collector of Amritsar	6	645
75	Natho *v.* Bhag Singh ...	6	661
76	Nakhu Mal *v.* Phagu Shah ...	6	664
77	Imam-ud-din *v.* Nur Din ...	6	665
78	Allah Dia *v.* Sandha ...	8	242
79	Viru *v.* Imam Din ...	8	242
80	Kalyan Singh *v.* Crown ...	8	243
81	Kishen Chand *v.* Sasoon & Co. ...	7	351
82	Abdul Haq *v.* Niaz Ahmad ...	7	718
83	Meda *v.* Mohan Lal ...	8	244
84	Lala Das *v.* Spratt ...	8	245
85	Girdhari Lal *v.* Crown ...	8	137
86	Ram Rattan Shah *v.* Kirpa Ram ...	8	246
87	Sital Das *v.* Crown ...	8	247
88	Sital Das *v.* Jesi Bai ...	8	248
89	Muhammad Azim *v.* Secretary of State ...	8	248
90	Crown *v.* Ram Chand ...	6	623
91	Sant Singh *v.* Crown ...	6	952
92	Madan Gopal *v.* King-Emperor ...	6	620
93	Sosni *v.* Crown ...	8	494
94	Kalu *v.* Farmana ...	8	495
95	Girdhari Lal *v.* Devidial ...	8	497
96	Malan *v.* Rura ...	7	719
97	Askaur *v.* Sawan Singh ...	7	1009
98	Balak Ram *v.* Dadu ...	7	1000
99	Gurdevi *v.* Raman Mal ...	8	547
100	Bhola Singh *v.* Mano ...	8	547
101	Imam Din *v.* Jiwan ...	6	735
102	Attar Singh *v.* Sant Singh ...	6	719
103	King-Emperor *v.* Alum Khatun ...	6	959
104	Crown *v.* Alla Ditta ...	6	956
105	Sheo Narain *v.* Crown ...	8	550
106	Ghauns *v.* Imam Din ...	7	465
107	Muzaffar Ali *v.* Zainab ...	7	348
108	Umda *v.* Dilbagh Rai ...	7	467
109	Kokan *v.* Lakhoo ...	7	470
110	Fazal Ilahi *v.* Habib Bakhsh ...	7	474
111	Sohnu *v.* Labha ...	7	476
112	Bishen Das *v.* Ram Dhan ...	7	483
113	Hardam Singh *v.* Mahan Kaur ...	7	484
114	Nabi Bakhsh *v.* Ram Jawaya ...	7	479
115	Pal Singh *v.* Bur Singh ...	7	480
116	Amru *v.* Mohan Singh ...	6	729
117	Girdhari Ram *v.* Mehr Khan ...	7	495
118	Bagga *v.* Salihon ...	6	723

(A).—11 PUNJAB LAW REPORTER, 1910—*concld.*

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120	Khuda Bakhsh *v.* Shamas ...	7	489
121	Natha Singh *v.* Crown ...	7	493
122	Khem Singh *v.* Kesar Singh ...	7	528
123	Shib Dit Singh *v.* Devindar Singh ...	7	710
124	Imrat Lal *v.* Lal Chand ...	7	715
125	Malla *v.* Munshi Ram ...	7	711
126	Abdulla Khan *v.* Crown ...	8	551
127	Thakar Das *v.* Barkhurdar ...	8	552
128	Bishen Singh *v.* Jaimal Singh ...	8	553
129	Maluk Singh *v.* Dasaundha Singh ...	8	353
130	Ghulam Murtaza *v.* Fateh Shah ...	8	554
131	Aisha Bibi *v.* Aziz-ud-Din ...	6	946
132	Shahamad *v.* Naurang ...	6	961
133	Bhagwana *v.* Goru ...	6	954
134	Dalip Singh *v.* Jaimal Singh ..	8	555
135	Ahmad Hussan *v.* Mehdi Hussan ...	8	557
136	Firm of Sheru Mal *v.* Von Goldstein	6	948
137	Amir *v.* Sharf Nur ...	6	929
138	Fazil *v.* Sadan ...	6	936
139	Sultan *v.* Sher Muhammad ...	6	939
140	Thakar Singh *v.* Chattar Pal ...	6	944
141	Rugh Nath Das *v.* Panna Lal ...	6	945
142	Channan Shah *v.* Amar Das ...	7	994
143	Ghania Lal *v.* Pohlo Mal ...	7	718
144	Rahmun *v.* Hasham ...	7	717
145	Maiden *v.* Bhondu ...	7	1006
146	Nur-ul Hasan *v.* Muhammad Hasan	7	1022
147	Hanwanta *v.* Akbar Khan ...	7	1011
148	Hazar Khan *v.* Sawan Ali ...	7	1014
149	Bhagwan Kaur *v.* Harnam Kaur ...	7	1017
150	Chokha *v.* Fateh Muhammad ...	7	1001
151	Buta Singh *v.* Khushal Singh ...	8	558
152	Radha Ram *v* Anokh Singh ...	5	909
153	Muhammad *v.* Lakhan ...	5	908
154	Fleming of Simla *v.* Municipal Committee of Simla ...	6	725
155	Mangal Singh *v.* Crown ...	7	491
156	Nabia *v.* Fatto ...	5	232
157	Jiwan *v.* Diwan Singh ...	5	235
158	Kasim *v.* Samail ...	5	241
159	Ilahi Bakhsh *v* Budhi and Mehran	5	247
160	Kanda Ram *v.* Khan Muhammad Khan ...	4	949
161	Chanan *v.* Crown ...	5	257
162	Radha Kishen *v.* Binj Raj ...	5	806
163	Ganpat Rai *v.* Malla Mal ...	5	804
164	Abdulla *v.* King-Emperor ...	4	1025
165	Inayat *v.* Nourang ...	5	253
166	Dasounda Singh *v.* Mangal ...	5	817
167	Kundan Mal *v.* Allah Dad Khan	5	821
168	Bahadur Shah *v.* Crown ...	4	432
169	Crown *v.* Jalal Shah ...	5	827
170	Shibbu *v.* Crown ...	5	829
171	Harnam Singh *v.* Sajawal ...	8	307
172	Gokal Chand *v.* Phul Chand ...	5	830
173	Khushi Ram *v.* Asu Ram ...	8	311
174	Begam Jan *v.* Qadar Khan ...	8	306
175	Dhera Singh *v.* Tara Singh ...	7	527
176	Devi Dial *v.* Muhammad Amin ...	8	312
177	Bhagan *v.* Guranditta Mal ...	6	1005
178	Bhagan *v.* Jahana ...	7	486
179	GangaRam *v.* Pokhar Das ...	5	992
180	Hazara Singh *v.* Ganda ...	6	658
181	Crown *v.* Niadar Singh ...	6	717
182	Allah Ditta *v.* Achhru Mal ...	6	774
183	Wazir Ali *v.* Mulkyar ...	5	597
184	King-Emperor *v.* Ali ...	5	915
185	Ganesha Singh *v.* Karam Din ...	6	618
186	Sawan Singh *v.* Karim Baksh ...	8	353
187	Behari Lal *a.* Kalu ...	8	318
188	Niadar Mal *v.* Lewin ...	8	355
189	Madho Ram *v.* Badar-ud-din ...	8	317
190	Kishen Chand *v.* Sassoon & Co. ...	8	319
191	Baij Nath *v.* Gulab Din ...	8	315
192	Feroze-ud-din *v.* Rahim Bakhsh ...	8	356
193	Gul Hassan *v.* King-Emperor ...	8	250
194	Lekhraj *v.* Crown ...	8	389
195	Crown *v.* Abdul Ghani ...	8	382
196	Nanku *v.* Crown ...	8	385
197	Crown *v.* Sundar Singh ...	8	387
198	Sahab Singh *v.* Phuman ...	8	528
199	Crown *v.* Dewa Singh ...	8	383
200	Crown *v.* Hari Singh ...	7	355
201	Khera *v.* Ralla ...	8	486
202	Bishen Singh *v.* Jawala Singh ...	8	776
203	Nawab *v.* Jawaya ...	8	777
204	Harnama *v.* Attar Singh ...	8	779
205	Chaitu *v.* Niaz Begam ...	8	780
206	Jaimal Singh *v.* Gurmukh Singh ...	5	898
207	Ismail *v.* Ismail ...	5	901
208	Dula Singh *v.* Dial Singh ...	5	902
209	Fazal Ilahi *v.* Secretary of State ...	5	905
210	Ram Chand *v.* Ram Sukh Das ...	5	910
211	Madho Mal *v.* Jawahir Singh ...	6	713
212	Manak Chand *v.* Munna Lal ...	4	844
213	Husaina *v.* Sahib Nur ...	7	505
214	Sanga *v.* Mali ...	8	1043
215	Mir Abdullah *v.* Crown ...	8	1044
216	Fazal Ahmad *v.* Dittu ...	8	1045
217	Umri Mal *v.* Jai Gopal ...	8	1047
218	Imam Din *v.* Kishen Singh ...	8	1048

(B).—45 PUNJAB RECORD, FROM SEPTEMBER TO DECEMBER, 1910.

No. of Vol. 45 P. R. 1910.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. 1910.	No. of Vol. 45 P. R. 1910.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. 1910.
	Civil.	V. P.		*Civil*—concld.	V. P.
85	Begam Jan *v.* Qadir Khan ...	8 306	103	Davies *v.* Brock Smith ...	8 1158
86	Harnam Singh *v.* Sajawal ...	8 307	104	Dhian Das *v.* Jagat Ram ...	8 1160
87	Khushi Ram *v.* Asu Ram ...	8 311		*Criminal.*	
88	Dhera Singh *v.* Tara Singh ...	7 527			
89	Devi Dial *v.* Muhammad Amin ...	8 312	23	Girdhari Lal *v.* Crown ...	8 137
90	Baij Nath *v.* Gulab Din ...	8 315	24	Gul Hassan *v.* King-Emperor ...	8 250
91	Madho Ram *v.* Badar-ud-Din ...	8 317	25	Crown *v.* Abdul Ghani ...	8 382
92	Behari Lal *v.* Kalu ...	8 318	26	Crown *v.* Hari Singh ...	7 355
93	Sawan Singh *v.* Karim Baksh ...	8 353	27	Pleader, *In the matter of* ...	6 736
94	Niadar Mal *v.* Lewin ...	8 355	28	Crown *v.* Dewa Singh ...	8 383
95	Kishen Chand *v.* Sassoon ...	8 319	29	Muhammad Din *v.* Crown ...	8 385
96	Feroze-ud-Din *v.* Rahim Bakhsh ...	8 356	30	Crown *v.* Sundar Singh ...	8 387
97	Nehal Devi *v.* Kishore Chand ...	8 999	31	Lekhraj *v.* Crown ...	8 389
98	Fatta *v.* Jiwan ...	8 1153	32	Bhana *v.* Crown ...	8 1160
99	Roshan Din *v.* Khuda Bakhsh ...	8 1155	33	Crown *v.* Bishen Das ...	8 1161
100	Musadi Lal *v.* Badhawa ...	8 1156	34	Crown *v.* Bakhtawar ...	8 1166
101	Ali Bakhsh *v.* Chuhar Singh ...	8 1157		*Revenue.*	
102	Rajji Bai *v.* Jesa Ram ...	8 1157	5	Raja Ram *v.* Durga Dut ...	8 391

(C).—5 PUNJAB WEEKLY REPORTER, FROM 20TH SEPTEMBER TO DECEMBER, 1910.

No. of Vol. 5 P. W. R. 1910.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. 1910.	No. of Vol. 5 P. W. R. 1910.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. 1910.
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114	Tara Chand *v.* Budh Ram ...	6 485	137	Nanak Chand *v.* Jawaya ...	8 576
115	As Kaur *v.* Sawan Singh ...	7 1009	138	Tirkha *v.* Rizak Ram ...	8 811
116	Khuda Bakhsh *v.* Kaim Din ...	6 486	139	Bhola Singh *v.* Mano ...	8 547
117	Hanwanta *v.* Akbar Khan ...	7 1011	140	Muhammad *v.* Charag ...	8 812
118	Gujjar Mal *a.* Sita Ram ...	6 488	141	Fazal Muhammad *v.* Fazal Muhammad ...	8 814
119	Devi Dial *v.* Muhammad Amin ...	8 312	142	Nehal Devi *v.* Kishore Chand ...	8 999
120	Bel Parkash *v.* Partapa ...	6 494	143	Faiz-ud-din *v.* Amam Ali ...	8 1090
121	Begam Jan *v.* Qadar Khan ...	8 306	144	Harnam Singh *v.* Harnam Singh ...	8 222
122	Bhagwan Kaur *v.* Harnam Kaur ...	7 1017		*Criminal.*	
123	Har Devi *v.* Harnam Singh ...	6 491			
124	Kashi Ram *v.* Gopi Mal ...	6 482	33	Bulanda *v.* Crown ...	8 494
125	Prabh Devi *v.* Diwan Chand ...	6 490	34	Crown *v.* Alam Khatun ...	6 959
126	Behari Lal *v.* Kalu ...	8 318	35	Crown *v.* Shib Das ...	8 190
127	Hazar Khan *v.* Sawan Ali ...	7 1014	36	Amar Das *v.* Crown ...	8 193
128	Sawan Singh *v.* Karim Bakhsh ...	8 353	37	Soman *v.* Crown ...	8 249
129	Madho Ram *v.* Badar-ud-din ...	8 317	38	Gul Hassan *v.* Crown ...	8 250
130	Harnam Singh *v.* Sajawal ...	8 307	39	Crown *v.* Ganesh Das ...	6 483
131	Niadar Mal *v.* Lewin ...	8 355	40	Hari Kishen *v.* Crown ...	8 256
132	Chugata Khan *v.* Wasil Khan ...	6 496	41	Ram Ditta *v.* Crown ...	6 490
133	Kishen Chand *v.* Sassoon & Co. ...	8 319	42	Khadam *v.* Crown ...	8 257
134	Nabi Bakhsh *v.* Ram Jawaya ...	7 479	43	Saidan *v.* Crown ...	8 815
135	Bhola Ram *v.* Nanak Chand ...	8 575	44	Sundar Singh *v.* Crown ...	8 387
136	Bhagan *v.* Jahana ...	7 486	45	Dewa Singh *v.* Crown ...	8 383

Table 10

SIND JUDICIAL COMMISSIONER'S COURT.

4 SIND LAW REPORTER, APRIL TO JULY, 1910.

Page of Vol. 4 S. L. R. 1910.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. 1910. V.	P.	Page of Vol. 4 S. L. R. 1910.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. 1910. V.	P.
52	Mahomed Hashim *v.* Crown ...	8	202	88	Abdul Hossein Khan *v.* Bibi Sona Dero ...	8	897
53	Gulu Tirith *v.* Chatunal ...	8	203	147	Sethna *v.* Ladak Khaku ...	8	924
55	Imperator *v.* Virumal ...	8	203	149	Narsidas *v.* Dosa Kalian ...	8	925
65	Hasraj *v.* Karachi Municipality ...	8	208	152	Gopaldas *v.* Hassasing ...	8	926
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Vakil High Court,
SRINAGAR (Kashmir)

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107	„	1022
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109	„	995
110	„	1001
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112	„	1000
113	„	994
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117	VII	1011
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Title [redacted]

Author [redacted]

Accession No. [redacted]

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INDIAN CASES.

1910.

VOLUME VIII.

CALCUTTA HIGH COURT.

CIVIL RULE No. 2859 OF 1910.

August 31, 1910.

Present:—Mr. Justice Mookerjee and Mr. Justice Teunon.

BANKU BEHARY DEY AND OTHERS —PLAINTIFFS— PETITIONERS

versus

HARENDRA NATH MUKHERJEE —DEFENDANT—OPPOSITE PARTY.

Receiver—Party—When Receiver is a necessary party --Suit against Receiver--Permission of Court, whether condition precedent.

Where property in the hands of a Receiver is intended to be affected by the result of the litigation, the Receiver is a proper and necessary party to the suit.

Jatindra Nath Chowdhri v. *Sarfaraz Miah*, 6 Ind. Cas. 214; 14 C. W. N. 653, followed.

Miller v. *Ram Ranjan Chakravarti*, 10 C. 1014, *Charted Bank* v. *Haris Chunder Neogy*, 5 C. W. N. xv and *Kumar Suttya Suttya Ghosal* v. *Rani Golap Moni Debi*, 5 C.W. N. 27, distinguished.

The consent of the Court to an action against a Receiver appointed by the Court, is not a condition precedent to the right of the party to sue, and the omission can be rectified by a subsequent application for leave to continue an action brought without such permission.

Pramatha Nath Gangooly v. *Khetra Nath Banerjee*, 32 C. 270; 9 C. W. N. 247, dissented from.

Where, therefore, a suit has been brought against a Receiver without the permission of the Court appointing him, it is open to the Court in which the suit has been brought to allow the plaintiff an opportunity to obtain the necessary leave and then to continue the suit.

Rule against the order of the Small Cause Court Judge of Sealdah, dated April 8, 1908.

Babu *Debendra Nath Ghosh*, for the Petitioners.

Babu *Satish Chandra Mukherjee*, for the Opposite Party.

Judgment.—The petitioners commenced a suit in the Small Cause Court at Sealdah for recovery of money alleged to be due on account of the price of jute sold by them to one Debendra Nath Mukerjee. Debendra died intestate on the 16th July 1907 after the close of the transaction on which the claim is founded. Shortly after his death on the 9th December 1907, a suit was commenced by his eldest son Harendra Nath for partition of the family properties. On the 4th December 1908, Harendra was appointed Receiver of the subject-matter of the litigation and subsequently took possession of all the assets left by his father. The plaintiffs, therefore, prayed for a decree for Rs. 684 against the estate of Debendra Nath, in the hands of the Receiver, and joined as parties defendants to the suit, Harendra Nath the Receiver, as also the other sons of Debendra Nath. The Receiver defendant resisted the claim, *inter alia*, on the ground that he as Receiver could not have been sued without the leave of the Court by which he was appointed. The other sons contended that they were not personally liable, and admittedly no part of the assets was in their hands. The learned Small Cause Court Judge held that a personal decree could not be made against any of the defendants, inasmuch as upon the allegation in the plaint, the claim, if well-founded, was enforceable only against the assets of Debendra Nath; and as these assets were in the hands of the Receiver, the only decree possible would be against him, but as leave had not been obtained from the Court by which the Receiver had been appointed, the suit could not proceed against him. In this view, the learned Judge dismissed the suit. The plaintiffs now invite us to discharge this decree and to direct a re-trial of the suit.

It has been argued in support of the rule, *first*, that it was not necessary for the plaintiffs to sue the Receiver at all, because what

they really seek is a personal decree against the defendants, and, *secondly*, that if it was necessary for the plaintiffs to sue the Receiver and to obtain leave of the Court in that behalf, the suit ought not to have been dismissed, but opportunity should have been afforded to the plaintiffs to enable them to obtain necessary sanction from the Court by which the Receiver was appointed.

In so far as the first of these contentions is concerned, it is, in our opinion, obviously unfounded. The plaintiffs have framed their plaint so as to make the Receiver a necessary party to the suit. Their allegation is that the money which they seek to recover is due from the estate of Debendra Nath, and the prayer in the plaint is to the effect that a decree may be made against the assets of Debendra Nath which are now admittedly in the hands of the Receiver. Consequently the Receiver is a necessary party to the suit. The learned Vakil for the petitioners placed reliance upon the cases of *Miller* v. *Ram Ranjan Chakravarti* (1), *Chartered Bank* v. *Haris Chander Neogy* (2) and *Kumar Suttya Suttya Ghosal* v. *Rani Golap Moni Debi* (3), to show that the Receiver is not a necessary party to a suit of this character. But the cases upon which reliance is placed are clearly distinguishable. The test to be applied to determine whether the Receiver is or is not a necessary party to a litigation was laid down by this Court in the case of *Jatindra Nath Chowdhuri* v. *Sarfaraz Miah* (4). That test is this: Where property in the hands of a Receiver is intended to be affected by the result of the litigation, the Receiver is a proper and necessary party to such a suit, because although the appointment of the receiver does not of itself debar the creditor of the person over whose estate the receiver has been appointed from suing for his claim, yet if the object of the suit is to interfere with the possession of the Receiver or the jurisdiction of the Court appointing the Receiver, leave of the Court must be obtained and the Receiver made a party to the suit. Now as we have already explained, the frame of the plaint in the case before us shows that the only relief claimed by the plaintiffs is sought against the assets of Debendra Nath in the hands of the Receiver. Consequently the Receiver is a necessary party to the suit and the plaint was properly framed. The first contention, therefore, fails.

In so far as the second contention of the petitioners is concerned, it is clearly well-founded and must prevail. The learned Vakil for the Receiver has contended, upon the authority of a decision of this Court in the case of *Pramatha Nath Gangooly* v. *Khetra Nath Banerjee* (5), that the consent of the Court to an action against a Receiver appointed by the Court, is a condition precedent to the right of the party to sue and the omission cannot be rectified by a subsequent application for leave to continue an action brought without such permission. After careful consideration of the decision on which reliance has been placed, we regret we are unable to follow it as well-founded on principle. There is no statutory provision which renders it necessary for a litigant to obtain permission of the Court by which the Receiver has been appointed previous to the institution of the suit against him. No doubt, if such a litigant makes an attempt to disturb the possession of the Receiver, he may be guilty of contempt of Court and may thus render himself liable to be dealt with summarily. It may also be conceded that if such a suit has been brought, the Court in which the suit has been instituted, will not permit the plaintiff to harass the Receiver till permission of the Court by which the Receiver was appointed has been obtained. But we are unable to appreciate upon what intelligible principle the position can be defended that because the suit has been instituted without leave previously obtained, it must necessarily be dismissed, and that it is not open to the Court to stay proceedings in the suit with a view to enable the plaintiff to obtain leave of the Court to proceed with the suit against the Receiver. Mr. Justice Bodilly, who decided the case of *Pramatha Nath Gangooly* v. *Khetra Nath Banerjee* (5), observed that no authority had been cited to him to show that the suit might be brought without leave previously obtained. Possibly, this absence of authority may be attributed to the fact that the suggestion had never before been made that it is not open to the party, who has instituted a suit without leave of the Court, to proceed with it after leave has

(1) 10 C. 1014.
(2) 5 C. W. N. xv.
(3) 5 C. W. N. 27.
(4) 6 Ind. Cas. 214; 14 C. W. N. 653.
(5) 32 C. 270; 9 C. W. N. 247.

been obtained. The only case in which this question appears to have been directly raised is *Hirshfield* v. *Kalisker* (6). There a suit had been instituted against a Receiver without leave previously obtained. The objection was taken that the suit could not proceed. The plaintiff thereupon asked for permission to obtain leave and prayed that an opportunity might be given to him by stay of proceedings in the suit. It was held that although the suit had been commenced without leave, the remedy was either a stay of proceedings on the part of the plaintiff or to punish him for contempt of Court, or both, but not to dismiss the suit, and that it was open to the Court, upon application by the plaintiff, to allow him an opportunity to obtain the necessary leave and then to continue the suit. We do not refer to this decision as an authority binding in any way upon this Court, but the case clearly indicates that the view which we take has been previously adopted as well-founded on legal principle, [see also *Barton* v. *Barbour* (7), where the Supreme Court of the United States was divided in opinion upon the question whether failure to secure leave of Court to sue a Receiver is a mere irregularity or a defect which affects the jurisdiction of the Court]. The Court below, therefore, in the case before us, ought not to have dismissed the suit, but should have stayed the proceedings for a reasonable time in order to enable the plaintiffs to apply to the Court by which the Receiver was appointed for leave to proceed with the suit against him.

The result is that this Rule is made absolute and the order of dismissal discharged. The case will be remitted to the Small Cause Court in order that he may allow an opportunity to the plaintiffs to obtain the necessary leave. The costs of this Rule will be costs in the suit. We assess the hearing fee at two gold *mohurs*.

Rule made absolute.

(6) (1894) 30 New York Supplement 1027.
(7) (1881) 104 U. S. 126; 26 Law. Ed. 672.

CALCUTTA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 127 OF 1910.

August 26, 1910.

Present:—Mr. Justice Mookerji and Mr. Justice Teunon.

BHADRESWAR GOLOI AND OTHERS—JUDGMENT-DEBTORS—APPELLANTS

versus

BISHNU CHARAN SEN AND OTHERS—AUCTION-PURCHASERS—RESPONDENTS.

Sale—Application for setting aside—Fraud—Second appeal, whether competent—Change in law—Civil Procedure Code (Act XIV of 1882), s. 244—Civil Procedure Code (Act V of 1908), ss. 2, 47, 104 sub-s. (2), 154, O. XXI, rr. 90, 92—Application for setting aside sale on ground of fraud placed on same footing with those made on ground of irregularity, as regards appeal.

In December 1908, an application for setting aside a sale was made by the judgment-debtor on the ground of material irregularity and fraud. The first Court granted the application and set aside the sale in August 1909. On appeal, the lower appellate Court allowed the appeal and rejected the application. The judgment-debtor then preferred a second appeal and contended that as the application was made under the Code of 1882, it fell under section 244 of the Code and a second appeal was competent:

Held, that the order of the first Court having been made when the Code of 1908 had come into operation, the order should be treated as one made under O. XXI, Rule 92 sub-rule (1); that the application must have been treated by the first Court as one under rule 90 which has effected a material alteration in the law and had placed cases in which a sale was impeached on the ground of fraud on the same footing as cases in which the sale was impeached on the ground of material irregularity; and that under section 104 sub-section (2) a second appeal was incompetent.

Appeal from the order of the District Judge of Hooghly, dated January 24, 1910, reversing that of the Munsif of Howrah, dated August 23, 1909.

Babu *Harendra Krishna Mookerjee*, for the Appellant.

Judgment.—This is an appeal against an order refusing to set aside an execution sale. The sale was held in execution of a rent decree on the 15th August 1908. On the 23rd December 1908, an application was made by a person who claimed to be the transferee of a portion of the holding to set aside the sale on the ground of material irregularity in publishing and conducting it and also on the ground that the sale had been brought about by fraud. On the 23rd August 1909, the Court of first instance granted this application and set aside the sale. On the 24th January 1910, the learned District Judge made the order now under consideration by which he allowed the appeal and

dismissed the application for reversal of the sale. It is clear that no appeal lies to this Court against the appellate order of the District Judge. But the learned Vakil for the appellant has suggested that as the application was made on the 23rd December 1908, when the Code of 1882 was in force, under sections 244 and 311 of that Code, the appellant is entitled to prefer an appeal to this Court against the appellate order of the District Judge. In our opinion, there is no foundation for this contention. The order of the Court of first instance was made after the Code of 1908 had come into operation. The order, therefore, must be treated as one made under Order XXI, Rule 92, sub-rule (1). The application must have been treated by the original Court as one under Rule 90 which has effected a material alteration in the law and has placed cases in which a sale is impeached on the ground of fraud on the same footing as cases in which the sale is impeached on the ground of material irregularity. If, therefore, the order was made under Rule 92, section 104, of the Code read with Order XXIII, Rule 1, clause, (7) allowed an appeal to the Court of the District Judge: but under section 104, sub-section (2), no appeal is allowed from the order passed in appeal. It is also clear that section 155 is of no assistance to the appellant. That section only saves a right of appeal which had accrued to a party at the commencement of the new Code. Section 2 is equally ineffectual, because it excludes from the definition of 'decree' any adjudication under section 47 from which an appeal lies as an appeal from an order. The result, therefore, is that this appeal must be dismissed on the ground that no appeal is allowed by law.

Appeal dismissed.

CALCUTTA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 244 OF 1909.

August 24, 1910.

Present:—Mr. Justice Mookerjee and Mr. Justice Teunon.

BENODE LAL BANDOPADHYA AND OTHERS—*Pro forma* DEFENDANTS—APPELLANTS

versus

SRIKRISTO CHUCKERBUTTY AND OTHERS—PLAINTIFFS—RESPONDENTS

Decree—Order directing distribution of sale proceeds between several mortgagees, if decree—Civil Procedure Code (Act V of 1908), ss. 2 cl. (2), 47 (1)—Distribution of sale proceeds between prior mortgagees—Interest to run till date of confirmation—Transfer of Property Act (IV of 1882), ss. 83, 84.

An order directing the distribution of sale proceeds between the first mortgagee and the second mortgagee, who were made parties to a suit by the third mortgagee to enforce his security, is an order within the scope of section 47, sub-section (1), of the Civil Procedure Code of 1908 and is, therefore, a decree within section 2, sub-section (2), and is appealable as such.

In directing the distribution of the sale proceeds, the Court should proceed upon the assumption that each of the prior encumbrancers was entitled to interest at the contract rate up to the date of the confirmation of the sale, which was the earliest date on which money became really available for distribution amongst the different mortgagees.

Appeal from the order of the Sub-Judge of Murshidabad, dated March 5, 1909.

Babu *Tarak Chandra Chakravarti*, for the Appellants.

Babus *Bipin Behari Ghosh*, *Hemendra Nath Sen*, *Karunamoy Bose* and *Haradhone Nag*, for the Respondents.

Judgment.—This appeal is directed against an order for distribution of sale proceeds between the first mortgagee and the second mortgagee, who were made parties to a suit by the third mortgagee to enforce his security.

It appears that the mortgagor, Harish Chandra Tewari, executed a mortgage on the 15th December 1894 in favour of one Kali Krishna Choudhari, now represented by the executors to his estate who were made the second, third and fourth defendants in the mortgage suit. The mortgagor executed a second mortgage in favour of the fifth defendant on the 12th June 1896 and a third mortgage in favour of the plaintiff on the 11th July 1899. He appears to have executed other mortgages subsequently in favour of the sixth and seventh defendants.

The plaintiff third mortgagee sued to enforce his security and joined as party defendants not only the mortgagor but also the two prior and the two puisne encumbrancers. On the 16th March 1906, the prior mortgagees consented to an order for sale of the mortgaged properties free of all encumbrances. The Court thereupon passed the following order :—

"That the suit be decreed with costs bearing interest, at 6 per cent. per annum, that the defendant do get three months'

grace to pay off to the plaintiff or to the Court the principal and interest due on the mortgage with costs as above ordered, that on default the mortgaged property No. I (in which the third mortgagee alone was interested) be sold first, that in the case of balance remaining due, the mortgaged property No. II be sold free from encumbrances and the sale proceeds be applied, first to the mortgage amount due to the defendants Nos. 2 to 4, then to the defendant No. 5, and then to the balance due to the plaintiff, and lastly to the defendants Nos. 6 and 7." The decree as originally drawn up was not in accordance with this judgment, but it was subsequently amended and brought into conformity with it. The period of grace expired and neither the mortgagor nor the puisne mortgagees paid anything. Execution was, therefore, taken out by the decree-holder third mortgagee, and the property common to the various mortgagees was sold on the 22nd September 1908. One-fourth of the purchase money was deposited by the purchaser on that date and the balance was paid into Court on the 30th September 1908. On the 30th October 1908, the judgment-debtor made an application to set aside the sale. The result was that the time of the Court was occupied up to the 23rd January 1909, with the consideration of the question of the validity of the sale. On that date the application for reversal of the sale was rejected, and the sale was confirmed. Shortly after, on the 5th March 1909, the Court proceeded to determine how the sale proceeds, which were insufficient to satisfy in full the claims of both the first and second mortgagees, were to be applied. The controversy between them related to the point of time up to which interest as stipulated in their respective mortgages was to run according to the contract rates. The Subordinate Judge held that the interest was to be calculated upon each of these securities up to the date of the sale, and he distributed the proceeds on this basis. The first mortgagee has now appealed to this Court, and on his behalf it has been contended that the order of the Court below is erroneous inasmuch as interest ought to have been allowed on his security up to the date of the confirmation of the sale.

A preliminary objection has been taken to the competency of the appeal on the ground that the order is not a decree within the meaning of section 2 of the Civil Procedure Code of 1908 and is consequently not appealable. In our opinion, there is no force in this contention. The order is clearly one within the scope of section 47, sub-section 1, of the Civil Procedure Code of 1908. The question raised is one which arises between the parties of the suit, in which the decree was passed. It also relates to the satisfaction of the decree, because the decree directs the sale proceeds to be applied in the first instance to discharge the debt due to the first mortgagee, then to the second mortgagee and the balance to be applied to the satisfaction of the debt due to the plaintiff, the third mortgagee. Consequently the question is clearly one between the parties to the suit and relates to the satisfaction of the decree. The order is, therefore, a decree within the meaning of section 2 of the Code, and is appealable as such.

The question, we are invited to determine, relates to the date up to which interest at the contract rate can be claimed by the first and second mortgagees. Is it the date of sale as held by the Subordinate Judge, or the date of the confirmation of sale as contended by the first mortgagee, or the date of the payment of the purchase-money into the Court as argued by the second mortgagee, or the date fixed in the decree for the re-payment of the mortgage money due to the plaintiff third mortgagee, as suggested by the mortgagor? Of these four possible alternatives, obviously the date accepted by the Subordinate Judge cannot be supported. On the date of the sale, the whole of the purchase-money, which was to be distributed between the different mortgagees, was not available for the purpose. Consequently the date of sale cannot be regarded as the date up to which interest should run upon the prior security. The real point in controversy between the parties is, whether the date should be that on which the whole purchase-money was brought into the Court by the purchaser or the date of the confirmation of sale. In our opinion, it is the latter date which ought to be accepted as the time up to which interest must run upon each of the senior securities. It has been argued on behalf of the second

mortgagee that the sale proceeds became available for distribution amongst the mortgagees as soon as the purchase-money was paid into Court by the purchaser, and in support of this view, reliance has been placed upon the cases of *Jogendro Nath Sircar* v. *Gobind Chunder Addi* (1) and *Hafez Mahommed Ali Khan* v. *Damodar Pramanick* (2). Neither of these decisions, however, is of any real assistance to the second mortgagee. The case of *Jogendro Nath Sircar* v. *Gobind Chunder Addi* (1), shows that although it may be open to the Court to distribute the sale proceeds amongst the different claimants, before the sale has been confirmed, it is, by no means, obligatory upon the Court to do so. In our opinion, an order for distribution ought not ordinarily to be made before the confirmation of the sale. At any rate, the first mortgagee cannot be called upon to demand distribution of the sale proceeds before the sale has been confirmed. The case of *Hafez Mahommed Ali Khan* v. *Damodar Pramanick* (2), also does not support the contention of the second mortgagee. That case merely shows that the deposit is not available for distribution in any event before the whole of the money has been brought into Court; it does not affirm the doctrine that the deposit is available as a matter of course for distribution before the order for confirmation has been made. The true principle, which ought to guide the Court in this matter, is, we think, to be found in section 84 of the Transfer of Property Act. Under that section when the mortgagor or other person entitled to redeem has tendered or deposited in Court under section 83 the amount remaining due on the mortgage, interest on the principal money ceases from the date of the tender or as soon as the mortgagor or such other person as aforesaid has done all that has to be done by him to enable the mortgagee to take such amount out of Court, as the case may be. In other words, interest upon mortgage debt does not cease to run till the mortgagor has rendered it possible for the mortgagee to take the money out of Court. The effect of the sale in the case before us was, no doubt, to make the money available for distribution amongst the different mortgagees in the event of the ultimate confirmation of the sale. But the mortgagor, shortly after the sale, applied for reversal of the sale on the ground of irregularity and fraud. By his own conduct, he challenged the validity of the sale and thus made it practically impossible for the prior encumbrancer to ask for a distribution of the sale proceeds, till those proceedings had terminated. In substance, if the sum realised by the sale be treated as the property of the judgment-debtor which he tendered to the prior encumbrancers in satisfaction of their dues, the tender was entirely of a conditional character. The prior encumbrancers could not be expected, in these circumstances, to take the money, from the risk of being called upon to refund the sum to the purchaser as soon as the sale was reversed at the instance of the mortgagor. In our opinion, the Court below ought to have directed the distribution of the sale proceeds on the assumption that each of the prior encumbrancers was entitled to interest at the contract rate up to the date of the confirmation of the sale, which was the earliest date on which money became really available for distribution amongst the different mortgagees.

We have not yet referred to the suggestion of the mortgagor that interest at the contract rate upon the senior securities should cease on the date fixed in the decree for re-payment by the mortgagor of the sum due to the plaintiff, third mortgagee, because this contention is, in our opinion, clearly unfounded. Reference was made by the learned Vakil for the mortgagor to the form of the decree given in Appendix D, form No. 8 of the Civil Procedure Code of 1908. That decree is essentially different from the decree drawn up in this case. The leading feature of that decree is that one period of redemption is fixed for the plaintiff mortgagee as well as the prior encumbrancers joined as parties to the suit. In the case before us, the decree fixed the period of redemption for the plaintiff, third mortgagee alone. It did not determine the amount due to the prior encumbrancers, nor did it define the period within which the mortgagor must satisfy their claims. Consequently the decree could not be deemed to transform the contractual obligations in favour of the prior encumbrancers into judgment-debts. The result was that when the sale proceeds

(1) 12 C. 252.
(2) 18 C. 242.

realised at the execution sale became available, the prior encumbrancers could take the amount due to each of them on the footing of their respective mortgages which were in no way affected by the decree made in favour of the plaintiff mortgagee.

The result is that this appeal is allowed and the order of the Court below varied. An account must be taken by the Subordinate Judge on the footing of the directions given in this judgment. Any amount which has been paid in excess of what was legitimately available to the second mortgagee must be refunded by him to the first mortgagee. The first mortgagee is entitled to the costs of this appeal from the second mortgagee. We assess the hearing fee at two gold *mohurs*.

Appeal allowed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 436 OF 1910.

September 20, 1910.

Present:—Mr. Justice Munro and Mr. Justice Krishnaswamy Aiyer.

BELLARY PRESS CO. LTD., BY THEIR AGENT MATHURA DASS—PETITIONER

versus

K. VENKATA RAO AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 24, O. XXXIX, R. 2, cl. (3)—Application to District Munsif for disobedience of ad interim injunction—Transfer of application by District Judge—Jurisdiction—Extent of powers of transfer under s. 24—Notice of transfer to party.

An interlocutory application pending before the District Munsif to punish the defendant for disobedience of an *ad interim* injunction granted by the Munsif cannot be transferred from his file to the file of some other Court by the District Judge or the High Court.

Section 24 of the Civil Procedure Code does not apply to such cases.

When the District Judge transfers a case under section 24, on the application of a party, he should, before passing the order of transfer, give notice to the opposite party.

If, however, the applicant invites the District Judge to transfer the case of his own motion and the Judge orders the transfer without giving notice to the opposite party, the order of transfer is not liable to be set aside on the mere ground of want of notice, the irregularity not being material, but only a defect of form.

Paramananda Doss v. *Mahabeer Dossji*, 20 M. 378, referred to.

Petition, under section 115 of Act V of 1908, praying the High Court to revise the Order of the District Court of Bellary, dated the 14th day of July, 1910, in O. P. No. 179 of 1910 (O. S. No. 155 of 1910) on the file of the District Munsif's Court of Bellary.

Judgment.—This is an application under section 115 of the Code of Civil Procedure to revise the order of transfer made by the District Judge of Bellary in O. S. Nos. 155 and 78 of 1910 and of interlocutory applications Nos. 486, 538 and 612 of 1910 on the file of the District Munsif of Bellary. We think there is no ground for interfering with the order of transfer as regards Suits Nos. 155 and 78 and Applications Nos. 486 and 612. It is argued that the order was bad inasmuch as no notice was given to the plaintiff as required by section 24. That section empowers the District Court to make a transfer on the application of a party after notice to all or of its own motion without such notice. The order in these cases was made on the application of the defendant. Notice to all parties should have been given by the District Judge before making the order. Not giving the notice, we may, therefore, assume, was an irregularity. We should have been inclined to regard it also as a material irregularity, justifying our interference under section 115 but for the fact that the District Judge had power to make the transfer by his own motion without notice and his attention was specially called to that provision and he was invited to make the order in the exercise of that power. The irregularity is a mere defect of form and we are not, therefore, prepared to interfere. The petition, so far as it is against the order of transfer of O. S. Nos. 155 and 78 of 1910 and interlocutory applications Nos. 486 and 612 of 1910, is dismissed.

With reference, however, to the order transferring interlocutory application No. 538 of 1910, the matter stands on a different footing. That was an application to the District Munsif under clause 3, rule 2, of Order XXXIX, to punish the defendant for disobedience of the *ad interm* injunction granted by the District Munsif under that clause. The Court granting the injunction has power to attach the property of the person guilty of disobedience or to detain him in the civil prison. The language of this clause giving the power to the Court granting the injunction is a modification of clause 3 of section 493 of the old Code. It must be presumed

that the change was intentional. The power to transfer under section 24 is, no doubt, very wide. But sub-clause 2 of clause (B) of sub-section 1 of section 24 authorises a transfer to subordinate Courts competent to try or dispose of the suit, appeal or other proceeding. If the application under Order XXXIX, Rule 2, clause 3, can only be made to the Court granting the injunction, it follows that that application must be dealt with by that Court and the Court to which it is transferred would not be competent to try or dispose of the same. We must, therefore, hold that the transfer of the interlocutory application No. 538 was bad. It is true that clause 3, Rule 2, of Order XXXIX is only an enabling provision conferring an authority on the Court granting the injunction and does not preclude an application to the Court to which a suit is transferred subsequent to the *ad interim* injunction from dealing with any disobedience of it. Indeed the *ad interim* injunction would probably be enforceable under section 36 read with Rule 32 of Order XXI by the Bellary Subordinate Judge's Court to which the suit has been transferred. But that is a very different thing from the power conferred by clause 3 of Rule 2 of Order XXXIX on the Court granting the injunction. It was held under section 257A of the old Code by this Court [*Paramananda Das* v. *Mahabeer Dossji* (1)], that the only Court which could sanction an agreement falling under that section was the Court which passed the decree. It could hardly be contended that the District Court could transfer an application for sanction under that section to another Court. Order XLVII, like section 623 of the old Code, authorises an application to review to the Court which passed the decree or order. It seems to us that such an application cannot be transferred by the District Court or the High Court to any other Court. These are cases which appear to be analogous to the application under clause 3 of Rule 2 of Order XXXIX. We must set aside the order of the District Judge transferring interlocutory application No. 538 of 1910 from the file of the District Munsif of Bellary. We make no order as to costs.

Order set aside.

(1) 20 M. 378.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL FROM ORDER No. 131 OF 1909.

July 28, 1910.

Present:—Sir George Knox, KT., Judge and Mr. Justice Griffin.

GAJRAJ LAL—APPLICANT—APPELLANT

versus

RAMDIN LAL—OPPOSITE PARTY—RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 104 (f), 154—Arbitration award—Application to file the award refused—Appeal—Retrospective effect of Civil Procedure affecting right to appeal.

Section 154 of the Code of Civil Procedure, 1908, does not affect any right of appeal, which shall have accrued to a party before the new Code came into force and is present at the commencement of the new Code.

Before the passing of the new Code of Civil Procedure, 1908, an application was made to have an award of arbitrators filed in Court. The Court refused the application subsequent to the passing of the Code:

Held, that inasmuch as there was no provision in the old Code of 1882 entitling an appeal against an order refusing an application to file an award, no appeal lay in the case. Section 104 of the new Code, having no retrospective effect, would not apply.

Hurosundari Debi v. *Bhagohari Das Manji*, 13 C. 86; *Satghuri* v. *Mujidan*, 15 C. 107; *Phillips* v. *Eyre*, 6 Q. B. 1 at p. 23; ; 10 B. and S. 1004; 40 L. J. Q. B. 28; 22 L. T. 869, *Nama* bin *Aba* v. *Sheku* bin *Anda*, 32 B. 337; 10 Bom. L. R. 330, relied upon.

First appeal from an order of the Subordinate Judge of Jaunpur, dated the 18th of June 1909.

Mr. *J. N. Chaudhri*, for the Appellant.

Mr. *Ahmad Karim*, for the Respondent.

Judgment.—Gajraj Lal applicant, here appellant, and Ram Din Lal, respondent here, had a dispute regarding the division of certain family property. They agreed *inter se* on the 2nd of July 1907 to refer the dispute to arbitration. The arbitrators decided the matter referred to them and pronounced their award on the 17th of July 1908. That award, as it happened, was in favour of Gajraj Lal, the appellant. On the 19th of September 1908, Gajraj Lal presented an application asking that the award might be filed and made a rule of Court. On the 18th of June 1909, the Subordinate Judge refused the application. Between the 19th of September 1908 and the 18th of June 1909, the present Code of Civil Procedure came into force and it is owing to the changes made by the present Code in the former Code that the difficulties, with which this appeal

is concerned, have arisen. It had been held in several cases under the Code of Civil Procedure now repealed that that Code granted no appeal to a higher tribunal from an order refusing an application to have an award made a rule of Code. The present Code [*vide* section 104 cl. (*f*)] grants an appeal from such an order. Taking advantage of section 104 cl. (*f*), Gajraj Lal has filed the present appeal. Upon the appeal coming here for hearing, the respondent raised a preliminary objection to the effect that no appeal lay from the order of the Subordinate Judge dated the 18th of June 1909. The contention of the respondent is that as the proceedings, out of which the order of the 18th of June 1909 arose, were instituted under the former Code of Civil Procedure, nothing contained in the present Code can affect those proceedings and he claims the benefit of the finality which the former Code of Civil Procedure gave to a refusal by a Court to grant an application to file an award. In support of his contention the learned Advocate for the respondent drew our attention to *Hurosundari Debi* v. *Bhogohari Das Manji* (1) and also to *Satghuri* v. *Mujidan* (2).

Those cases, undoubtedly, support his contention. The learned Advocate for the appellant, in answer to the objection raised, contends that the present Code in express terms saves from the provisions of the former Code any right of appeal which shall have accrued to a party at the commencement of the Code. This contention he bases upon section 154 of the present Code. Regarding the cases cited by the other side, his answer to them is that they were cases decided under the provisions of Act No. I of 1868 and that the language contained in Act No. X of 1897 which has replaced Act No. I of 1868 on the Statute Book is very different from the language contained in Act No. I of 1868. Regarding the first ground, *viz*, that section 154 sanctions the filing of the present appeal, we think that the obvious meaning of section 154 is that nothing in the Code shall affect any right of appeal which shall have accrued to a party before the new Code came into force and is present at the commencement of the new Code. This appears to be the proper interpretation of the section and according to that interpretation, section 104 would, in no way, help the present appellant. No right of appeal had accrued to him before the Code came into force. In a recent case, this Court had to consider the difference in the language contained in the two Statutes, Act II of 1868 and Act X of 1897. We see no reason to differ from the interpretation therein laid down. We followed in that case the principle laid down in *Phillips* v. *Eyre* (3) and held that "the Court will not ascribe retrospective force to new laws affecting rights, unless by express words or necessary implication it appears that such was the intention of the legislature." We find nothing in the new Code of Civil Procedure further than what was pointed out to us as evidencing any intention on the part of the legislature to depart from this principle of law. A similar view to that, which we have taken here, was taken by the Bombay High Court in *Nana* bin *Aba* v. *Sheku* bin *Anda* (4). The preliminary objection prevails and we hold that no appeal lies under the circumstances. We dismiss the appeal with costs including pleaders' fees in this Court on the higher scale.

Appeal dismissed.

(1) 13 C. 86. (2) 15 C. 107.

(3) L. R. 6 Q. B. 1 at p. 23; 10 B. and S. 1004; 40 L. J. Q. B. 28; 22 L. T. 869.

(4) 32 B. 337; 10 Bom. L. R. 330.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 715 OF 1909.

May 21, 1910.

Present:—Mr. Justice Karamat Husain.

GOKUL MISIR AND OTHERS—DEFENDANTS—APPELLANTS

versus

Mirza BANDE ALI BEG—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act XIV of 1882*), ss.* 13, 43—Res judicata—*Suit for permanent injunction—Second suit for possession barred—Cause of action—Object of* res judicata—*Suit for declaration.*

A suit by an owner, out of possession, for a permanent injunction against the defendant, who holds the property in dispute adversely to him, bars a subsequent suit for possession on the same cause of action.

Akbar Khan v. *Turaban*, 5 A. L. J. 610; A. W. N. (1908) 252; 4 M. L. T. 444; *Ram Sewak Singh* v. *Nakched Singh*, 4 A. 261: *Darbo* v. *Kesho Rai*, 2 A. 356, distinguished.

GOKUL MISIR *v.* BANDE ALI BEG.

Tulshi Ram v. *Ganga Ram*, 1A. 252; *Kamala Kamini Debi* v. *Loke Nath Kur*, 8 C. 528; *Mohan Lal* v. *Bilaso*, 14 A. 512; *Kalidhun Chuttopadhya* v. *Shibnath Chuckerbutty*, 8 C. 483, referred to.

The object of the rule of *res judicata* is always put upon two grounds :—(1) the public policy that there should be an end of litigation; (2) the hardship on the individual that he should be vexed twice for the same cause.

Lockyer v. *Ferryman*, 2 A. C. 519, referred to.

The expression cause of action means infringement of some right by some one which entitles the owner of the right to seek the assistance of the Court.

Section 43 of the Code of Civil Procedure, 1882, must apply to the facts as found by the Court and not to facts as alleged in the plaint.

Nathu v. *Budhan*, 18 B. 537, approved of.

Jibunti Nath Khan v. *Shib Nath Chuckerbutty*, 8 C. 819; *Monoo Singh* v. *Anand Singh Monda*, 12 C. 291, referred to.

Second appeal from the decision of the District Judge of Azamgarh, dated the 27th of May, 1909.

Mr. *Surendra Nath Sen*, for the Appellants.

Mr. *Ghulam Mujtaba* (with him Mr *Muhammad Ishaq*), for the Respondent.

Judgment.—The suit out of which this appeal arose was for possession on the basis of ownership and for damages. The plea in defence, which I have to consider in this appeal, is that a previous suit between the parties bars the present suit under sections 13 and 43 of the Code of Civil Procedure of 1882. The facts of the previous suit (No. 124 of 1907) are as follows :—One Bande Ali brought an action against Gokul and others on the allegation that he was the owner in possession of 5/16th share as purchaser from the heirs of one Bakas, that the defendants had appropriated the fruit and the trees. The relief sought by the plaintiff was a permanent injunction restraining the defendants Nos. 1 to 4 from cutting down the trees of the grove and for recovery of Rs. 34-5-9 as the value of his share of fruit in 1303 *Fasli* and of certain trees appropriated by them. The pleas of the defendant in that suit *inter alia* were that the grove had been in possession of Baha-ud-din and the defendants as mortgagees from him under the mortgage-deed of 1st of September 1898 for upwards of 12 years, before the institution of the suit and that the suit was barred by limitation. The issues framed by the Court of first instance were to the following effect :—

(1) Was the plaintiff or his vendor in possession of the *Bagh* within twelve years before the institution of the suit or was the suit barred by the time ?

(2) Was the suit barred by section 42 of the Specific Relief Act ?

(3) What were the rights and interests of the plaintiff's vendor on the date of the sale-deed of the 14th and 17th of July 1905 and what rights did the plaintiff acquire by his purchase ?

(4) What damages was the plaintiff entitled to ? On the second issue the first Court found that the plaintiff was not in possession, that he ought to have claimed possession and that his suit was barred by section 42 of the Specific Relief Act. On the first and third issues that Court found that the title of the defendants had not ripened into ownership by adverse possession and that the plaintiff was owner of 5/16th share in the *Bagh*. On the fourth issue it found that in consequence of the agreement between the parties, the amount of damages was Rs. 15. On the above findings, the first Court dismissed the claim for injunction and decreed it for damages. The judgment of the learned Munsif shows that he treated the suit as one for declaration of title under section 42 of the Specific Relief Act. Both parties appealed. The appeal of the defendants was decreed while that of the plaintiff was dismissed. The lower appellate Court in its judgment observes: "It seems to me that that the mortgagee is undoubtedly in possession. The settlement entry of Gokul's name was made on the basis of possession. There is no evidence on the plaintiff's part that he is in possession. The mortgagee's witnesses prove possession. It is absurd to plead that the plaintiff was put into possession notwithstanding the order of the Revenue Court. It is an elementary rule of law that without possession a man cannot complain of trespass or forcible invasion of his right of possession. The cases, in which the plaintiff is out of possession and seeks an injunction to restrain acts by the person in possession who claims by title adverse to him, are excepted from the operation of section 54 of the Specific Relief Act (Page 402 Collett on Specific Relief, third edition). It is not shown that irreparable mischief will be done to the grove which cannot be compensated by damages. The prayer for injunction, therefore, was rightly dismissed by the Munsif." The learned District Judge

at the end of his judgment says: "He (plaintiff) was referred to a separate suit for possession. He should claim damages also in that suit."

The plaintiff on the 13th of June 1908 brought the suit out of which this appeal arose. The reliefs sought in the present suit are the following:—(*a*) a decree for the establishment of the right of possession jointly with the defendants over 5/16th share of the grove—(*b*) Rs. 123-7-0 on account of the produce of the grove for 1314 and 1315 *Faslis*. One of the pleas in defence was that the suit was barred by the provisions of the sections 13 and 43 of the Code of Civil Procedure. The Court of first instance came to the conclusion that the cause of action in the two suits being the same the suit was barred but it did not specify whether it was barred under section 13 or section 43. The plaintiff appealed to the lower appellate Court which reversed the decree of the Court of first instance and gave the plaintiff a decree for possession of 5/16th of the grove and Rs. 31 as damages and costs. The learned District Judge relied on the following rulings:—*Kakaji Ranji* v. *Bapuji Madhav Rao* (1); *Mohun Lall* v. *Bilaso* (2); *Jibunti Nath Khan* v. *Shib Narain Chukerbutty* (3); *Ram Sewak Singh* v. *Nakched Singh* (4) and *Akbar Khan* v. *Turaban* (5).

The defendants have preferred a second appeal to this Court and it is argued by their learned Vakil that the present suit is barred by the provisions of Order II Rule 2 and Explanation IV of section 11 of the new Code of Civil Procedure. As the case is governed by the Code of 1882 his contention in substance is that the suit to barred by section 13, Explanation II and section 43 of the Code of Civil Procedure of 1882. In order to see whether section 13, Explanation II or section 43 of the Code of Civil Procedure, 1882, bars the present suit, the following introductory remarks are necessary:

"The object of the rule of *res judicata*," observes Lord Blackburn, "is always put upon two grounds, the one, public policy that there should be an end of litigation, the other, the hardship on the individual that he should be vexed twice for the same cause." *Lockyer* v. *Ferryman* (6).

Out of the two grounds vexation to a defendant more than once is the only ground on which Explanation II of section 13 and section 43 of the Code of Civil Procedure rest. Both of them are enacted in his interests and save him from the repetition of vexation on a single cause of action.

The expression "cause of action" is sometimes used in the sense of some infringement by the defendant which furnishes an immediate cause of action to the plaintiff. At others, it is used in the sense of infringement together with the right infringed. The latter sense is wider of the two and a Full Bench of this Court has held that the cause of action in section 43 is used in the wider sense [*Murli* v. *Bhola Ram* (7)]. That ruling is binding on me but with all the respect due to the learned Juges, I cannot help thinking that the expression simply means some infringement of some right by some one which entitles the owner of the right to seek the assistance of the Court. When it is used to denote the entire group of facts which the plaintiff has to prove to have the judgment of the Court in his favour, it denotes the elements of success and not the cause of action. The concepts of "infringement" "cause of action" and "relief," are closely connected with one another. The one and the same act which is an infringement is also the entire cause of action or a component element thereof and the relief is the restoration of the owner of the right to the position in which he was before the infringement and if that be impossible, to compensate him for the loss. In this connection I deem it my duty to observe that the words and group of words used in expressing the legal concept ought to be used in only one sense and that each legal concept ought to be expressed by one word or group of words. The practice of vaguely expressing one concept by several terms or using one term in more than one sense is a fruitful source of the multiplicity of suits and of the moral and social evils of the first magnitude.

(1) 8 B. H. C. R. A. C. 208.
(2) 14 A. 512.
(3) 8 C. 819.
(4) 4 A. 261.
(5) 5 A. L. J. 640; A. W. N. (1908) 252; 4 M. L. T. 444.
(6) (1897) 2 A. C. 519.
(7) 16 A. 165.

The cause of action, according to some rulings, must be sought for within the four corners of the plaint; [*Jibtuni Nath Khan* v. *Shib Nath Chakerbutty* (3); *Monoo Singh Monda* v. *Anand Singh Monda* (8)]. But in *Nathu* v. *Budhan* (9), the Court expressed an opinion *obiter* that section 43 must be applied as if the facts had been as found by the Court and not alleged in the plaint. This view, with due respect to the learned Judges who take a different view, is, in my judgment, sound. If the determination of a cause of action is to depend upon the allegations made by the plaintiff in the plaint with a complete disregard to the pleas in defence and to the findings of the Court on the pleadings of the parties, matters are left to the sweet will of the plaintiff who can invent as many causes of action as suit his fancy and can drag a helpless defendant into Court many times for one single cause of action in spite of the provisions of section 43. This will tend to increase the multiplicity of suits and give a handle to the malice of unscrupulous plaintiffs against innocent defendants. Further if the parties to a suit be not agreed as to the cause of action, it is the function of the Court to find what the cause of action is and the bare allegations in the plaint cannot be sufficient for determining it. The allegation in the plaint may estop the plaintiff from averring differently but they cannot furnish a sufficient basis for the determination of a cause of action. Again to set the machinery of the law in motion is a very serious matter and a plaintiff, who intends to seek the assistance of a Court, is under the obligation of exercising a reasonable care to find out what the real cause of his action is and what is the relief to which he is entitled. If without doing so he rushes into Court, he does so at his own risk. The defendant is also a party to the suit and to give preference to the allegations in the plaint over the pleas in defence in determining the cause of action in a particular suit is not consonant with justice. One of the elements of Explanation II is that the cause of action in the two suits must be the same. If it is not the same, the omission of a ground of attack or defence cannot take place. Another element is that the ground must be such as could help success or failure in the previous suit. A third element is that it must have been known to the party who could advance it [*Manik Bai Jivaraj* v. *Vir Chand Ramachandra* (10)] inasmuch as a party could not be barred from raising a ground which was not known to him. The element of the doctrine of *res judicata*, that the matter must be heard and finally decided, is no element of Explanation II; for adjudication upon a ground which has been omitted is impossible. The bar created by Explanation II rests on the omission by a party and not on adjudication by a competent Court. This is founded on the Maxim "*Nemo debet bis vexari pro una et eadem causa*" and not upon "*interest rei publicæ ut sit finis litium.*" It has a close affinity to estoppel and has no connection with *res judicata*. The absence of adjudication on the omitted ground is conclusive to show that the matter cannot be *res judicata*. But as the rule of *res judicata* is treated by the English lawyers as a branch of the law of estoppel and as the practical results are the same whether the explanation finds a place under *res judicata* or under estoppel, much regard has not been paid to assign a proper place to it. As the omission has been dealt with under the rule of *res judicata*, the Courts have tried to explain how it can come under that rule. In *Hari Narain Brahmin* v. *Ganpat Rao Daji* (11), the matter is said to be *constructively* in issue:—"The law of *res judicata* is contained in section 13 of Act X of 1877 but the matter in issue in the present suit was obviously not heard and finally decided by the Poona Court unless it can be said to have been *constructively* in issue in the former suit under Explanations I and II of section 13." In some cases the opportunity of obtaining a decision is deemed tantamount to actual decision:—"If the parties have had an opportunity of controverting, that is the same thing as if the matter has been actually controverted and actually decided." [*Newington* v. *Levy* (12) per Martin, B., citing

(8) 12 C. 291.
(9) 18 B. 537 at p. 542.
(10) 9 Bom. L. R. 1020.
(11) 7 B. 272.
(12) L. R. 6 C. P. 180 at p. 189; 40 L. J. C. P. 29; 23 L. T. 594; 19 W. R. 473.

Greathead v. *Bromley* (13), *Langmead* v. *Maple* (14); see also per Blackburn, *Newington* v. *Levy* (12); *Rakhal Das Singh* v. *Hera Motee Dassee* (15).]

The point that for the application of Explanation II a final decision of the omitted ground is not necessary has been noticed by Sharaf-ud-Din and Coxe, JJ. in *Mohim Chandra Sarkar* v. *Anil Bandhu* (16); and no reasonable doubt in the soundness of this view is possible; but it is strange to find that according to some cases, *Woomesh Maitra* v. *Baroola Das Maitra* (17) and *Kailash Mandal* v. *Baroda Sundari Dasi* (18), the question ought and cannot be treated as *res judicata* under Explanation II unless there is a judicial determination express or implied on the matter not put directly.

Section 43 like Explanation II deals with an omission and is based on the maxim which prohibits vexing a defendant more than once for one cause. It bars a subsequent suit for a portion of the relief which is omitted in the previous suit on the same cause of action. The omitted portion of the relief is termed, in second paragraph of section 43 of Act XIV of 1882, a "portion of his claim" and in the third paragraph it is termed a "remedy." If the term relief be taken in its widest sense, that is, the "thing" or the "object of right" or "the compensation therefor" to which the plaintiff on the happening of a specific cause of action is entitled, the "portion of his claim," and the "remedy," both become sub-classes of "the portion of the relief" and the distinction between the two sub-classes turns out to be physical. When his claim, that is, the thing claimed is of a homogeneous character, such as, money or tangible property, the omitted portion of the relief is spoken of as "any portion of his claim", when the relief consists of several component reliefs, such as, a simple money decree and a mortgage decree the omitted portion of the relief is spoken of as a "remedy."

The points of agreement between Explanation II and section 43 are that both deal with an omission, that the cause of action under both must, in the two cases, be the same and that the bar in both is to avoid repeated vexation to the defendant and is due to the omission of the party and not to adjudication by the Court.

The points of difference between them are that the omission under Explanation II is the omission of a ground of attack or defence in respect of the relief, while under section 43 it is the omission of a portion of the relief itself, that the omission under the former may be either by the plaintiff or by the defendant but that under the latter it must always be by the plaintiff.

A suit for a declaration is very distinct from a suit for permanent injunction. The former is brought under section 42 and the latter under section 54 of the Specific Relief Act. In a suit for declaration the plaintiff may or may not be in possession of the property in respect of which a declaration is sought. In a suit for a permanent injunction, the plaintiff must be in possession of the property in respect of which the permanent injunction is sought. A plaintiff out of possession may sue for a temporary injunction but that is very different from a permanent one. In the former a mere declaration can be made and in the latter the defendant is restrained from some infringement and hence the former decree is unfit to be executed. A permanent injunction is a remedy or relief against the defendant, while a declaration is a mere declaration: "I can understand an injunction being a relief", *Marsh* v. *Keith* (19); but I do not understand how a decree which declares a right merely and gives no relief can be termed a remedy. [*Kaly Dhun Chuttopadhya* v. *Shib Nath Chuttapadhy* (20)].

In a declaratory suit possession may be a consequential relief but in a suit for permanent injunction possession can never be a consequential relief. Hence possession as a relief may be added to a declaration as a relief but it cannot be added as a relief to a permanent injunction. If "the declaration of title to a property," "the possession of it" and "the permanent injunction to restrain from doing some irreparable damage to it," be deemed to be one chain of reliefs, declaration will represent the first link, possession the second and injunction the third. In other words, declaration will precede possession and injunction will follow.

It follows that a dispossessed owner ought

(13) 7 T. R. 455; 4 R. R. 490.
(14) 18 C. B. N. S. 255.
(15) 22 W. R. 282.
(16) 13 C. W. N. 513; 9 C. L. J. 362; 5 M. L. T. 247; 1 Ind. Cas. 66.
(17) 26 C. 17.
(18) 24 C. 711.
(19) Draw & Sim. 342; 30 L. J. Ch. 127; 6 Jur. (N. S.) 1182; 3 L. T. 498; 9 W. R. 115.
(20) 8 C. 483.

to sue for possession and ought not to sue first for the declaration of title and next for possession inasmuch as the law is "that a plaintiff will not be allowed to make two litigations when the whole matter can be disposed of in a single suit. *Kali Dhun Chuttopadhya* v. *Shibnath Chuttapadhy* (20). The case law, however, is that a previous suit for a declaration of title is no bar to a subsequent suit for possession. The way in which this has come to pass is not only interesting but of material help in deciding the case before me. I, therefore, set out its history.

The Courts of Equity in England were at one time different from the Courts of Common Law and, therefore, a declaration was first obtained from the Equity Courts and then a suit for consequential relief was instituted in the Common Law Courts.

"Now in a country where there are different Courts administering different portions of the substantive law, it may be quite possible that a right may have to be established in one Court before a consequential relief can be had in another Court" *In re Kali Dhun Chuttapadhya* (20). Owing to the separation of the two sets of Courts, the rule that a Civil Court may make a declaratory decree without consequential relief, was first enacted in a statutory form in the 15 and 16 Victoria, Chap. 86, section 50. That section was re-enacted in India for the old Supreme Court in section 29 of Act VI of 1854. It was then re-produced in the same form in section 15 of the old Code of Civil Procedure(Act VIII of 1859). "No suit shall be open to objection on the ground that a merely declaratory decree or order is sought thereby and it shall be lawful for a Civil Court to make binding declarations of right without granting consequential relief." [*Kali Dhun Chuttopadhya* v. *Shibnath Chuttopadhy* (20)]. Section 42 of the Specific Relief Act, which came into force on the 1st of May 1877, materially altered the law on this subject. The last paragraph of that section is in these terms: "Provided that no Court shall make any such declaration where the plaintiff being able to seek further relief than a mere declaration of title omits to do so." The above history of the legislation on the subject shows that a Civil Court under section 15 of Act VIII of 1859 had power of "making binding declarations of right without granting consequential relief" and that that power was taken away by the proviso to section 42 of the Specific Relief Act. The former section in terms confers that power and the latter puts an end to it. There is nothing in either of the two sections to throw any light on the fate of a subsequent suit for a consequential relief.

In *Kalidhun Chuttopadhya* v. *Shibnath Chuttapadhy* (20), there are observations which go to show that such a suit would but for section 15 be barred: "If section 7 stood alone, unqualified by any other provision in the law, it would, indeed, be very difficult to contend that the present suit is not barred. It is obvious that the plaintiffs' real object in the first suit was to obtain an account from the defendant and that the declaratory decree, with which they were then content, was only a means to effect that end. It would seem, therefore, impossible to say, that in suing for that decree, they sued for their whole claim in respect of their cause of action. But then it is contended that section 15 of the Code is intended to modify section 7 and removes any difficulty which the plaintiffs might otherwise have had in enforcing their present claim.....It seems to me that this contention is well-founded. I think that section 15 is intended to modify the provisions of section 7, and the present case is just one of those to which the section is intended to apply. This was evidently the view taken by the Allahabad High Court in *Tulshi Ram* v. *Ganga Ram* (21) and I entirely agree with that decision."

A reasonable inference from the above remarks is that after the repeal of section 15 of Act VIII of 1859 by section 42 of the Specific Relief Act, a subsequent suit for consequential relief would be barred by the principle of section 7 of Act VIII of 1859, which was re-enacted with an enlarged scope in section 43 of Act X of 1877 and of Act XIV of 1882. Such, however, is not the case law. *Jibunti Nath Khan* v. *Chukerbutty* (3), which was a case under Act X of 1877, lays down: "Where a previous suit for a declaration of title and confirmation of possession of certain land has been dismissed on the ground that the plaintiff was not in possession at the time of the suit a suit on the same title for recovery of possession is not barred under section 43 of the Code of Civil Procedure." The rule is based on the following reasoning:—"On

(21) 1 A. 252.

the whole we are of opinion that there has been no splitting of remedies in this case within the meaning of section 43 of the new Code of Civil Procedure and that this suit is not barred in consequence". With due respect to the learned Judges, I find myself unable to hold that there is no splitting of remedies. If a consequential relief is not a portion of the relief (using that term in its widest sense) to which a plaintiff is entitled, a sum of one hundred rupees is also not a portion of five hundred rupees. This case entirely ignores the observations of Garth, C.J., in *Kali Dhun Chuttopadhya* v. *Shibnath* (20) and the express provisions of section 43 of Act X of 1877, which raise a bar by the omission of "any portion of his claim," as well as of a "remedy," and it is exceedingly difficult to contend that a consequential relief is not a remedy which is open to a plaintiff to seek. This case is followed in *Kamala Kamini Debi* v. *Loke Nath Kur* (22).

The learned Judges note that the point decided in *Kalidhun's case* (20) "cannot arise under the present law as section 42 of the Specific Relief Act forbids such a suit." They, however, go on to say:—"But we cannot think that where a plaintiff mistakenly believing himself to be in possession, sues merely for a declaratory decree and where in accordance with this rule, the Court, finding him not to be in possession, dismisses his suit on this ground without any enquiry into his right, he is precluded from subsequently suing for his entire cause of action."

The reasoning shows that the principle of repeated vexation is made inapplicable because of the ignorance of the fact of possession at the date of the suit and, therefore, the case is no authority for the plaintiff who at the date of his suit knows that he is not in possession and yet omits to seek that relief. This case was also followed in *Mohan Lal* v. *Bilaso* (2) but the judgment with the greatest possible respect is very short.

In *Akbar Khan* v. *Turaban* (5), it is laid down that the dismissal of a suit for a declaration of title is no bar to a subsequent suit for possession. The proposition is laid down as elementary. *Ram Sewak Singh* v. *Nakched Singh* (4) rests on the basis that in the former suit the cause of action for the relief of possession had not arisen and is, therefore, no authority for a case in which at the institution of the former suit the cause of action for possession exists. *Tulshi Ram* v. *Ganga Ram* (21) lays down as follows:—"The fact that, at the time when the purchaser of certain lands sued with a view of confirming his title to the land under his purchase, for a decree declaring such title, he was in a position to have sued for possession of the lands was no bar under the provisions of section 7 of Act VIII of 1859 to his subsequently suing for possession of the same". The *ratio decidendi* will appear from the following portion of the judgment:—"The lower appellate Court considered that section 7 applies to cases in which the plaintiff omits to seek relief in respect of a portion of his claim, and not to cases in which, although he may be entitled to claim more than one kind of relief, he seeks for the time one remedy only. In our judgment the lower appellate Court has properly interpreted the provisions of the section referred to. We have not now to consider whether the plaintiff ought to have obtained a declaratory decree, seeing that he might have obtained that relief in an ordinary suit for possession. We have to determine whether in seeking a declaratory decree to establish his purchase deed and omitting to sue for possession, he can be held to have omitted any portion of the claim arising out of the cause of action he then put in suit. The cause of action he then put in suit did not necessarily involve any breach of the contract to deliver possession. The plaintiff might have obtained a declaratory decree without entering on the question of possession. For these reasons we hold that section 7 is applicable". This rule, with reference to the terms of section 7 of Act VIII of 1859, is quite correct and the words "the plaintiff might have obtained a declaratory decree without entering on the question of possession," may have reference to the provisions of section 25 of that Act. The rule, however, would be incorrect under section 43 of Act X of 1877 or Act XIV of 1882, in both of which the omission of a "remedy" is placed on the same footing as the omission of "a portion of his claim."

Darbo v. *Kesho Rai* (23) also lays down that a suit for a declaration of title does not bar a subsequent suit for possession. The judgment is in the following terms:—

(22) 8 C. 528.

(23) 2 A. 356.

"In so far as the appellant now claims possession of property to which she formerly claimed a declaration of title, we are of opinion that the suit is clearly not barred; she is seeking a different relief, and the relief she formerly sought was refused her in respect of this property, on the ground that the Court ought not to exercise its discretionary power of awarding a declaration of title when relief can be obtained by an ordinary suit for possession."

A very important point noticeable in all the cases reviewed is that each of them deals with a suit for a declaration of title. None of them touches the effect of a previous suit for a permanent injunction by a plaintiff who is out of possession on a subsequent suit by him for possession.

The plea of Explanation II may be dismissed in a few words. The relief sought in the present suit is different from the one sought in the former suit. That being the case, the question of omitting a ground of attack in the former suit cannot arise. Besides joint possession which is sought in the present case can in no way be a ground of attack for obtaining a permanent injunction.

On the analogy of the case law as to declaratory decrees, it is, however, contended that a suit for a permanent injunction is no bar under section 43 to a subsequent suit for possession. This analogy in the first place cannot hold good inasmuch as the facts are dissimilar. A suit for the declaration of title as has already been explained stands on a footing totally different from a suit for a permanent injunction and the rule applied to a suit for a declaration is not applicable to a suit for a permanent injunction. Moreover, the case law regarding declaratory suits is in direct opposition to the principle which is the foundation of section 43 and is not, therefore, to be extended to suits for permanent injunctions. So far as I am aware, there is no authority for the proposition that a suit by an owner out of possession for a permanent injunction against the defendant who holds the property in dispute adversely to him does not bar a subsequent suit for possession on the same cause of action. Such a suit on principle must be barred. I have already explained that section 43 of Act XIV of 1882 is enacted in the interest of the defendant and protects him from repeated vexation. That being the object of the rule, it is perfectly immaterial whether the repetition of vexation is in respect of a portion of the relief or in respect of an entire relief. The case of a plaintiff, who omits the entire relief to which he on a specific cause of action is entitled and starts a suit for some relief to which he on that cause of action is not entitled, is, in no way, distinguishable from the case of a plaintiff who omits only a portion of the relief. So far as the repetition of vexation is concerned, the former case is worse than the latter. In the latter there is the consolation of the termination of liability for a portion of the relief; but there is no such thing in the former. If the omitter of an entire relief, to which he on a specific cause of action is entitled, were not barred by the principle of section 43 from seeking it in a subsequent suit, a wide door for the repetition of vexation would be opened and unscrupulous plaintiffs would harass innocent defendants as often as they chose by keeping the relief to which they on a specific cause of action were entitled and putting forward sham reliefs to which they were not entitled.

In the previous case between the parties, it was found that the plaintiff was out of possession and that that fact was known to him when he instituted the previous suit. The relief sought by him in that suit was a permanent injunction to which he was not entitled on the cause of action brought about by dispossession and the entire relief of possession to which he was entitled on that cause of action was omitted by him. With reference to those facts, I hold that his present suit for possession is barred by the principle on which section 43 is founded. It may be contended that the cause of action in the previous suit was different from the cause of action in the subsequent suit and that, therefore, section 43 has no application. Having regard to the findings of fact in the previous suit that the plaintiff was not in possession and that he knew that he was not in possession and to the facts that in the present suit the relief sought is based on the same cause of action which had arisen before the institution of the present suit and that no fresh cause of action save the former one is alleged, I have no hesitation in holding that the cause of action in both suits is one and the same.

The rulings relied on by the lower appellate Court have no application to the facts of the

case before me inasmuch as none of them deals with the fate of a subsequent suit for possession after a suit for permanent injunction on one and the same cause of action. The result is that I allow this appeal, set aside the decree of the lower appellate Court and restore that of the Court of first instance with costs.

Appeal allowed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 381 OF 1910.

September 9, 1910.

Present:—Mr. Justice Miller.

KUTHALALINGAM PILLAY—PETITIONER

versus

PACKIYAM FERNANDEZ—RESPONDENT.

Promissory-note—Transfer of ownership—Want of endorsement—Purchaser in Court auction—Right of purchaser to sue—Vesting order—Civil Procedure Code (Act V of 1908), O. XXI, Rr. 80 and 81.

In order to effect a transfer of ownership of a negotiable instrument, an endorsement is not in general required by law.

A purchaser of a promissory-note in Court auction, who has obtained a vesting order before date of his decree is entitled to a decree in a suit on the promissory-note, even though there was no endorsement on it.

Krishnaji Ravji Godbole v. *Ganesh Bapuji Patverdhan*, 6 B. 139, referred to.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the decree of the Subordinate Judge's Court of Tuticorin, in S. C. S. No. 1475 of 1908.

Judgment.—I think it is clear and indeed it is not denied that in order to effect a transfer of ownership of a negotiable instrument, an endorsement is not, in general, required by law, but it is contended that the provisions of Order XXI Rules 80 and 81 of the Code of the Civil Procedure, 1908, show that an endorsement is required when the negotiable instrument is sold by Court auction. It cannot accede to this contention. Rule 80, as I understand it, merely enables the Court to take such steps as may be required by law to make an effective transfer and inasmuch as a negotiable instrument can legally be transferred as an actionable claim without endorsement, Rule 80 does not affect the present case. The property not being property which requires an endorsement for its transfer appears to be property not otherwise provided for within the meaning of Rule 81 and by Rule 81 vests in the purchaser on his obtaining a vesting order. The plaintiff obtained a vesting order before his decree, though apparently not before the suit. I think his suit is not to be defeated on that account [*vide Krishnaji Ravji Godbole* v. *Ganesh Bapuji Patverdhan* (1)].

The decree is reversed and the suit is remanded for disposal according to law.

The costs will abide the event.

Appeal allowed.
Case remanded.

(1) 6 B. 139.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 938 OF 1910.

August 25, 1910.

Present:—Mr. Justice Holmwood and Mr. Justice Doss.

Kumar NARENDRA NATH MITTER—PETITIONER

versus

CHAIRMAN, CORPORATION OF CALCUTTA—OPPOSITE PARTY.

Calcutta Municipal Act (III B. C. of 1899), s. 3, cl. (29)—Nuisance—Putting up posts to prevent wheel traffic passing through busti, *if nuisance.*

The owner of a *busti* put up certain posts which had the effect of preventing the wheel traffic passing through the *busti* from east to west and from north to south, leaving the opening on to the main road open and free at all times for any cart which had business in the *busti* and could go all over it and all round it and out again by the same passage by which it came in; but the cart could not get in and out of this *busti* by the shortest route as it had to go back by the way it came in:

Held, that, although it may be inconvenient to the Municipal servants and although it may add to the expense of cleansing the *busti*, the act of the owner cannot in any way interfere with the effective cleansing of the *busti*, which it is necessary to establish before it can be held to be a nuisance.

Rule against the order of the Municipal Magistrate of Calcutta, dated June 18, 1910, directing the Chairman of the Corporation to remove the posts placed in and across the *busti* of the petitioner.

Babus *Dasarathi Sanyal* and *Sailendra Nath Palit*, for the Petitioner.

Babu *Debendra Chandra Mallik*, for the Opposite Party.

Judgment.—This is a Rule calling upon the Municipal Magistrate of Calcutta to show cause why the orders referred to in the petition should not be set aside for the reasons stated in the petition.

RAHIM BAKSH *v.* SASI KANTA.

It appears that the present petitioner is the owner of a large *busti* abutting in the Circular Road and on Gas Street as also upon a street known as Dinendra Narayana Roy's Street. The *busti* has been the subject of improvement under the Act and certain streets and passages have been laid out in accordance with the provisions of the Act. The Municipality now claims to take wheel traffic through every one of these streets and to practically make them into thoroughfares for wheel traffic. The owner having found that during the time of the repairs of the said roads abutting on his property, the public were in the habit of using his private streets as thoroughfares, put up certain posts which had the effect of preventing the wheel traffic passing through the *busti* from east to west and from north to south, leaving the opening on to the Upper Circular Road open and free at all times for any cart which had business in the *busti* and which entered the *busti*, and if so desired could go all over the *busti* and all round it and out again by the same passage by which it came in. The Municipality charges the proprietor upon this with creating a nuisance, the nuisance being that the private street is not at all times kept open to the use of the Municipal authorities for scavenging purposes.

The learned Magistrate in the Court below has found that it is a nuisance within the meaning of section 3, clause 29, of the Municipal Act, and has directed the Chairman to remove the aforesaid posts placed in and across the streets in the *busti* of Kumar Narendra Nath Mitter and to so alter the position of the kerb and channel stones at the southern extremity of the Municipal Road as to enable conservancy carts to pass through and to recover the expenses of so doing from the said Kumar Narendra Nath Mitter.

We have heard the learned Vakil for the Municipality at some length and we are unable to accede to his contention that there is a nuisance under the Act. "Nuisance includes any act, omission, place or thing which causes or is likely to cause injury, danger, annoyance or offence to the sense of sight, smell or hearing or which is or may be dangerous to life or injurious to health or property." The learned Magistrate has found that the nuisance "consists in the annoyance to the conservancy overseers and other Municipal employees when they found that the carts could not get in and out of this *busti* by the shortest route but that they had to go back by the way they came in." We cannot see that this constitutes an act which is likely to cause injury or danger to any one or annoyance or offence to the sense of sight, smell or hearing or which is, or may be, dangerous to life or injurious to health or property.

The question is whether the Municipality are in a position to effectively cleanse this *busti* so that no such danger or annoyance may arise; and it appears to us perfectly clear that although it may be inconvenient to the Municipal servants and although it may add to the expense of cleansing the *busti* it cannot, in any way, interfere with the effective cleansing of the *busti* which it is necessary to establish when we are asked to hold that it is a nuisance. On the other hand, the proposal of the Municipality that the owner should put up gates and have them opened for the use of the Municipal carts when required would give rise to a very great balance of inconvenience and expense on the part of the owner. We can see no justification for transferring the inconvenience and expense which necessarily arises in dealing with private properties from the Corporation to the owner. The owner has done all which he is bound to do under the law. Every one of these private streets is open and the Municipal carts can go up and down every one of them for scavenging purposes and the only difficulty is that they in some cases have to go back by the way they came. If the inhabitants of the *busti* did not find this a nuisance it is difficult to see how the Chairman can find it a nuisance.

For all these reasons we make the Rule absolute and set aside the order of the Municipal Magistrate. *Rule made absolute.*

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 1493 OF 1910.

September 8, 1910.

Present :—Mr. Justice Mookerjee and Mr. Justice Teunon.

RAHIM BAKSH MANDAL AND OTHERS—DEFENDANTS—APPELLANTS

versus

Kumar SASI KANTA ACHARYA CHOWDHRY—PLAINTIFF—RESPONDENT.

Qabulyat—*Construction—Remission of rent on ac-*

RAHIM BAKSH *v.* SASI KANTA.

count of Mondoloi—Mondol's *services dispensed with*—*Rent of holding, what is to be considered as.*

The defendant executed a *qabulyat* to the plaintiff in1865 in the following terms:—"The rent, at the rate of 5 annas a *bigha*, has been settled at Rs. 2,434; on the prayer of the tenant and in consideration of his services as *mondol*, a sum of Rs. 811 is remitted and the tenant admits a rent of Rs. 1,623 and agrees to pay the same year by year in accordance with certain instalments". The plaintiff in 1909 removed the defendant from his position as *mondol* and brought this suit for rent at the higher amount. It appeared that in certain *eqrars* executed by the defendant the rent actually fixed was declared to be the smaller amount and the rent receipts granted, the rent payable as the *jama* was stated at the lower figure, and that when on one occasion an attempt was made to state the *jama* at the higher figure and below this the remission, the tenant objected and the attempt was abandoned:

Held, that, on a true construction of the *qabulyat*, the lesser sum agreed to be paid was the rent of the holding, and that the remission granted was not contingent upon, or held in abeyance as payment for, services to be rendered, but represented a permanented and irrevocable abatement.

Appeal from the order of the District Judge of Rajshaye, dated January 24, 1910, affirming that of the Sub-Judge of that District, dated August 20, 1908.

Babus *Mohendra Nath Roy* and *Kumar Sankar Roy*, for the Appellants.

Babus *Dwarka Nath Chuckerbutty* and *Joy Gopal Ghosha*, for the Respondent.

Judgment.—This appeal arises out of a suit for arrears of rent.

It appears that the plaintiff-respondent is now the sole proprietor of *pergunnah* Shershabad in the District of Malda, and that under him the defendants, appellants, hold an 8 anna share in two holdings, one in *taraf* Dullarpur, and one in *taraf* Sherpur Bhandar.

It is conceded that the respective rights of the parties are based on two *qabuliats* (Exhibit No. 1 and Exhibit No. 1 *a*) executed by one Jiyad Din Mondol, the then representative tenant, on the 19th Poh 1272 (1865).

When we take these two *qabuliats* together and treat them as executed in favour of the 16 annas landlords, we find that they recite that the land in the possession of the tenants had been measured, that the landlords had thereupon brought and succeeded in suits for enhancement, that thereafter an amicable settlement had been arrived at, and the rent, at the rate of 5 annas a *bigha*, settled at Rs. 2,434; they next recite that on the prayer of the tenant and in consideration of his services as *mondol*, a sum of Rs. 811 (*i. e.*, one-third of the sum first mentioned) is remitted. The tenant then proceeds to admit a rent of Rs. 1,623 and agrees to pay the same year by year in accordance with certain instalments.

It is admitted on both sides that since the year 1291 to 1296, the defendants have paid their half share of the rent separately. The plaintiff then alleges that while the holder of the 2nd half share, *i. e.*, Jiyad Din and after him, his son Belat Ali, has continued to render services as the landlord's *mondol* in *taraf* Dullarpur and Sherpur Bhandar, the defendants, on the other hand, have failed to do so. Partly for that reason and partly because it is now unnecessary to retain more *mondols* than one, the plaintiff, on the 26th Bhadro 1312 (11th September 1909), removed the defendants from their position as *mondols*.

The case for plaintiff then is that the sum remitted, namely, one-third of the full rent settled, was merely held in abeyance as payment for services to be rendered by the tenants as his *mondols* and that when such services were no longer required, or ceased to be rendered, he is entitled to resume the concession and demand rent at the full rates recited in the *qabuliats*. Indeed from the issues raised in the Court of first instance, it appears that the plaintiff went further than this and contended that the ordinary law of master and servant applied, that he was entitled to dismiss the defendants at his pleasure, and that on their dismissal the sum previously set off against their wages became payable to him. For the period in suit, that is the 2nd half of 1312, and the whole of 1313, the plaintiff, therefore, claims rent at the full or unabated rates, that is, in respect of the half share of the defendants at the rate of Rs. 1,217 per annum. We should note here that in stating figures we neglect fractions of rupees.

The defendants contended *inter alia* that their predecessors as the principal tenants, headmen or *mondols* of the locality had rendered valuable services to the landlords in connection with the settlements made with the tenants of Dullarpur and Sherpur Bhandar in or about the year 1272 and that in consideration of the said services they were granted a permanent reduction or abatement of rent. In other words, their contention is that the remission recited in the *qabuliats* of

1272 is not contingent on services to be rendered, and that the lesser sum agreed to be paid represents the rent of the holding. They further contended that *mondols* are not liable to dismissal at the pleasure of the landlord, and that, therefore, even on plaintiff's own view of the *qabuliat* inasmuch as Belat Ali, one of the co-sharers in the *Jotes*, is admittedly performing all the duties required of the *mondol*, the plaintiff is not entitled to resume or withhold any part of the consideration agreed to be paid in respect of the said services.

The plaintiffs' suit having been decreed in both the lower Courts, the defendants now appeal to this Court, and the substantial questions for our determination are (1) whether, on the true construction of the *qabuliats* of 1272, the remission recited therein represents a permanent reduction or abatement of rent or is contingent on services to be rendered by the tenants, and (2) if the remission is found to be contingent on services to be rendered, whether on the facts of the present case the plaintiff is entitled to withdraw the remission.

Of the negotiations leading up to the execution of these *qabuliats*, no evidence has been given and possibly no such evidence is now available. But to assist the Courts in the construction of the *qabuliats*, evidence has been adduced of the following matters, namely, (1) of the services rendered by the predecessors of defendants in or about 1272 and the duties since performed, (2) of the acts and conduct of the parties subsequent to the *qabuliat* as evidenced, (*a*) in three *eqrars* or agreements (Exhibits Nos. 2, 2 *a* and 2 *b*) executed by, or on behalf of, the present defendants in 1291 and 1296 and (*b*) in rent receipts and (3) of usage or custom as evidenced in (*a*) two judgments of this Court and (*b*) two reports on the settlement of an estate resumed by Government, being a *taraf* within this same *pergunnah*, submitted to their official superiors by two Settlement officers, Mr. Latour and Mr. Russel, the one in 1245 (1838) and the other in 1266 (1889).

On this evidence, the lower appellate Court found that the remission was granted (partly) in contemplation of services to be rendered in future, and (partly) in consideration of services previously rendered "probably in connection with settlement" (that is, as we understand, in connection with the settlement of rents made in the *pergunnahs* or in the *tarafs* now in question in or about the year 1272). As to the duties since performed, the Court of first instance found that the *mondols* were expected or required (1) to maintain or assist in the maintenance of boundaries, (*i. e.*, the prevention of encroachments), (2) attend at the *Zemindars'* annual *punyaha* ceremony and (3) assist in the settlement of tenants on lands lying waste. The Subordinate Judge found further that the defendants had performed all the duties required of them up to 6 years before suit. The lower appellate Court has come to no clear finding on these points but has referred merely to the covenants in the *eqrars* of 1291 and 1296 to the effect that with the assistance of the *Zemindar*, the tenant defendants will take all steps necessary for the maintenance of boundaries and will perform all other customary duties.

The judgments referred to, one by Ameer Ali and Brett, JJ., in Second Appeal No. 1683 of 1893 and one by Mr. Justice Holmwood in Second Appeal No. 1803 of 1905, do not appear to us to throw much light on the question now in issue. In these two judgments, the learned Judges appear to have held that a remission granted "*mondoloi sababe*" (*i. e.*, on account of the recipients of services as *mondol*) was a concession contingent upon the continued rendering of such services. But the *pattahs* and *qabuliats* then in question are not before us and in one of the two cases it appears that they contained an express covenant that the tenants, their sons and grandsons, and so on in succession should continue to perform in perpetuity the duties specified in the documents as the duties of the *mondol*. In the other case, the covenant was held to be one personal to the individual tenant to whom the grant was made.

In the Settlement Report of 1838 (1245), it is stated that in *mouzas* held by *Zemindars* the principal tenants or *mondols* promote cultivation and the settlement of tenants and maintain in tact the limits and boundaries and so receive remissions as compared with other tenants. The Settlement officer then proceeds to say that in the past, principal tenants of the resumed estate had been allowed similar remissions and he, therefore, made to them such remissions on condition that they shall maintain in tact the *sarkar*

Kashmir Universe Library,
Accession No 75377

boundaries. He ends by the explicit statement "on failure to maintain the limits and boundaries, the remission granted shall come to be part of the *jama*."

In the second report the Settlement officer states that the remissions granted by Mr. Latour to the *mondols* were at the rate of one-third of their rent. He discontinued this allowance made to one tenant, who had "given up" or had ceased to perform the duties, continued to the other *mondols* of 1245 or their successors the allowances granted in that year and apparently made allowances at the same rate to one or more new applicants. These reports do tend to show that in 1838 and in 1859 in certain portions of, if not throughout this *pergunnah* there existed a custom whereby the principal tenants in a *mouza* were recognised as *mondols*, and were granted remissions (not exceeding one-third of the full rent) contingent on their maintaining limits and boundaries and possibly otherwise advancing the interests of the landlord. But they certainly do not support the contention of the appellant that when the remission has been once granted the office of *mondol* may be terminated and the concession withdrawn at the landlord's will and pleasure. Moreover, the contention of the defendants-appellants is that whether there were or were not any general custom or usage in the matter of *mondols* and remissions of rent, their case is not governed by any such custom.

We may now consider the *eqrars* of 1291 and 1296. In this connection on behalf of the respondents, stress is laid on (1) the recitals in respect of the remissions granted in 1272 and (2) the express covenants for the performance of the customary duties of *mondols*. As the recitals of the three *eqrars* are not in identical terms, we here re-produce the essential portions. In the first *eqrar* of 1291 (Exhibit No. 2) the recital runs thus: "In *taraf* Dullarpur..... is our long standing ancestral *jote-jama*..... .....In all, out of the *jama* of Rs. 2,467..... .....the balance on account of your share is Rs. 267; out of the same deducting Rs. 73 the *mondoloi* remission granted in respect of your share.....on account of our being the chief *mondols* of the *parganna* and preserving the limits and boundaries, we, with our co-sharers, held by jointly paying a *jama* of Rs. 194."

In the second *eqrar* (Exhibit No. 2 *a*), executed on the same day in favour of another co-sharer landlord, the recital is in these terms:

"We have an old ancestral *jote jama* in Durladpur .....recorded .....at a total of Rs. 2,467, out of which..... the rent payable in respect of your share is Rs. 267, as we are the chief *mondols* of the *pergunnah*, for preserving the limits and boundaries, we got a remission of Rs. 73 on account of our *mondoli* fees and paid jointly the balance of Rs. 194 and held possession."

In the 3rd and last *eqrar* of 1296, executed in favour of the plaintiff after he had become sole landlord, the recital may be quoted thus:—"Within your *pergunnah* Shershabad, there is a *jote* bearing a *jama* of Rs. 2,032 as we are the principal *mondols* and preserve the limits and boundaries so after deduction of the remission of Rs. 677 for (our) services as *mondols* out of the *jama*, a balance of Rs. 1,355 is left which constitutes a *jote*. There is also a *jote* in *taraf* Sherpur Bhandar bearing a *jama* of Rs. 401 out of which after deduction of such remission of Rs. 134 for (our) services as *mondol* a balance *jama* of Rs. 268 is left which constitutes another *jama*."

Now these recitals may possibly support the case of the plaintiff but it cannot be said that they are not reconcilable with the contention of the defendants-appellants. It is then significant that in these *eqrars* as in the original *qabuliat* it is the smaller sum that is ultimately declared to be the *jama* or rent actually fixed and annually payable. Moreover, when at the close of the recitals we reach the operative portions of the *eqrars*, it is of even greater significance that in all of them, the tenants' covenants (1) to pay the annual *jama* (*i. e.*, the smaller sum) and (2) to perform the customary duties of the *mondols*, are followed by the express stipulation that failure to perform the said duties will entail, not as on the plaintiffs' case and from Mr. Latour's report we should have expected, the withdrawal of the remission but liability in damages.

Lastly on the side of the appellants stress is laid on the rent receipts. Rent has been paid at the lower rate from 1272 to 1312 and in the receipt granted the rent payable as the *jama* is stated at the lower figure and it appears that when on one occasion in 1303

an attempt was made to state the *jama* at the higher figure and below this the remission, on the objection of the tenants the attempt was abandoned.

We may now examine the *qabuliats* of 1272. It is on these documents that in this suit for rent the rights and liabilities of the parties are to be determined, for it cannot be too clearly remembered that in so far as the parties are landlords and tenants, the *eqrars* of 1291 and 1296 on which the plaintiff largely relies create no new rights and liabilities and may be used only to facilitate the interpretation of the original lease.

Now the *qabuliats* do contain recitals to the effect that calculated at a certain rate a certain sum was settled as the *jama*, and that from this sum at the prayer of the defendant "on account of *mondoloi*", a deduction of one-third is made. The plaintiff relies on this recital but, in our opinion, the recital itself is more consistent with the case of the defendant than with the contention of the plaintiff.

Further in the operative portions of the *qabuliats*, the rent admitted and agreed to be paid is the smaller sum and though the covenant to pay the sum year by year is followed by express covenants respecting the boundaries of the *jotes*, the establishment of *hats* and factories, the digging of tanks, the cutting of trees, and the payment of new cesses, there are no covenants that the tenants will continue to protect the landlord against encroachments or perform other customary duties and there is no stipulation that on failure to perform such duties the remission granted will be withdrawn.

We are, therefore, of opinion that on the true construction of the *qabuliats*, the lesser sum agreed to be paid is the rent of the holding, and that the remission granted is not contingent upon, or held in abeyance as, payment for services to be rendered but represents a permanent and irrevocable abatement.

We are supported in this view by (1) the finding of the District Judge that the remission was granted at least in part in consideration of past services rendered by the tenant in connection with settlement, (2) the value of the concession and the nebulous character of a *mondol's* duties, (3) the express stipulation in the *eqrars* that failure to perform those duties will entail liability in damages, and the absence of any corresponding stipulation that in default the remission will be withdrawn and (4) the statements in the rent receipt.

In the view we have taken of the 1st question for determination, the 2nd does not arise and it is unnecessary to express any opinion upon it.

In the result this appeal is decreed. The plaintiff-respondent will have a decree for the arrears due at the admitted rate. As the sums payable were admittedly tendered, the arrears will carry no interest. On the sum decreed interest will run at the rate of 6 per cent. Defendants-appellants will have their costs throughout.

Appeal decreed.

CALCUTTA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 658 OF 1908.

August 4, 1910.

Present:—Mr. Justice Mookerjee and Mr. Justice Sharf-ud-Din.

SRIPATI CHARAN CHOWDHURY AND OTHERS—JUDGMENT-DEBTORS—APPELLANTS

versus

R. BELCHAMBERS AND OTHERS—DECREE-HOLDERS—RESPONDENTS.

Execution of decree—Limitation—Objection by judgment-debtor—Notice, service of, under s. 248, *Civil Procedure Code (Act XIV of* 1882*), effect of—Opportunity to contest validity of order—Estoppel.*

Mere service of notice upon a judgment-debtor under section 248, Civil Procedure Code of 1882, is not by itself sufficient to debar him from urging the objection that an application is barred by limitation, when no order for execution has been made after the service of notice.

Bisseshur v. *Mahtab Chunder*, 10 W. R. 8 (F. B.), *Umed Ali* v. *Abdul Karim*, 8 C. L. J. 193, and *Khoshal Chandra* v. *Ukiladdi*, 14 C. W. N. 114; 3 Ind. Cas. 47, relied upon.

Again, if an order for execution has been made without notice to the judgment-debtor, it is not sufficient to debar him from urging the objection of limitation.

Mazzèm Hossain v. *Sarat Kumari*, 5 Ind. Cas. 59; 11 C. L. J. 357; 14 C. W. N. 433, *Monmohan Karmakar* v. *Dwarka Nath Karmakar*, 7 Ind. Cas. 55; 12 C. L. J. 312, relied upon.

The principle is that a party to an execution proceeding, who allows an order for execution to be passed against him at one stage of the proceedings when he had an opportunity to contest the validity of the order, cannot be permitted at a subsequent stage of the proceedings to re-open the whole matter in controversy.

Mungul Pershad Dichit v. *Grija Kant Lahiri*, 8 C. 51; 11 C. L. R. 118; 8 I. A. 123, *Ram Kirpal* v. *Rup*

Kuari, 6 A. 269, and *Beni Ram* v. *Nanhu Mal*, 7 A. 102, referred to.

Even though a notice may be issued to a judgment-debtor upon an application for transfer of a decree, it is not competent for him to appear and contend at that stage that the decree ought not to be transferred because an application for execution thereof is likely to prove infructuous.

A notice under section 248 is not required to be issued upon an application for transfer of a decree. It must be issued by the Court which has seizin of the application for execution.

Consequently upon receipt of a notice under section 248 irregularly issued, it was not only not the duty of the judgment-debtor to appear and urge the objection of limitation, but that under the law it was impossible for him to take that step.

The judgment-debtor is not debarred from urging his objection on the ground of limitation in a subsequent application for execution.

Appeal from the order of the Additional District Judge of 24-Pergannahs, dated May 6, 1908, reversing that of the second Sub-Judge of the District, dated January 25, 1908.

Babus *Narendra Chandra Bose*, and *Charu Chandra Biswas*, for the Appellants.

Babu *Provash Chunder Mitter*, for the Respondents.

Judgment.—The substantial question of law which requires consideration in this appeal is, whether the decree-holders are still entitled to take out execution of a decree for rent made in their favour so far back as the 19th June 1898. The judgment-debtors, in answer to the application for execution made on the 2nd May 1907, urged that execution could not proceed as the judgment-debt had already been extinguished by limitation. The Court of first instance accepted this contention as well-founded, and dismissed the application on the ground that a previous application for execution made on the 14th January 1903, was barred by limitation. Upon appeal the District Judge has reversed that decision and allowed execution to proceed on the ground that it is no longer open to the judgment-debtors to urge the objection that the judgment-debt had already been extinguished by limitation, inasmuch as they did not prefer any such objection in previous execution proceedings. It appears that the first application for execution was made on the 13th August 1898. A sum of Rs. 600 was realised by the sale of the properties of the judgment-debtors and the execution case was disposed of on the 27th May 1899. The second application for execution was made on the 14th September 1899. On the 10th November 1899, the decree-holder paid the requisite process fees for service of the sale proclamation, but apparently no other steps were subsequently taken and on the 15th January 1900, the application was dismissed for non-prosecution. The third application for execution was made on the 14th January 1903, upon which an order was made for the issue of a notice under section 248 of the Code of 1882. On the 16th February 1903, the return of service of notice was filed in Court. The decree-holders were, thereupon, directed to take further steps in aid of execution. Apparently they did nothing, and on the 23rd February 1903, the application was dismissed for default. Subsequently the decree-holders appear to have discovered that the judgment-debtors had no other properties within the jurisdiction of the Midnapur Court, where the decree had been passed, which might be seized in execution. Consequently, on the 1st June 1904, they applied to the Midnapur Court to transfer the decree to the Court of the Subordinate Judge of the 24-Pergannahs. On the same date, the Court directed the issue of notice under section 248, Civil Procedure Code, upon the judgment-debtors. On the 8th July 1904, the return of service of the notice was received. The Court thereupon ordered the issue of the requisite certificate which was granted on the 28th July following. After the decree had been thus transmitted to the Court of the Subordinate Judge of the 24-Pergannahs, on the 17th February 1905, the decree-holders presented their fourth application for execution in the latter Court. On the 18th March1905, a writ of attachment was directed to issue; this was subsequently returned unserved. There was a fresh order for the issue of attachment on the 3rd April 1905. On the 20th April, the return of service was received by the Court. On the day following the sale proclamation was directed to issue and the 13th June 1905 was fixed for the sale of the properties attached. On that day, however, the Court dismissed the application for execution inasmuch as it was discovered that the decree-holders had failed to deposit the necessary process fees. The records were then returned to the Midnapur Court. On the 30th July 1908, the decree-holders, again applied to the Midnapur Court for transfer of the decree to the Court of the Subordinate Judge of the 24-Pergannahs. The Court directed the issue of a notice upon the judgment-debtors

under section 248 of the Code of 1882. On the 22nd August 1906, the return of service of notice was received, and on the 1st September 1906, the necessary certificate was issued. After the decree had been thus transferred a second time from Midnapur to the 24-Pergannahs, the decree-holders presented their fifth application for execution in the Court of the Subordinate Judge of the 24-Pergannahs. The judgment-debtors then appeared and contended that the application could not be entertained as the previous application made on the 14th January 1903, was obviously barred by limitation. The Subordinate Judge held that this contention was well-founded, and it has not been contested before us that if the matter is still open for consideration, the application of the 14th January 1903 was unquestionably barred by limitation. But it has been argued, on the authority of the decision of the Judicial Committee in the case of *Mungul Pershad Dichit* v. *Grija Kanta Lahir* (1), that the matter is no longer open to discussion, that the judgment-debtors were bound to urge this objection in the course of the execution proceedings which followed the application of the 14th January 1903, and that, in any event, they were bound to urge the objection either in the course of the application for transfer of the decree from Midnapur to the 24-Pergannahs or in the course of the application for execution of the decree made on the 17th February 1905. The District Judge has given effect to this contention and has held that the judgment-debtors are no longer entitled to question the validity of the application made on the 14th January 1903. In our opinion, the view taken by the District Judge is erroneous and cannot be supported.

It is well-settled that mere service of notice upon a judgment-debtor under section 248, Civil Procedure Code, is not by itself sufficient to debar him from urging the objection that an application is barred by limitation, when no order for execution has been made after the service of notice under section 248. In support of this proposition, reference may be made to the cases of *Bisseshur Mullick* v. *Mahtab Chunder* (2); *Umed Ali* v. *Abdul Karim* (3) and *Khoshal Chandra* v. *Ukiladdi* (4). It cannot, again, be disputed that if an order for execution has been made without notice to the judgment-debtor, it is not sufficient to debar him from urging the objection of limitation. In support of this proposition reference may be made to the cases of *Mazzam Hossain* v. *Sarat Kumari* (5); *Monmohan Karmakar* v. *Dwarka Nath Karmakar* (6) and *Mochai Mandal* v. *Meser-ud-din Molla* (7). In these cases, it was pointed out that the principle, which underlies the decisions of the Judicial Committee in the cases of *Mungul Pershad Dichit* v. *Grija Kant Lahiri* (1); *Ram Kirpal* v. *Rup Kuari* (8) and *Beni Ram* v. *Nanhu Mal* (9), is that a party to an execution proceeding, who allows an order for execution to be passed against him at one stage of the proceedings when he had an opportunity to contest the validity of the order, cannot be permitted at a subsequent stage of the proceedings to re-open the whole matter in controversy. In other words, as pointed out by Mr. Justice West in *Sheikh Budan* v. *Ram Chandra Bhunjgaya* (10), the doctrine rests on the ground that the judgment-debtor, when called on to dispute, if he wished or if he could, a certain proposition of right and consequential demand of relief or action by the judgment-creditor, had either failed in his contention to the contrary or at any rate allowed the judgment to go by default. Consequently, as has been pointed out in the cases of *Narayana* v. *Gopala Krishna* (11), *Ramasamy Naik* v. *Ramasami Chetti* (12), if by reason of the omission to serve a notice or by reason of the defective notice served upon the judgment-debtor, he has not the opportunity to contest the validity of the proceeding, he is not bound by the doctrine of estoppel. Now, in the case before us, it is conceded that a notice under section 248 as required by the law, was not issued upon the basis of the application for execution made on the 17th February 1905. Consequently, any order for execution in the course of that proceeding cannot bind the judgment-debtor. Such an order cannot debar him from urging that the previous application for execution was barred by

(1) 8 C. 51; 11 C. L. R. 113; 8 I. A. 123.
(2) 10 W. R. (F. B.) 8.
(3) 8 C. L. J. 193.
(4) 14 C. W. N. 114; 3 Ind. Cas. 47.
(5) 5 Ind. Cas. 59; 11 C. L. J. 357; 14 C. W. N. 433.
(6) 7 Ind. Cas. 55; 12 C. L. J. 312.
(7) M. A. No. 532 of 1909.
(8) 6 A. 269.
(9) 7 A. 102.
(10) 11 B. 537.
(11) 28 M. 355; 15 M. L. J. 223.
(12) 30 M. 255; 2 M. L. T. 167; 17 M. L. J. 201.

limitation. No doubt, notices under section 248 were served upon the judgment-debtor on the basis of the application for transfer of the decree from the Midnapore Court to the Court of the Subordinate Judge of the 24-Pergannahs. It is manifest, however, from an examination of the provisions of the Code that upon receipt of such notice, the judgment-debtor could not at that stage possibly contend that the decree was barred by limitation. Section 223 of the Code of 1882 defines the circumstances under which the decree of one Court may be transmitted by that Court to another Court for execution. Section 224 then lays down the procedure to be followed when the Court desires that its own decree shall be executed by another Court. The Court sending the decree for execution under section 223 is required to send along with the copy of the decree, a certificate stating that the satisfaction of the decree has not been obtained by execution within the jurisdiction of the Court by which it was passed, or where the decree has been satisfied in part, the extent to which satisfaction has been obtained, and what part of the decree remains unexecuted. The concluding words of clause (*b*) of section 224 make it obvious that in sending the certificate the Court is not called upon to consider whether the decree is still capable of execution. All that the Court is called upon to certify is that a specified part of the decree still remains unexecuted. Whether the decree, in so far as it is still unexecuted, is capable of execution under the law, is a question for determination by the Court to which the decree is transferred, when a proper application for execution is presented to that Court. Consequently we must hold that even though a notice may be issued to a judgment-debtor upon an application for transfer of a decree, it is not competent for him to appear and contend at that stage that the decree ought not to be transferred, because an application for execution thereof is likely to prove infructuous. We may further observe that the language of section 248 makes it reasonably plain that a notice under that section is not required to be issued upon an application for transfer of a decree. The explanation to the section provides that the word "Court" means the Court by which the decree was passed, unless the decree has been sent to another Court for execution in which case it means such other Court; in other words, the notice under section 248 must be issued by the Court which has seizin of the application for execution, whether it be the original Court which made the decree or is the Court to which the decree has been transferred for execution. Consequently, it follows that upon receipt of the notice under section 248, thus irregularly issued, it was not only not the duty of the judgment-debtor to appear and urge the objection of limitation, but that under the law, it was impossible for him to take that step. The position, in substance, is that the decree-holders omitted to cause the issue of the notice under section 248 upon their application for execution; and got it issued upon their application for transfer of the decree. The two elements, which must be established before a judgment-debtor can be held debarred from urging the question of limitation, are thus both absent in the case before us. We may add that upon the application of the 14th January though a notice under section 248 was issued there was no order for execution which could bind the judgment-debtors, while upon the application for execution of the 17th February 1905, though an order for execution was made, it was made without notice to the judgment-debtors. Consequently, the principle which underlies the decision of the Judicial Committee in the case of *Mungul Pershad Dichit* v. *Grija Kant Lahiri* (1), cannot have any possible application to this case. The matter is still open for discussion and it is not disputed that if it is open for consideration the judgment-debt became barred by limitation long ago.

The result is that this appeal is allowed, the order of the District Judge is discharged and that of the Court of first instance is restored. Under the circumstances of the case, we make no order as to costs in any Court.

Appeal allowed.

CALCUTTA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 457 OF 1909.

September 5, 1910.

Present:—Mr. Justice Mookerjee and Mr. Justice Teunon.

Maharaj Kumar BINDESWARI PROSAD SINGH—JUDGMENT-DEBTOR—APPELLANT

versus

Thakur LAKPAT NATH SINGH AND OTHERS—DECREE-HOLDERS—RESPONDENTS.

Appeal—Usurpation of jurisdiction by Court below—Party not to assume inconsistent position—Execution—Court executing decree not to question validity of decree—Civil Procedure Code (Act XIV of 1882), *s.* 457—*Married woman appointed guardian* ad litem—*Civil Procedure Code (Act V of* 1908), *s.* 47.

When jurisdiction has been usurped by a Court, an appeal against its order cannot be successfully defeated on the ground that the order has been made without jurisdiction; in other words, a party, who has induced a Court to act without jurisdiction, cannot be permitted, when the validity of the order made for his benefit is challenged by way of appeal, to take up an inconsistent position and to defeat the appeal by proof that the order was made without jurisdiction.

Hurrish Chander v. *Kali Sunderi*, 10 I. A. 4; 9 C. 482, *Abdul Rahiman* v. *Ganapathi*, 23 M. 517, *Latchmanan* v. *Ramanathan*, 28 M. 127, followed.

Therefore, where an order of the Court below purports to have been made under section 47 of the Civil Procedure Code, 1908, it must be taken to be a decree and appealable as such.

A party litigant cannot be permitted to assume inconsistent positions in Court to the detriment of his opponent.

Gandy v. *Gandy*, 30 Ch. D. 67 at p. 82; 54 L. Ch. 1154; 53 L. T. 396; 33 W. R. 803, *Bir Chandra* v. *Bansidhar*, 3 B. L. R. A. C. 214, *Brij Bhookun* v. *Mahadeo*, 17 W. R. 422, *Efatoonnissa* v. *Khondkar Khoda*, 21 W. R. 374, *Sonaoollah* v. *Imamooddeen*, 24 W. R. 273, *Dabee* v. *Mungur*, 2 C. L. R. 208, *Satyabhama* v. *Krishna*, 6 C. 55, *Bhaja* v. *Chuni Lal*, 5 C. L. J. 95, at p. 105 and *Manindra* v. *Secretary of State*, 5 C. L. J. 148 at p. 169, followed.

An execution Court when called upon to execute the decree must proceed on the assumption that there is a valid decree capable of execution. The party who seeks to attack the decree must do so in a separate proceeding, for example, by a suit or an appeal or an application for review.

Rashidunnissa v. *Muhammad Ismail*, 36 I. A. 168; 31 A. 572; 3 Ind. Cas. 864; 13 C. W. N. 1182; 10 C. L. J. 318; 6 A. L. J. 822; 11 Bom. L. R. 1225; 6 M. L. T. 280; 19 M. L. J. 631, *Khairajmal* v. *Daim*, 32 I. A. 23; 2 A. L. J. 71; 1 C. L. J. 584; 7 Bom. L. R. 1; 9 C. W. N. 201; 32 C. 296, relied on.

An infant was represented by his mother, a married woman, as his guardian *ad litem* in contravention of section 457 of the Civil Procedure Code, 1882. A decree was passed against him. When the decree-holder applied to execute the decree, it was objected on behalf of the infant by his mother that the decree could not be executed against him, because there was no valid decree against him:

Held, that the objection must be overruled on the ground that the question of the validity of the decree could not be examined in execution proceedings under section 47 of the Code of 1908.

Appeal from the order of the Sub-Judge of Hazaribagh, dated September 2, 1909.

Dr. *Rash Behary Ghosh*, Babus *Dwarka Nath Chuckerbutty* and *Khettra Mohan Sen*, for the Appellant.

Mr. *Chuckerbutty*, counsel, Babus *Jogesh Chandra Roy*, *Surendra Nath Guho* and *Harihar Prosad Singh*, for the Respondent.

Judgment.—This is an appeal on behalf of the judgment-debtor against an order by which execution has been allowed to proceed. There is no controversy as to the circumstances under which the appellant, an infant, resists execution of the decree. The plaintiff sued for declaration of title, for confirmation of possession and for a permanent injunction to restrain the defendants from interfering with his possession. The Subordinate Judge made a conditional decree in favour of the plaintiff for recovery of possession upon payment of a specific sum. The principal defendants against whom this decree was made were the present appellant an infant represented by his mother and also his father. Against the decree, the infant alone appealed to this Court. When the appeal came to be heard, it was argued on his behalf that the decree against him ought to be discharged, because he had been represented in the suit by his mother, a married woman, in contravention of the provisions of section 457 of the Code of Civil Procedure of 1882, as explained in *Kali Shanker* v. *Maharaja Protap Udai Nath* (1). To this objection the reply on behalf of the plaintiff-respondent was that if it was well-founded, the logical inference was that the appeal itself was incompetent, because it has been presented on behalf of the infant by his mother. The appellant expected this position and the appeal was dismissed on the ground that it had been preferred on behalf of the minor by a person not competent to represent him. Upon dismissal of the appeal, the decree-holder applied to execute the decree. It was then objected on behalf of the infant by his mother that the decree could not be executed against him because there was no valid decree against him. The Deputy Commissioner has overruled this objection on the ground that the question of the validity of the decree could not be examined in execution proceedings under section 47 of the Code of 1908. In

(1) 6 C. L. J. 36.

this view, the Court below has overruled the objection and directed execution to proceed. The infant has now appealed to this Court represented by his mother, and on his behalf it has been argued that the Court below ought to have held that the decree is not binding upon the infant and cannot be executed against him. In our opinion, this contention is obviously unsustainable in execution proceedings.

The learned Vakil for the appellant has appreciated the difficulty of his position, because if his contention is well-founded, the infant is not a party to the suit, and the question raised does not fall within the scope of section 47, which authorises a Court of execution to deal only with questions which arise between the parties to the suit in which the decree was made or their representatives. Consequently, the order of the Court below is, in this view, not a decree and the appeal is incompetent. But he has argued that as the order of the Court below purports to have been made under section 47, it must be taken to be a decree and appealable as such. In support of this proposition, reliance has been placed upon the cases of *Hurrish Chander* v. *Kali Sundari* (2), *Abdul Rahiman* v. *Ganapathi* (3), *Latchmanan* v. *Ramanathan* (4) and *Bickett* v. *Morris* (5), to show that when jurisdiction has been usurped by a Court, an appeal against its order cannot be successfully defeated on the ground that the order has been made without jurisdiction, in other words, that a party who has induced a Court to act without jurisdiction cannot be permitted, when the validity of the order made for his benefit is challenged by way of appeal, to take up an inconsistent position and to defeat the appeal by proof that the order was made without jurisdiction. In our opinion, there is considerable force in this contention and the present appeal must be treated as competent. Indeed, the respondent has not argued that the appeal is incompetent, because his possession here as in the Court below has consistently been that the decree binds the infant and may be executed against him.

As regards the merits of the appeal, it has been argued that it is not open to the decree-holder to contend that the infant was properly represented in the suit, because to allow him to do so would be to permit him to take up a position inconsistent with that assumed by him when the appeal against the original decree was heard. In our opinion, this is not an accurate statement of the actual position. When the appeal against the original decree was heard, the respondent did not take exception to the competency of the appeal, it was the appellant who made a a bold effort to assume a position contradictory to that adopted by him in the original Court, where no suggestion had been made that the infant was not properly represented. To this argument of the appellant the respondent appropriately replied that it necessarily tended to destroy his appeal. The appellant voluntarily assumed that position and practically invited the Court to dismiss his appeal as incompetent. It is difficult to appreciate how under these circumstances, the decree-holder can be charged with inconsistency, or how it can be seriously maintained that as between him and the infant judgment-debtor, it has been conclusively established that the decree does not bind the latter. Nothing that happened in this Court when the appeal against the original decree was heard can possibly support this conclusion. The doctrine that a party litigant cannot be permitted to assume inconsistent positions in Court to the detriment of his opponent is firmly settled and has been repeatedly applied [*Gandy* v. *Gandy* (6), *Bir Chandra* v. *Bansidhar* (7), *Brij Bhookun* v. *Mahadeo* (8), *Efatoonnissa* v. *Khondkar Khoda* (9), *Sonaoollah* v. *Imamooddeen* (10), *Dabee* v. *Mungar* (11), *Satyabhama* v. *Krishna* (12), *Bhaja* v. *Chuni Lal* (13), *Manindra* v. *Secretary of State* (14). Broom on Legal Makims 132.] But this principle cannot be applied to the prejudice of the present respondent.

The only question which now requires consideration is, whether it was open to the Court below to investigate the validity of the decree and its binding character in so far as the infant is concerned. That it was not competent to the Court below, as an

(2) 10 I. A. 4; 9 C. 482.
(3) 23 M. 517.
(4) 28 M. 127.
(5) L. R. 1 Se. and Div. 47 at p. 53.
(6) 30 Ch. D. 57 at p. 82; 54 L. J. Ch. 1154; 53 L. T. 306; 33 W. R. 803.
(7) 3 B. L. R. A. C. 214.
(8) 17 W. R. 422.
(9) 21 W. R. 374.
(10) 24 W. R. 273.
(11) 2 C. L. R. 208.
(12) 6 C. 55.
(13) 5 C. L. J. 95 at p. 105.
(14) 5 C. L. J. 148 at p. 169; 11 C. W. N. 284.

execution Court, to embark upon such an enquiry is, in our opinion, beyond the pale of controversy. It is an elementary doctrine that an execution Court when called upon to execute the decree must proceed on the assumption that there is a valid decree capable of execution. The party who seeks to attack the decree must do so in a separate proceeding, for example, by a suit or an appeal or an application for review. If any authority is needed for a proposition of this character, it is sufficient to refer to the decision of the Judicial Committee in *Rashidunnissa* v. *Muhammad Ismail* (15), and the case of *Khairajmal* v. *Daim* (16), tends to support the same conclusion. The Court below adopted an obviously right course when it declined to consider the validity of the decree.

As a last resort, the learned Vakil for the appellant has asked for permission to treat the petition of objection in the execution proceedings under section 47 of the Code of 1908, as a plaint in a suit for declaration that the decree was not operative against the infant. In the circumstances of this case, we do not think that this application should be granted. The petition of objection requires considerable modification before it can be treated as an appropriate plaint in a declaratory suit. Besides no question of limitation can arise as the appellant is still an infant. It will, therefore, be obviously more satisfactory if a separate suit to test the validity of the decree is instituted by the infant upon a plaint properly drawn up for the purpose. But to guard against any possible injury to the infant by reason of an execution against him before the proposed suit is instituted, we shall direct a stay of execution for a limited time.

The result, therefore, is that the order of the Court below must be affirmed and this appeal dismissed with costs. We assess the hearing fee at 5 gold *mohurs*. We further direct that the execution be stayed till the 30th November next.

Appeal dismissed.

(15) 36 I. A. 168; 31 A. 572; 3 Ind. Cas. 864; 13 C. W. N. 1182; 10 C. L. J. 318; 6 A. L. J. 822; 11 Bom. L. R. 1225; 6 M. L. T. 280; 19 M. L. J. 631.

(16) 32 I. A. 23; 2 A. L. J. 71; 1 C. L. J. 584; 7 Bom. L. R. 1; 9 C. W. N. 201; 32 C. 296.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 1611 OF 1908.

September 8, 1910.

Present:—Mr. Justice Mookerjee and Mr. Justice Sharf-ud-Din.

AKHIL SUNDARI DASI—PLAINTIFF—APPELLANT

versus

NANIBALA DASI AND OTHERS—DEFENDANTS—RESPONDENTS.

Res judicata—*Will—Letters of Administration—Suit by widow—Legatee made party—Subsequent grant of Letters of Administration—Suit by legatee—Whether doctrine of* res judicata *applicable.*

B executed a Will and died leaving him surviving his widow (defendant No. 1), his second sister (plaintiff) and a son of his third sister, defendant No. 3. Under the Will, plaintiff was entitled to the estate of B, and defendant No. 3 was the executor who took possession of the estate after B's death. The widow then brought a suit for possession against the nephew and the sister. The latter in his written statement said that she had heard of a Will under which she was entitled to the property left by B. The widow then entered into a compromise with the nephew executor, and a decree by consent was made against the latter and an *ex parte* decree was made against the sister. The sister then obtained Letters of Administration with the copy of the Will annexed and sued to recover possession on the strength of her title as legatee:

Held, that this suit was not barred by *res judicata*, that the Court in which the first suit was brought was not competent to determine the question of the genuineness of the Will, and as Letters of Administration were not then in existence, it was impossible for the plaintiff to establish her title thereunder. A litigant is not bound to assert his title under a Will till it has been proved.

Appeal from the decree of the District Judge of Murshidabad, dated April 30, 1908, affirming that of the Munsif of Kandi, dated August 28, 1907.

Maulvi *Nur-ud-din Ahmed*, for the Appellant.

Babu *Nalini Ranjan Chatterjee*, for the Respondents.

Judgment.—This is an appeal on behalf of the plaintiff in a suit for recovery of possession of land and mesne profits. It is the common case of both parties that the land originally belonged to one Behari Lal Karmokar. Behari executed a Will on the 10th October 1904, had it registered four days later, and died on the 16th October. He left him surviving his widow, the first defendant, his second sister, the plaintiff, and a nephew, the son of his third sister, who is now the third defendant. Under the Will, the second sister was entitled to the dis-

puted property. Upon the death of Behari, it appears that the nephew, who had been appointed executor, took possession of the estate. The result was that on the 21st December 1904, the widow brought a suit for recovery of possession against the nephew and the sister of her husband. The latter alleged in her written statement that she had heard of a Will under which she was entitled to the disputed property. The executor defendant, however, alleged that the testator had no testamentary capacity at the time of the execution of the alleged Will, and he entered into a compromise with the widow. A decree by consent was made on the 26th May 1905, against the executor, and an *ex parte* decree was made against the sister as the widow was obviously entitled to take the estate upon an intestacy. This decree, in so far as it was *ex parte* against the sister, was subsequently sought to be set aside by her, but her application was refused, and the order of refusal was confirmed on appeal. The sister then applied to the District Judge for Letters of Administration on the estate of Behari Lal with copy of the Will annexed. Notices were duly served upon the widow, the executor, and the other relations of the testator. The Will was duly proved and Letters of Administration with copy of the Will annexed were granted to the plaintiff on the 23rd May, 1906. On the 3rd January 1907, she sued to recover possession of the disputed land from the widow on the strength of her title as legatee under the Will of her brother. The Courts below have concurrently dismissed the suit as barred by the principle of *res judicata*. We are of opinion that this view cannot be maintained. The question now in controversy is, whether upon a true construction of the Will, the plaintiff has title to the disputed land. This question was sought to be raised in the previous suit, in which the second part of the fourth issue was framed in the following terms :—"Whether the husband of the plaintiff made a Will in favour of Akhil Sundari." The Court did not adjudicate upon this question ; indeed the Court was not competent to determine the question of the genuineness of the Will. It was the Court of probate alone that had exclusive jurisdiction over the matter. The doctrine of *res judicata* is, consequently, inapplicable. But it is suggested that the principle of constructive *res judicata* applies, because the title under the Will might and ought to have been made a ground of defence and was, therefore, a matter directly and substantially in issue in such suit. The obvious answer is that the Court had no jurisdiction to deal with the question of the genuineness of the Will, and as the probate or Letters of Administration with the copy of the Will annexed, by which its terms could be proved, were not in existence, it was impossible for the defendant to establish her title thereunder. No doubt, under section 12 of the Probate and Administration Act, a probate when granted establishes the Will from the death of the testator, but it cannot be affirmed that a litigant is bound to assert his title under the Will till it has been proved in a Court of competent jurisdiction. In our opinion, the question now raised is not *res judicata*; it was not and could not have been determined by the Court in the previous suit. The position is very similar to what happened in the case of *Udit Chobey* v. *Radhika Prasad* (1). There the person, who would be entitled to succeed to the estate of a deceased person upon intestacy, obtained a decree for possession before his Will had been proved. The decree was treated as conditional, to be operative only so long as the Will was not established. The result was that upon the grant of Letters of Administration with the copy of the Will annexed during the pendency of proceedings in execution of the decree in the suit for recovery of possession, he practically lost the benefit of the decree. In the case before us, there is no room for controversy that the plaintiff is clearly entitled to the property under the Will of her brother and the decree in the previous suit does not present any effective bar to the successful assertion of her right.

The result, therefore, is that this appeal must be allowed, the decrees of the Courts below discharged, and the suit decreed with costs in all the Courts. The plaintiff will recover possession of the land from the defendants, but under the circumstances of the case, we think that she ought not to have any mesne profits antecedent to the date of this judgment.

Appeal allowed.

(1) 6 C. L. J. 662; 3 M. L. T. 41.

SARIP JAN BIBI *v.* AFTAB-UD-DIN.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL NO. 807 OF 1908.
August 26, 1910.
Present:—Mr. Justice Mookerjee and
Mr. Justice Sharf-ud-Din.
SARIP JAN BIBI AND OTHERS—DEFENDANTS—APPELLANTS
versus
AFTABUD-DIN MIA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Landlord and tenant—Partial eviction by landlord—Suspension of whole rent—Lease of different parcels on distinct rents—Tenancy for aggregate rent payable in instalments—Effect of eviction from some parcels.

Where there has been a partial eviction of the tenant by reason of the interference by the landlord with the enjoyment of a substantial portion of the lands of the tenancy, the entire rent is suspended during the whole period for which the eviction has continued in operation.

Rosseswari v. *Sourendra Mohun*, 5 Ind. Cas. 105; 11 C. L. J. 601, *Chandra Kanta Das* v. *Rama Nath Burman*, 6 Ind. Cas. 478; 11 C. L. J. 591 and *Purna Chandra* v. *Rasik Chandra*, (unreported), relied upon.

Where in a lease of several parcels of land, a distinct rent is stated against each parcel, and then one indivisible tenancy is created for an aggregate rent which is made expressly payable in certain different instalments: the lease does not include substantially a separate demise of distinct parcels of land for different rents.

In such a case, if the tenant is evicted from some of the parcels by the landlord, the whole rent is suspended.

Appeal from the decree of the Sub-Judge of Backergunge, dated December 11, 1907, modifying that of the Munsif of Barisal, dated December 14, 1906.

Babus *Jogesh Chandra Roy* and *Prokash Chandra Majumdar*, for the Appellants.

Babu *Harendra Narain Mitter*, for the Respondents.

Judgment.—This is an appeal on behalf of the defendant in a suit for rent. The plaintiffs allege that their predecessor-in-interest granted on *osat raiyati* lease to the first defendant on the 17th September 1884 in respect of 16 parcels of land for a total rental of Rs. 218-1. In 1895, a decree for rent was obtained against the first defendant and in execution thereof the entire holding was put up to sale and purchased by the second defendant. In 1902, the plaintiffs brought another suit for rent against the first two defendants, but the second defendant contended that he had purchased the property not for the benefit of the first defendant but the present third defendant. Consequently in the present suit in which rent is claimed for the years 1309 to 1312, that is from April 1902 to April 1906, the plaintiffs have joined the three defendants as parties. The plaintiffs admit in their plaint that the defendants have been kept out of possession of three out of the sixteen parcels comprised in the tenancy which are in the occupation of the plaintiffs themselves. They further allege that the rent was assessed separately in respect of each parcel and consequently seek to recover rent at the rate of Rs. 212-11 for the thirteen (13) parcels in the possession of the defendants. The first two defendants have not resisted the suit because obviously they have no subsisting interest in the tenancy. The third defendant alone has contested the claim on the ground that as he has been evicted from a substantial portion of the lands of the tenancy, the entire rent has been suspended. The Court of first instance found that the eviction took place with effect at the latest from the beginning of the year 1311 and in this view decreed the claim for the years 1309 and 1310, and dismissed it for the years 1311 and 1312. Upon appeal by the plaintiffs, the learned Subordinate Judge has decreed the claim in full. He has held that as rent was assessed in respect of each separate parcel comprised in the tenancy, the landlords were entitled to have the rent apportioned even though they themselves had evicted the tenant from a portion of the lands. The defendants have now appealed to this Court and on their behalf the decision of the Subordinate Judge has been assailed on the ground that by reason of eviction by the landlords, the entire rent for the years 1311 and 1312 were suspended. In support of this proposition reliance has been placed upon the cases of *Haroo Kumari* v. *Purna Chandra* (1) and *Rasseswari* v. *Sourendra Mohan* (2). This position has been strenuously controverted on behalf of the plaintiffs-respondents on whose behalf it has been suggested that there was no eviction of the defendant such as would justify a suspension of the entire rent and that in any event, upon the authority of *Dhunput Singh* v. *Mahammed Kazim Isphain* (3), there ought to be an apportion-

(1) 28 C. 188.
(2) 11 C. L. J. 601; 5 Ind. Cas. 105.
(3) 24 C. 296.

ment of the rent. After careful consideration of the arguments addressed to us on both sides, we have arrived at the conclusion that the contention of the appellants is well-founded and must prevail.

It is too late for the plaintiffs to contend in this Court that there has been no eviction of the tenant from a substantial portion of the lands of the tenancy. They came into Court upon the allegation that they were themselves in possession of three out of the sixteen parcels of land comprised in the tenancy created on the 17th September 1884. In fact their allegation was that the landlords successfully kept the tenants out of possession from these parcels from the very inception of the tenancy. The Courts below have, however, found that the eviction took place in April 1904. This is consistent with the circumstance that in previous suits the landlords claimed the entire rent payable for all the lands of the holding; this they could hardly have done without any demur on the part of the tenants if the latter have really been evicted at the time from a portion of the lands of the tenancy. We must, therefore, assume for the purposes of this appeal that as found by the Courts below the tenant was evicted in April 1904. In this connection, we must remember that the Courts below have also found that the three parcels, of which the landlords have taken unlawful possession, formed a very important portion of the entire lands of the tenancy, which are not all of the same character or equally advantageous. Two of these parcels include the homestead and the third is a garden near the homstead and brings considerable profit. The position, therefore, is incontestable that there has been a partial eviction of the tenant by reason of the interference by the landlords with the enjoyment of a substantial portion of the lands of the tenancy. It follows consequently, upon the authority of a long series of decisions of this Court, which will be found reviewed in *Rasseswari* v. *Sourendra Mohan* (2); *Chandra Kanto Das* v. *Rama Nath Burman* (4) and *Purna Chandra* v. *Rasik Chandra* (5), that the entire rent was suspended during the whole period for which the eviction has continued in operation. It has been argued, however, by the learned Vakil for the landlord respondent, upon the authority of the case of *Dhunput Singh* v. *Mohammed Kazim Ispahain* (3), that the rent ought to be apportioned. The learned Judges appear to have relied on this case that where the act of a landlord is not a mere trespass but something of a graver character, interfering substantially with the enjoyment by the tenant of the demised property, the tenant is entitled to a suspension of rent during such interference; even though the interference be committed in respect of a portion only of the property. That this view is supported by well-recognised principles is obvious from the case of *Rai Charan Sar* v. *Administrator General of Bengal* (6). The learned Judges, however, proceeded to engraft upon the general rule an exception, namely, that if the interference is in respect of only a certain portion of the demised property, the rent for which is separately assessed, there should be an apportionment. It is unnecessary for us to consider whether this exception can be defended on principle, because it is clear that the case before us does not fall within the exception and the case then before the learned Judges was brought within the exception by an erroneous assumption of the facts. The learned Judges stated that the rents payable on account of the two *Mauzahs*, Bishanpore, Parmanandpore (in respect of which there was eviction), were ascertainable from the *putni* lease and that consequently the landlord was entitled to recover so much of the rent reserved by the lease as was assignable upon the property other than the two *Mouzahs*. An examination of the *putni* lease in that case shows that the figure stated against the name of each *Mouzah* was not the rent payable in respect of the village. In fact, if all these figures are added up, the total, namely, Rs. 14,436, is different from the aggregate rent, that is Rs. 14,306. In the case before us also, the figures stated against each property if added up do not give precisely the total annual rent; but even if the two figures agreed, the circumstance would, in our opinion, be immaterial, because there is no foundation for the suggestion that the different parcels were leased out on distinct rents. There is

(4) 6 Ind. Cas. 478; 11 C. L. J. 591.
(5) R. A. No. 447 of 1908.
(6) 2 Ind. Cas. 169; 13 C. W. N. 853; 9 C. L. J. 578; 36 C. 856.

one indivisible tenancy created for an aggregate rent which is made expressly payable in four different instalments. If the interpretation suggested by the landlords were adopted, the instalments also would have to be altered, but upon what basis or upon what principle, it is impossible to discover. We are unable to uphold the contention of the respondents that the lease of the 17th September 1884 includes substantially a separate demise of distinct parcels of land for different rents.

We must, therefore, apply to the case before us the general principle which is now too firmly established to be successfully questioned. Much reliance was placed by the learned Vakil for the respondent upon the case of *Ananda Prasad* v. *Mathura Lall* (7), which it was suggested adopts a different rule. That case, however, is clearly distinguishable because the learned Judges there found that there had been no eviction by the landlord. It may be conceded, however, that it does not appear to have been fully appreciated in that case that the rule in question is not based upon any technicalities of English jurisprudence, but is founded upon weighty reasons fully explained in the cases of *Dhunput* v. *Mahamed Kazim* (3) and *Rai Charan* v. *Administrator-General of Bengal* (6). The result, therefore, is that this appeal must be allowed, the decree of the Subordinate Judge discharged and that of the Court of first instance restored. The appellants are entitled to their costs from the plaintiffs-respondents both in this Court and in the Court of appeal below.

Appeal allowed.

(7) 2 Ind. Cas. 123; 9 C. L. J. 585; 13 C. W. N. 702.

ALLAHABAD HIGH COURT.

EXECUTION SECOND APPEAL No. 438 OF 1910.

August 9, 1910.

Present:—Mr. Justice Chamier.

Seth JASWANT RAI AND OTHERS—JUDGMENT-DEBTORS—APPELLANTS

versus

Shaikh SADIQ ALI—DECREE-HOLDER—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 90—Mortgage decree—Proceeds of the sale of mortgaged property—Appropriation—Costs—Principal and interest.

There is no rule that the proceeds of the mortgaged property sold under a decree for sale shall be applied in the first place towards the principal and interest and shall be applied towards the payment of costs only after the satisfaction of the principal and interest.

Ram Lal v. *Silchand*, 23 A. 439, followed.

Maqbul Fatima v. *Lalta Prashad*, 20 A. 523, distinguished.

Execution second appeal from the decision of the District Judge of Farrukhabad, dated the 17th February 1910.

Mr. *Gulzari Lal*, for the Appellants.

Mr. *Muhammad Ishaq*, for the Respondent.

Judgment.—This is rather a curious case. On December 23rd 1897, the respondent obtained a decree on a mortgage under section 88 of the Transfer of Property Act against several persons including one Pitam Mal, who was the predecessor-in-title of the present appellants. Pitam Mal was impleaded in the suit because he had purchased a house which was part of the mortgaged property. The case seems to have been referred to arbitration, and objections to the award were filed by Pitam Mal which were overruled and the Court passed a decree in accordance with the award. In due course an order absolute was made. The property including the house was put up to sale, and there was an unsatisfied balance of Rs. 489-1-3. The present application for a decree under section 90 was made in 1907. The first Court gave the respondent a decree under that section for the whole amount remaining due. But on appeal, the District Judge reduced the amount to Rs. 292-13 so far as the appellants are concerned. The learned Judge observed that the appellants as representatives of Pitam Mal were not responsible for the mortgage money. He was of opinion that the balance remaining due to the respondent included the amount decreed as costs, namely Rs. 191-5 in the first Court, Rs. 51-8 in the lower appellate Court, and Rs. 50 in this Court. So far as the costs of the lower appellate Court and this Court are concerned, the order of the learned Judge is clearly wrong. They were costs incurred by the respondent in resisting appeals to the District Court and to this Court preferred by Pitam Mal. The decrees passed on Pitam Mal's appeals are not decrees under section 88 of the Transfer of Property Act themselves, nor can they be incorporated with the decree of the first Court passed under that section. It is quite clear

that the plaintiff decree-holder cannot, under section 90 of the Transfer of Property Act, obtain a decree for any sum which was not recoverable by sale of the mortgaged property. With regard to the sum of Rs. 191-5, the costs awarded to the respondent in the first Court, the position is somewhat peculiar. The translation of the decree will be found at pages 10 and 11 of the paper-book in S.A. No. 870 of 1898. First of all there is a decree under section 88 in accordance with the prescribed form in which it is declared that Rs. 1,398 odd, which sum includes the sum of Rs. 191-5 on account of costs, will be due on a certain date, and there is the usual order for the sale of the mortgaged property for the recovery of the whole amount declared to be due. Then follows an order that according to the award, a decree for sale shall be passed under section 88, Transfer of Property Act, and then there is the following passage; "Having regard to the circumstances of the case and the defence taken up by the defendants, the costs of the suit be charged against the answering defendants except Wazir Begum." This passage is taken from the judgment of the Court, and leaves no doubt that it was the intention of the Court to make Pitam Mal and the other answering defendants to pay the plaintiff's costs, and below this there is a separate order that the defendants aforesaid do pay the plaintiff aforesaid a sum of Rs. 191-5. The case, therefore, is clearly distinguishable from the Full Bench case of *Maqbul Fatima* v. *Lalta Prasad* (1), where a formal order for costs was held not to entitle the plaintiff to recover costs from the defendant personally. I have no doubt that the Court in the present case intended to make Pitam Mal and others personally responsible for Rs. 191-5 on account of costs. But it seems to me impossible to say that the balance now remaining unpaid includes this sum payable on account of costs. There is no rule so far as I am aware that the proceeds of the mortgaged property sold under a decree for sale shall be applied in the first instance towards the principal and interest, and shall be applied towards the payment of costs only after satisfaction of the principal and interest. Pitam Mal and his representatives, the appellants, are in very much the same position as the defendant Ram Lall was in the case of *Ram Lal* v. *Sil Chand* (2), where, as here, the Court was asked to pick out a certain sum from an unsatisfied balance of the decree and hold that it represented unpaid costs In that case the Court declined to do this, and for the same reasons I think I must decline to do so here. I hold, therefore, that the respondent is not entitled to a decree under section 90 for the sum of Rs. 292-13 mentioned in the Judge's judgment. I allow the appeal, set aside the order of the lower appellate Court, and dismiss the respondent's application with costs in all Courts.

Appeal allowed.

(1) 20 A. 523.
(2) 23 A. 439.

S. N. DAR, B. A. LL. B.,
Vakil High Court.
SRINAGAR (KASHMIR)

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1007 OF 1909.

September 13, 1910.

Present:—Mr. Justice Munro and Mr. Justice Krishnaswami Aiyar.

CHANDANA VENCATADRI—APPELLANT

versus

MAJATI LAKSHMINARASIMHA ROW AND OTHERS—RESPONDENTS.

Promissory-note—Allocation in partition—Want of endorsement—Right of person to whose share it falls to sue—Transfer of Property Act (IV of 1882), ss. 130, 137—Instruments negotiable by custom—Assignment in writing—Partition list.

A member of a Hindu co-parcenary, to whose share, on partition, a promissory-note executed in favour of the manager of the family, was allotted, can sue on the promissory-note even though there was no endorsement on it.

Section 130 of the Transfer of Property Act has no application to the case as the instrument was, by custom, negotiable.

Arunachella Reddi v. *Subba Reddi*, 17 M. L. J. 393; 3 M. L. T. 7, doubted.

Mahamud Khumarab v. *Ranga Rao*, 24 M. 654, referred to.

Even if an assignment in writing was necessary to create a right of suit, the partition list in the case was sufficient to satisfy the requirements of section 130 of the Transfer of Property Act.

Second appeal against the decree of the District Court of Kistna at Masulipatam, in A. S. No. 173 of 1908, presented against the decree of the Court of the Principal District Munsif of Musilipatam.

Judgment.—A negotiable promissory-note executed in favour of the 3rd defendant as manager of his family fell in a partition of the joint family property to the share of the 1st plaintiff and his son. There is no endorsement on the note and it is, therefore, contended that the plaintiffs cannot sue

on the note. Though there is no endorsement on the note, it is clear that the note could be transfered otherwise than by endorsement; *Mahamud Khumarab* v. *Ranga Rao* (1).

It is contended, relying on section 130 of the Transfer of Property Act, that the transfer must be evidenced by an assignment in writing. Section 130 of the Transfer of Property Act, however, does not, in our opinion, apply in view of section 137 of the Act which declares that section 130, among other sections, does not apply to instruments which are for the time being, by law or custom, negotiable. At the time of the alleged transfer in this case, the promissory-note was certainly negotiable. It was, no doubt, held in *Arunachala Reddi* v. *Subba Reddi* (2), that section 130 of the Transfer of Property Act applies when the claim is made under an assignment and not by reason of an endorsement, the reason given being that, when suing, the plaintiff cannot be regarded as suing on a negotiable instrument. Such a view would require the importation of words into section 137 of the Transfer of Property Act which are not to be found in it.

However this may be, there is a writing in the case, *viz.*, partition list, which is sufficient, if necessary, to satisfy the requirements of section 130 of the Transfer of Property Act.

The second appeal is dismissed with costs of the plaintiffs.

Appeal dismissed.

(1) 24 M. 654.
(2) 17 M. L. J. 393; 3 M. L. T. 7.

CALCUTTA HIGH COURT.
MISCELLANEOUS CIVIL APPEAL No. 209 OF 1910
WITH RULE No. 3698 OF 1910.
September 6, 1910.
Present:—Mr. Justice Mookerjee and
Mr. Justice Teunon.
BHUPENDRA KUMAR CHAKRAVARTI
—JUDGMENT-DEBTOR—APPELLANT
versus
PURNA CHANDRA BOSE—DECREE-HOLDER
—RESPONDENT.

Mesne profits—Antecedent to suit and pendente lite—*Jurisdiction of Court—Amount when exceeds Court's pecuniary jurisdiction—Course to follow—Civil Procedure Code (Act XIV of* 1882*), ss.* 211, 212—*Bengal Civil Courts Act (XII of* 1887*), s.* 18 et seq.

Mesne profits antecedent to the suit and mesne profits *pendente lite* stand on very different grounds. As regards the latter, there is no cause of action at the time of the commencement of the suit, and it is only by means of statutory provisions, framed with the obvious purpose of shortening litigation, that they can be awarded in the suit even though they accrued subsequent to the institution of the suit. A Munsif cannot entertain the application for investigation of mesne profits *pendente lite* when the claim is laid at over Rs. 1,000, and the proper course to follow in such a case is to direct the return of the plaint in so far as it embodies a prayer for assessment of mesne profits *pendente lite* for presentation to the Court of the Subordinate Judge.

But mesne profits antecedent to the suit have, on the other hand, accrued before the commencement of the suit, and the amount can be mentioned approximately. When, therefore, a plaintiff institutes his suit for possession and mesne profits antecedent to the suit in a Court of limited pecuniary jurisdiction, he may be rightly deemed to have limited his claim to the maximum amount for which that Court can entertain a suit. In such a case if the plaintiff subsequently puts forward a claim in excess of the jurisdiction of the Court, he may justly be required to remit the excess, because he has, with his eyes open, brought his suit deliberately in a Court of limited pecuniary jurisdiction.

Golap Sundari v. *Indra Coomar Hazra*, 1 Ind. Cas. 86; 13 C. W. N. 493; 9 C. L. J. 367; 5 M. L. T. 360, followed.

Sudarshan Das v. *Ram Pershad*, 7 Ind. Cas. 385, dissented from.

Appeal from the order of the District Judge of 24-Pergannahs, dated March 19, 1910, affirming that of the First Munsif of Barnipur, dated December 22, 1909.

Babus *Mohendra Nath Roy* and *Shiba Prosonna Bhattacharyya*, for the Appellant.

Babu *Bisva Nath Bose*, for the Respondent.

Judgment.—This appeal is directed against an order made in course of proceedings in execution of a decree in a suit for recovery of possession of land and mesne profits. The respondent commenced his suit on the 12th April 1902 in the Court of the Munsif at Barnipur. His claim valued at Rs. 886-8 was composed substantially of three parts, namely, *first*, for recovery of possession of about 100 *bighas* of land valued at Rs. 686-8 which was stated to be the price paid by him to his vendor on the 24th March 1899; *secondly*, mesne profits from the date of dispossession on the 12th April 1899 to the date of the institution of the suit, valued approximately at Rs. 200 and, *thirdly*, mesne profits from the date of institution of the suit up to the date of recovery of possession in execution of the decree to be made in the suit. No objec-

tion was taken by the defendant to the valuation of the suit, although the claim was contested upon the merits in every particular. On the 27th November 1905, the Munsif made his decree in favour of the plaintiff. This decree entitled the plaintiff to recover possession of the land. As regards the amount of mesne profits, the Munsif left them to be determined in execution. Upon appeal by the defendant, this decree was affirmed by the Subordinate Judge on the 8th February 1907. Upon appeal to this Court, the decree of the Subordinate Judge was confirmed on the 17th August 1908. Meanwhile the decree-holder had executed his decree and recovered possession of the land on the 15th July 1907. On the 9th January 1909, the decree-holder applied to the Munsif for assessment of mesne profits. In this application, he claimed the mesne profits for nearly a period of ten years. The claim was laid at Rs. 3,750 per year for the first six years and Rs. 6,300 per year for the remaining four years. The aggregate claim inclusive of interest amounted to Rs. 75,510. As soon as this application was presented, the judgment-debtor objected that the Munsif had no jurisdiction to make a decree for any sum in excess of what taken with the value of the land would make up Rs. 1,000 which was the statutory limit of the pecuniary jurisdiction of the Munsif. As this difference amounted to Rs. 313-8, the judgment-debtor offered to deposit the amount in Court. The Munsif, thereupon, held that he had jurisdiction to award mesne profits for any sum that might be found due even though it exceeded the limit of his pecuniary jurisdiction, provided that such sum was awarded on account of mesne profits between the institution of the suit and the delivery of possession in execution of the decree. As regards mesne profits antecedent to the suit, the Munsif did not express any opinion as to the amount up to which he was competent to make an award. The judgment-debtor then appealed to the District Judge who has affirmed the order of the Munsif. The judgment-debtor has now appealed to this Court and on his behalf the decision of the Court below has been assailed on the ground that the Munsif, as a Court of limited pecuniary jurisdiction, cannot make a decree for more than Rs. 313-8 (the difference between Rs. 1,000 the limit of the pecuniary jurisdiction of the Munsif and Rs. 686-8 the value of the land). In support of this proposition, reliance has been placed upon the decision of this Court in *Golap Sundari* v. *Indra Coomar Hazra* (1). This position has been disputed on behalf of the decree-holder and it has been argued that even if it could be maintained in respect of the mesne profits antecedent to the institution of the suit, it could not be supported in respect of the mesne profits *pendente lite* in view of the decision of this Court in the case of *Rameswar Mahton* v. *Dilu Mahton* (2). The question raised is one of some nicety and its solution must ultimately depend upon the true effect to be atributed to the provisions of the Bengal Civil Courts Act of 1887 and the Civil Procedure Code of 1882.

Section 18 of Act XII of 1887 provides that the jurisdiction of the District Judge and the Subordinate Judge shall, subject to the provisions of section 15 of the Civil Procedure Code of 1882, extend to all original suits for the time cognizable by the Civil Courts. Section 19 sub-section (1) then provides that the jurisdiction of a Munsif shall extend to all like suits of which the value does not exceed Rs. 1,000. Sub-section (2) of the same section provides that in certain cases, a Munsif may be invested with jurisdiction to try suits not exceeding in value Rs. 2,000. Section 21 then provides that appeals from any decree of the Subordinate Judge lie to the District Judge in all cases in which the value of the suit does not exceed Rs. 5,000. In cases in which the value exceeds Rs. 5,000, the appea l lies to the High Court. Appeals from the decrees of the Munsif lie to the District Judge. The policy of the Legislature as indicated by these provisions is obvious. Suits of which the value exceeds Rs. 1,000 or in certain instances Rs. 2,000 shall be tried by a Subordinate Judge. If the value of the suit exceeds Rs. 5,000, a first appeal shall lie to this Court in which not merely questions of law but also questions of fact may be investigated.

Let us now turn to the provisions of sections 211 and 212 of the Code of Civil Pro-

(1) 1 Ind. Cas. 86; 13 C. W. N. 493, 9 C. L. J. 367; 5 M. L. T. 360.
(2) 21 C. 550.

cedure of 1882. The first of these authorizes the Court which has seizin of a suit for recovery of possession of immovable property to provide in the decree for recovery of mesne profits from the institution of the suit to the delivery of possession. The second section deals with cases in which the claim is for recovery of possession and mesne profits antecedent to the suit. The Court may either determine the amount by the decree itself or direct an enquiry and dispose of the matter on further orders. Section 244 then provides that an enquiry into the amount of mesne profits in either of these contingencies must be made by the Court executing the decree. Clause (*a*) deals with mesne profits antecedent to the institution of the suit; that refers to cases covered by section 212. Clause (*b*) refers to mesne profits *pendente lite* and covers cases mentioned in section 211. Now in so far as mesne profits antecedent to the decree are concerned, the plaintiff is required, under section 50 of the Civil Procedure Code, to name the amount claimed only approximately and the Court-fees have to be paid under section 7 clause (1) of the Court Fees Act according to the amount claimed. Section 11 of the Court Fees Act then provides that if the amount decreed ultimately exceeds the amount claimed, the decree is not to be executed till the deficit Court-fees have been paid. This applies whether the mesne profits are awarded by the decree itself or are left to be established in the course of the execution of the decree. In so far as mesne profits between the institution of the suit and the delivery of possession under the decree to be made are concerned, it does not appear that the plaintiff is required to state the amount even approximately. In fact even an approximate statement is impossible as the amount must vary with the length of the period during which the litigation continues. On this principle it has been ruled by the Bombay High Court in *Ram Krishna Bhikaji* v. *Bhima Bai* (3), by the Madras High Court in *Maiden* v. *Janakiramayya* (4), and by this Court in *Bunwari Lal* v. *Dayi Sunker* (5), that no Court-fees are required to be paid either in the original Court or in the Court of appeal in respect of the possible value of mesne profits *pendente lite*. It is manifest, therefore, that mesne profits antecedent to the suit and mesne profits *pendente lite* stand on very different grounds. In fact, as regards the latter there is no cause of action at the time of the commencement of the suit and it is only by means of statutory provisions framed with the obvious purpose of shortening litigation that they can be awarded in the suit even though they accrued subsequent to the institution of the suit. The mesne profits antecedent to the suit have, on the other hand, accrued before the commencement of the suit and although, therefore, these amounts may not be stated with absolute certainty, the amount can be mentioned with some approach to approximation. When, therefore, a plaintiff institutes his suit for possession and mesne profits antecedent to the suit in a Court of limited pecuniary jurisdiction, he may, on the principle explained in *Golap Sundari* v. *Indra Coomar Hazra* (1), to which we adhere in spite of the decision in *Sudarshan Das* v. *Ram Pershad* (6), be rightly deemed to have limited his claim to the maximum amount for which that Court can entertain a suit. In fact, in such a case if the plaintiff subsequently puts forward a claim in excess of the jurisdiction of the Court, he may justly be required to remit the excess, because he has with his eyes open brought his suit deliberately in a Court of limited pecuniary jurisdiction. In the case before us, therefore, the plaintiff cannot rightly claim more than Rs. 313-8 on account of mesne profits antecedent to the suit. Indeed the decree-holder has, through his learned Vakil, offered to abandon the claim in respect of mesne profits antecedent to the suit. Consequently no assessment need be made on account of these mesne profits.

The question next arises as to mesne profits *pendente lite*. It has been suggested that the learned Munsif should be deemed to have jurisdiction to assess these profits and to make a decree for any amount he may determine, however much such amount may exceed the limit of the pecuniary jurisdiction of the Court. In support of this proposition, reliance has been placed upon the case of *Rameswar* v. *Dilu Mahton* (2). In our opinion, that case is clearly distinguishable. There a suit was brought to recover land valued at

(3) 15 B. 416.
(4) 21 M. 371.
(5) 1 Ind. Cas. 670; 13 C. W. N. 815.
(6) 7 Ind. Cas. 385.

Rs. 950. Mesne profits antecedent to the suit were not claimed but there was a prayer for award of mesne profits *pendente lite*. When the suit was instituted the limit of the pecuniary jurisdiction of the Munsif was Rs. 1,000. By the time the Munsif made his decree for recovery of the land and for assessment of mesne profits *pendente lite*, the pecuniary limit of his jurisdiction had been raised to Rs. 2,000. The plaintiff subsequently invited the Court to ascertain the mesne profits and estimated them at Rs. 1,595. The judgment-debtor objected that an award could be made for only Rs. 50 that is, the difference between Rs. 1,000 (the limit of the pecuniary jurisdiction of the Court at the date of the institution of the suit) and Rs. 950 the value of the land. This contention was overruled. It may be remarked that at the date of the institution of the suit, there was no cause of action for recovery of mesne profits *pendente lite*. The jurisdiction of the Munsif was extended to Rs. 2,000 before the decree for mesne profits was made. In fact, the cause of action for mesne profits accrued from day to day after the institution of the suit and when the Court made the order for assessment, it had jurisdiction, if a suit for mesne profits had been then commenced, to make a decree for Rs. 2,000. As a matter of fact, the amount claimed was Rs. 1,595. The actual decision, therefore, in *Rameswar* v. *Dilu* (2), may, possibly, be defended, though there are expressions in the judgment which may be open to criticism. But as was observed by Lord Halsbury in *Quinn* v. *Leathem* (7), every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expressions which may be found therein are not expositions of the whole law but governed and qualified by the particular facts of the case in which such expressions are to be found. It may further be observed that Courts have always been reluctant to extend the application of the case of *Rameswar* v. *Dilu* (2) to cases not precisely similar. See *Gulab Khan* v. *Abdul Wahab Khan* (8) ; *Ijjatulla* v. *Chandra Mohan* (9) ; *Golap Sundari* v. *Indra Coomar* (1) and *Munna Lal* v. *Samandu* (10). We are clearly of opinion that the rule laid down in *Rameswar* v. *Dilu* (2), cannot possibly be extended to the case before us for two weighty and obvious reasons, namely, *first*, that the value of the claim for mesne profits *pendente lite* which the decree-holder now invites the Court to investigate is much in excess of the value of a suit which a Munsif is generally competent or may specially be authorized to try; and, *secondly*, that if the Munsif investigated the claim there would be insuperable difficulty as to the *forum* of appeal, which could not be either the Court of the District Judge, who can hear appeals only in suits of which the value does not exceed Rs. 5,000, or this Court because the legislature never contemplated an appeal direct from a decision of the Munsif to the High Court. We must hold, therefore, that the Munsif cannot entertain the application for investigation of mesne profits *pendente lite* as the claim is laid at over Rs. 1,000. In our opinion, the proper course to follow is to direct the return of the plaint in so far as it embodies a prayer for assessment of mesne profits from the institution of the suit to the date of delivery of possession for presentation to the proper Court, that is, the Court of the Subordinate Judge. In fact, the plaint may be treated as including two, if not three, distinct claims as we have already explained, and we may very well direct that the plaint in so far as it includes a claim for mesne profits *pendente lite* should be returned for presentation to a Court of competent pecuniary jurisdiction. The decree-holder has no objection to the adoption of this course. But the judgment-debtor urges that if the mesne profits have been now estimated by the decree-holder with any approach to accuracy, the value of the property itself must have been very much higher than Rs. 686-8 and the case should not have been tried by a Munsif. We are unable to give effect to this contention at the present stage after the suit, in so far as it is for recovery of land, has terminated and the decree of this Court has become final. It must further be remembered that the defendant did not take any exception to the value of the land and cannot now be heard to question the jurisdiction of the Court in that respect.

(7) (1901) A. C. 495 at p. 506; 1 S. E. C. (N. S.) 97 at p. 98; 70 L. J. P. C. 76; 85 L. T. 289; 50 W. R. 139; 65 J. P. 708; 17 T. L. R. 749.

(8) 31 C. 365; 8 C. W. N. 233.

(9) 34 C. 954; 6 C. L. J. 258; 11 C. W. N. 1133.

(10) 46 P. R. 1906; 94 P. L. R. 1906.

JAHEDUNNESSA BIBI *v.* NAJIB-UL-ISLAM.

The result, therefore, is that this appeal is allowed and the order of the Court below discharged. The claim for mesne profits antecedent to the suit is dismissed as it is abandoned by the decree-holder. The plaint, in so far as it embodies a claim for mesne profits from the institution of the suit on the 12th April 1902 to the delivery of possession on the 15th July 1907, will be returned to the plaintiff for presentation to the proper Court that is the Court of competent pecuniary jurisdiction. We do not decide whether when the plaint is so presented, any question of limitation will arise, or if any question of limitation arises, whether section 14 of the Limitation Act will be of any assistance to the plaintiff. The appellant is entitled to his costs in the present proceedings in all the Courts. We assess the hearing fee in this Court at 3 gold *mohurs*.

The Rule will stand discharged.

Appeal allowed.
Rule discharged.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEALS NOS. 1332 AND 1364 OF 1908.
September 2, 1910.
Present:—Mr. Justice Mookerjee and Mr. Justice Sharf-ud-Din.
JAHEDUNNESSA BIBI—PLAINTIFF—APPELLANT
versus
NAJIBUL ISLAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Muhammadan Law—Gift of immovable property—Written and registered document not required—Transfer of Property Act (IV of 1882), ss. 123, 129—Musha, doctrine of, applicability of—Not applicable to shares of zemindari—Co-sharer making gift in favour of co-sharer—Delivery of possession—Joint gift to adult and minor—Gift by parent to child—Possession.

Under the Muhammadan Law, a gift of immovable property can be made verbally without recourse to a written and registered document.

The doctrine of *musha* is applicable only to small plots of lands and houses and does not apply to shares in an unpartitioned *zemindari*.

Ameeroonnissa v. *Abadoonnissa*, 2 I. A. 87; 15 B. L. R. 67; 23 W. R. 208, relied on.

The doctrine is wholly unadopted to a progressive state of society and ought to be confined within strict rules.

Muhammad Mumtaz v. *Zubaida*, 11 A. 460; 16 I. A. 205, relied upon.

Where a property is held by several co-sharers, any one of them may give his share to any one of the other co-sharers without the formality of a delivery of possession, and such a gift would not be open to the objection of *musha*.

Mahomed Baksh Khan v. *Hosseni Bibi*, 15 C. 684; 15 I. A. 81, followed.

A declaration by the donor in the deed of gift that possession has been given, binds his heirs.

Muhammad Mumtaz v. *Zubaida*, 16 I. A. 205; 11 A. 460, followed.

There is no inherent illegality in a joint gift to an adult and a minor.

In the case of a gift made by one of the parents of a minor child in favour of that child, it is not necessary that the formality of a formal delivery of possession should be resorted to, inasmuch as the parent is the *de facto* guardian of the minor.

Appeal from the decree of the District Judge of 24-Pergannahs, dated March 17, 1908, affirming that of the Second Munsif of Diamond Harbour, dated June 26, 1907.

Babus *Nil Madhub Bose* and *Shib Chandra Palit*, for the Appellant.

Babu *Shashi Shekhar Bose*, for the Respondents.

Judgment.—The events antecedent to the litigation that have led up to this appeal, may be shortly stated: One Munir-ud-din died leaving a widow named Subjan, a minor son, named Najibul Islam and five daughters, one of whom is the present plaintiff. In accordance with the rules of inheritance in Muhammadan Hanfia Law, the share of each of the heirs of Munir-ud-din would be as follows: 2 annas for the widow, 4 annas for the minor son and 2 annas for each of the five daughters. The plaintiff, as one of the daughters of Munir-ud-din, claims 2 annas share as her inheritance from her father and also small fractions of shares that she says she inherited from two of her sisters. The suit is for a declaration of her title to the properties mentioned in the plaint which the defendant Najibul Islam claimed to have acquired by gift from the plaintiff and her two deceased sisters in 1896. The plaintiff alleges that the gift set up by her brother Najibul Islam never took place and that if it did take place, it was invalid.

The original Court held that the gift did take place and that it was valid. On appeal to the District Judge by the plaintiff, this judgment was upheld. The plaintiff now appeals to this Court and attacks the judgments of the two Courts below on two grounds, namely, *first*, that the lower Courts should have held that the subject of the gift being undivided shares in a *zemindari*, there could not be any valid gift of such shares, in accordance with the principles regarding gift of *Musha*: and, *secondly*, that the

donors had no possession over their respective shares when the alleged gift is said to have been made and hence there could not have been any delivery of possession which is a condition precedent to the validity of a gift.

It appears from the pleadings in the case that the gift of 1896 was a verbal one and made by all the five daughters of Munir-ud-din in favour of their mother, Subjan and their minor brother Najibul Islam. It is firmly settled that under the Muhammadan Law, a gift of immovable properties can be made verbally without recourse to a written and registered document. In the case of *Kamar-un-nissa Bibi* v. *Husaini Bibi* (1), a verbal gift of landed property if followed, by a transfer of possession, was considered valid. Section 123 of the Transfer of Property Act, no doubt, requires that a gift of immovable properties must be effected by a registered instrument signed by, or on behalf of, the donor and attested by at least two witnesses; but section 129 makes an exception in favour of gifts effected under any rule of Muhammadan Law. We may here observe that the Courts below have held that the gift, as alleged by the defendant, was, as a matter of fact, made in favour of Subjan Bibee and Najibul Islam. This is a finding of fact.

The first ground taken necessitates an enquiry as to whether the gift made by the five daughters of Munir-ud-din to their mother and minor brother, was or was not what is called *Hibabil Musha*. The word *Musha* is derived from *Shuyua* which means confusion. When a property is owned by several persons jointly and without any division, none of them can point out any specific portion of that property as his own without partnership of any of the other co-sharers. If a co-sharer in such a property makes a gift of his own share without first separating it from the other share, a confusion might arise and hence the law on the subject, according to the doctrine of the Imam Abu Hanifa, is that a gift of *Musha* which is not capable of division is valid, but in the case where the *Musha* can be partitioned without any material inconvenience to the share-holders and without any material deterioration of the property, a gift of *Musha* is invalid (*fasid*) and not void (*batil*). There has been a marked difference between the opinions of the Imam and his two famous disciples, Mohammad and Abu Yusuf. Generally speaking, the views of the disciples are in accordance with the demands of a progressive society.

From the examples given in the books of authority on Muhammadan Law, it may easily be inferred that the doctrine of *Musha* was applicable only to small plots of lands and houses and it does not appear that the Mahomedan Jurists of that time ever contemplated the changed condition of society and the ownership of specific shares in large estates or *Zemindaris* as known to us in this country.

The *Alamgiri*, which is an authority on the subject, has the following passage on *Hibabil-Musha*: "The gift of *Musha* that admits of partition to two men or to a group is valid according to the two disciples (above named) and invalid according to the *Imam*. But it is not void so that it avails to the establishment of property by possession." From the above authorities, it follows that the *Hibabil-Musha* (gift of undivided joint property) is not void but only invalid and possession remedies that defect.

Majma-ul-Anhar (page 345) has the following passage in regard to the view held by the Imam Abu Hanifa: "Yakub Pasha has held that if a person makes a gift to two persons of a thing which is capable of division that is an invalid *hiba*, but it is not void, (*batil*), according to the Imam Abu Hanifa; so, if the donees take possession, it establishes the property in them according to his saying and the *Fatwah* is according to it." In the case of *Sheikh Muhammad Mumtaz* v. *Zubaida* (2), their Lordships of the Privy Council remarked that "the doctrine relating to the invalidity of gifts of *Musha* is wholly unadopted to a progressive state of society and ought to be confined within strict rules."

In the case of *Ameeroonnissa* v. *Abadoonnissa* (3), their Lordships of the Privy Council discussed the question, whether the objection of invalidity of a gift on the ground of *Musha* was applicable to shares in *zemindaris* for which revenue was paid separately. Their Lordships held that the principle of *Musha* did not apply to shares in an unpartitioned *zemindari* and it was further held that although a right to effect partition may exist, the shares in a *zemindari* appear from the

(1) 3 A. 266 (P. C.).

(2) 11 A. 460; 16 I. A. 205.
(3) 2 I. A. 87; 15 B. L. R. 67; 23 W. R. 208.

special legislation relating to them, to be capable of distinct enjoyment before partition by reception of the separate and defined rents by the holders thereof and they, therefore, do not fall within the principle of the law of *Musha*.

It is worthy of note that the present gift was not to any stranger. It was a gift by five of the co-sharers to two other co-sharers. In the case of *Mahomed Buksh Khan* v. *Hosseini Bibi* (4), their Lordships of the Privy Council held "that where a property is held by several co-sharers, any one of them may give his share to any one of the other co-sharers and that such a gift would not be open to the objection of *Musha*. It is clear, therefore, that when persons own a property jointly, any sharer may make a gift of his share in that property to any other sharer without the formality of a delivery of possession. The donee having been already in possession as a sharer does not require a formal delivery of possession in order to make the gift operative.

It was held in the case of *Sheikh Muhammad Mumtaz* v. *Zabeeda* (2), that a declaration by the donor in the deed of gift that possession had been given, bound his heirs. In the present case in an application by the plaintiff (Exhibit A) dated the 11th February 1900, it was admitted that she had made the gift in favour of the donees. No doubt, there is another application (Exhibit D) in which the plaintiff, while admitting the above statement alleges that she made the admission in order to save her mother,—one of the donees —from a criminal prosecution which was impending against her on account of her having got her and her son's name registered for the entire share of Maunir-ud-din. This latter application was made in July 1905, *i.e.*, sometime after the dispute between the plaintiff and the defendants Nos. 1 and 2. It is clear, therefore, that not only was the gift made but that the plaintiff admitted having made it after it had been made.

The gift in the present case was in favour of an adult and a minor (mother and son). A gift to an adult and a minor is valid as the present developed Hanafi Law disapproves of the strictness of the rule which prevents a gift simultaneously to an adult and a minor. This is shown by a device pointed out by Jurists to escape from the operation of the principles of *Musha*; and it is the following:—"But if the gift be to an adult and a minor, the latter being in the *purvarish* of the former or to two sons, one adult and one minor, it is not valid, for possession on behalf of the minor, could be taken by his guardian." "However," continues the *Rudd*, (*Ruddul Muhtar*, Volume IV, page 783) "there is a device by which a gift jointly made to an adult and to a minor may be made validly, *viz.*, the entire property may be consigned to the adult and then a gift of it may be made to both. In such a case the adult donee would be a trustee for the minor and possession being already vested in him as depository, the objection of *Shuyun* would not apply as to the gift of the share of the minor." The accepted doctrine, therefore, is that there is no inherent illegality in a joint gift to an adult and a minor, the objection has its origin in a desire to prevent disputes but where the interests of the two are sufficiently specified, there can be no apprehension of any confusion or dispute.

We must hold, therefore, that the doctrine of *Musha* cannot apply to the present case; for the reason that in the first place the donors are co-sharers of the donees, in the second place the gift was made by the donors at one and the same time to the donees. This was in essence one transaction which transferred the shares of all the sisters by way of gift to the donees and the doctrine of *Musha* can, therefore, have no application.

The next point urged on behalf of the appellant is that the donors were, at the time of the gift, not themselves in possession of their respective shares, and hence they could not make over possession to the donees at the time when the gift is said to have been made and the gift is, therefore, invalid. With regard to this part of the case, the finding of the lower appellate Court is to the following effect: "It is then contended that the gift was invalid for want of delivery of possession. A passage in the evidence of the widow (Subjan) is relied upon where she says that the daughters were never in possession. I do not think that I would be justified in pressing the meaning of the widow's language to a logical conclusion. The family were jointly deriving maintenance from the income of the property which was being managed for them by the *gomastha*. The daughters verbally gave up all rights to the

(4) 15 I. A. 81; 15 C. 684.

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property, then the donees thereafter actually exercised possession over the property and the son had his name registered in the public State Registers. Thereafter the donors in a public and open manner acknowledged that they had transferred their rights by a gift. I am of opinion that there was such delivery of possession as in the circumstances and having regard to the nature of the property the donors were capable of." The above is a clear finding of fact to the effect that on the day of the gift the donors had possession which they transferred to the donees and subsequently acknowledged having done so. The appellants cannot invite us to disturb this finding of fact.

The gift is said to have been made in favour of the widowed mother Subjan and her minor son Najibul Islam. She obtained Letters of Administration to the estate of her deceased husband Munir-ud-din on behalf of her minor son Najibul Islam. It is reasonable to hold that she made a verbal gift of the shares which she had acquired by gift from her daughters in favour of her minor son Najibul Islam and hence she treated, in her application for Letters of Administration, her minor son as the owner of the entire estate left by her husband. The Mahomedan Law on the subject of delivery of possession in case of a gift made by one of the parents of a minor child in favour of that child is clear. In such a case, inasmuch as the parent is the *de facto* guardian of the minor, it is not necessary that the formality of a formal delivery of possession should be resorted to.

The appeal, therefore, fails and is dismissed with costs. The judgment in this appeal will govern Appeal No. 1364 of 1908.

Appeals dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 1405 OF 1908.

September 5, 1910.

Present :—Mr. Justice Mookerjee and Mr. Justice Teunon.

NEPEN BALA DEBI—PLAINTIFF—APPELLANT

versus

SITI KANTA BANERJEE AND OTHERS—DEFENDANTS—RESPONDENTS.

Succession Act (X of 1865), ss. 2, 331—'Hindu', meaning of—Whether includes Hindu convert to Christianity—Inheritance to be governed by what law—Pleadings—Adverse possession not raised explicitly in plaint—When may be allowed to be raised—True test, what is.

The provisions of section 2 of the Succession Act show that the Act is of universal application in this country unless a person claiming to be exempted can show that he is specifically excepted from the operation of its provisions.

Dagree v. *Pacotti*, 19 B. 783, relied upon.

A Hindu, who has embraced the Christian faith and continues to be a Christian up to the time of his death, is not a Hindu within the meaning of section 331 of the Succession Act, for the term Hindu does not include a convert to Christianity and it is not sufficient to bring a man within the definition of Hindu to prove his Hindu birth and origin.

Jogendra Chandra Bose v. *Bhagwan Coomari*, P. L. R. 1900 p. 251 at p. 268, referred to.

Under the law, as it stood before the Indian Succession Act, a Hindu after his conversion to Christianity might by his conduct show by what law he intended to be governed in matters of succession and inheritance.

Abraham v. *Abraham*, 9 M. I. A. 195 at p. 199; 1 W. R. 1 (P. C.), relied on.

In view, however, of the provisions of sections 2 and 331 of the Succession Act, this position can no longer be maintained, and when a Hindu has embraced Christianity and continues to be a Christian up to the time of his death, all questions of succession to his estate upon intestacy must be determined by the Succession Act.

In re Joseph Vathiar, 7 M. H. C. R. 121; *Ponnusami* v. *Dorasami*, 2 M. 209; *Administrator General* v. *Anandachari*, 9 M. 466; *Tellis* v. *Saldanha*, 10 M. 69, *Dagree* v. *Pacotti*, 19 B. 783, *Bai Baiji* v. *Bai Sentok*, 20 B. 53 and *Lastings* v. *Gonsalves*, 23 B. 539; relied upon.

Francis Ghosal v. *Gabri Ghosal* 31 B. 25; 8 Bom. L. R. 770 and *Edith Mukerji* v. *George Alfred*, 52 P. W. R. 1907, distinguished.

Where no case of acquisition of title by adverse possession is made in the plaint, nor is the question raised directly or indirectly in any of the issues, the plaintiff ought not to be allowed to succeed upon such a case.

Joytara v. *Mobaruck*, 8 C. 975, *Sunderi* v. *Madhoo Chunder*, 14 C. 592 and *Anand Hari* v. *Secretary of State*, 3 C. L. J. 316, relied on.

But when the question reduces itself to one of law upon facts admitted or proved beyond controversy, it is not only competent to the Court but expedient in the interest of justice to entertain the plea of adverse possession, if such a case arises on the facts stated in the plaint and the defendant is not taken by surprise.

Lilabati Misrain v. *Bishun Chobey*, 6 C. L. J. 621, relied upon.

The true test to be applied to determine whether the plea of title by adverse possession should be allowed to be urged though not explicitly raised in the plaint is, how far is the defendant likely to be prejudiced if the point is permitted to be taken.

Appeal from the decree of the Additional District Judge of 24-Pergannahs, dated March

31, 1908, modifying that of the Sub-Judge of that place, dated May 31, 1907.

Babus *Jogesh Chandra Roy* and *Surendra Nath Ghoshal*, for the Appellant.

Babus *Boido Nath Dutt*, *Biraj Mohan Majumdar* and *Probodh Chandra Mukherjee*, for the Respondents.

Judgment.—This is an appeal on behalf of the plaintiff in a suit for partition of joint family properties which has now lasted for nearly ten (10) years. The Court of first instance made a decree in favour of the plaintiff for a half share of the properties. Upon appeal the District Judge has given her a decree for $\frac{1}{4}$th share only. It is the common case of both parties that the property in dispute belonged to two brothers Hari Pada Banerjee and Sasi Pada Banerjee. The plaintiff is the widow of Hari Pada Banerjee and claimed to be jointly interested in one-half share which belonged to her husband. The first defendant is the purchaser of the right, title and interest of Sasi Pada at a sale held in execution of a mortgage decree on the 6th June 1893. The second defendant is Sasi Pada himself. The third defendant is a transferee from the purchaser at the mortgage sale. The fourth defendant has apparently no interest at present in the disputed properties. The fifth defendant is the sister of Hari Pada and Sashi Pada. The plaintiff stated in her plaint that her husband had embraced Christianity and that at the time of his death, he was a follower of the Christian faith. The substantial question in controversy between the parties, therefore, is whether the plaintiff has taken by inheritance under the Hindu Law the whole of the share of her husband or whether under the Indian Succession Act she has taken only one-half of that share and the other has been taken equally by the brother and sister of Hari Pada, that is, Sasi Pada and Mondakinee. The Courts below have concurrently held that the Indian Succession Act is applicable to the case and that under sections 27 and 36, the plaintiff is entitled to one-half of the half share of her husband and that the remaining half share has vested in equal halves in the brother and the sister of the deceased. But the Courts below have differed in the view they have taken upon the question of possession. The original Court has held that the plaintiff has acquired a good title by adverse possession for the statutory period in the half share which had passed by succession to the brother and the sister. The District Judge on appeal has held, on the other hand, that as title by adverse possession was not specifically set up in the plaint, the plaintiff is not entitled to succeed on any such basis. The plaintiff has now appealed to this Court and on her behalf the decision of the District Judge has been assailed on two grounds, namely, *first*, that the Indian Succession Act has no application to the case and, *secondly*, that if it does govern the matter, she has acquired a good title by adverse possession in the one-half share which vested in the brother and sister of her husband.

In so far as the first of these contentions is concerned, it is necessary to observe that section 2 of the Indian Succession Act provides that except as provided by this Act or by any other law for the time being in force, the rule therein contained shall be the law of British India applicable to all cases of intestate or testamentary succession. The provisions of this section show that the Act is of universal application in this country unless a person claiming to be excepted can show that he is specifically excepted from the operation of its provisions. *Dagree* v. *Pacotti* (1). In other words, as observed in *DeSouza* v. *Secretary of State*(2), the words "applicable to all cases" operate as a repeal of the previously existing law and that subject to the exception in the section, the Courts must look to this Act and this alone for the Law of British India applicable to all cases of testamentary and intestate succession. The burden, therefore, is upon the plaintiff to prove the exception within which her case falls, and she relies upon section 331 of the Indian Succession Act for this purpose. That section, we quote only so much of it as applies to the case before us, lays down the following rule :—"The provisions of this Act shall not apply to intestate or testamentary succession to the property of any Hindu, Mahomedan or Budhist." The question, therefore, narrows down to this. Is a Hindu, who has embraced the Christian faith and continues to be a Christian up to the time of his death, a Hindu within the meaning of section 331? The appellant has invited us to answer this question in the

(1) 19 B. 783.
(2) 12 B. L. R. 423.

affirmative while the respondents have strenuously maintained the contrary view. After a careful consideration of the arguments which have been addressed to us, we have arrived at the conclusion that the question ought to be answered in the negative. Dr. Whitley Stokes has pointed out that the collocation of the words Hindu, Mahomedan or Budhist makes it reasonably plain that the term Hindu is used as a theological term and denotes only persons who profess any faith of the Brahminical religion or the religion of Puranas, (Anglo-Indian Code Volume I, 483); [*Dagree* v. *Pacotti* (1)]. In our opinion by no stretch of language can we reasonably hold that the term Hindu includes a convert to Christianity. It is further obvious that, as ruled in the case of *Jogendra Chandra Bose* v. *Bhagwan Coomari* (3), subsequently affirmed by the Judicial Committee in *Bhagwan Koer* v. *Jogendra Chandra Bose* (4), it is not sufficient to bring a man within the definition of Hindu to prove his Hindu birth and origin. It is also essential that he should be a Hindu at the time when the question in issue arises, for example, if there is a dispute as to the succession to the estate of the deceased person, it must be proved that he was a Hindu at the time of his death. No doubt under the law as it stood before the Indian Succession Act, a Hindu after his conversion to Christianity might by his conduct show by what law he intended to be governed in matters of succession and inheritance. *Abraham* v. *Abraham*(5), because, as observed by their Lordships of the Judicial Committee, "upon the conversion of a Hindu to Christianity, the Hindu Law ceases to have any continuing obligatory force upon the convert; he might renounce the old Law by which he was bound as he had renounced his old religion or if he thought fit, he might abide by the old law notwithstanding he had renounced the old religion." In view, however, of the provisions of sections 2 and 331 of the Indian Succession Act, this position can no longer be maintained. We must consequently hold that when a Hindu has embraced Christianity and continues to be a Christian up to the time of his death, all questions of succession to his estate upon intestacy must be determined by the Indian Succession Act. The view we take is supported by the decisions of the Madras High Court in *In re Joseph Vathiar* (6); *Ponnusami* v. *Dorasami* (7); *Administrator-General* v. *Anandachari* (8); *Tellis* v. *Saldanaha* (9) and of the Bombay High Court in *Dagree* v. *Pacotti* (1); *Bai Baiji* v. *Bai Santok* (10) and *Lastings* v. *Gonsalves* (11). The decision of the Bombay High Court in *Francis Ghosal* v. *Gabri Ghosal* (12) and of the Punjab Chief Court in *Edith Mukerjee* v. *George Alfred* (13) are not really opposed to this view. They are distinguishable on the ground that the question raised there was whether the Indian Succession Act purported to enlarge the category of heritable property or affected the right of copartnership as between those to whom it applied. We must consequently hold that the Courts below have correctly applied the provisions of the Indian Succession Act to determine the distribution of the estate left by Hari Pada Banerjee who at the time of his death was a Christian. The first ground urged on behalf of the appellant must consequently fail.

In support of the second ground urged on behalf of the appellant, it has been contended that the plaint, though it did not expressly set out a title by adverse possession, yet contained a sufficient recital of the facts that the plaintiff was in possession of the entire half share of her husband and that consequently the plaintiff ought to have been allowed to succeed on the ground of title by adverse possession. Now it is perfectly true that, as laid down by this Court in the cases of *Joytara* v. *Mobaruck* (14); *Sunduri* v. *Madhoo Chunder* (15) and *Ananda Hari* v. *Secretary of State* (16), where no case of acquisition of title by adverse possession is made in the plaint nor is the question raised directly or indirectly in any of the issues, the plaintiff ought not to be allowed to succeed upon such a case. On the other hand, as pointed out by this Court in the case of *Lilabati Misrain* v. *Bishun Chobey* (17), when the question

(3) P. L. R. 1900 p. 251 at p. 268.
(4) 31 C. 11.
(5) 9 M. 1. A. 195 at p. 199; 1 W. R. 1 (P. C.).
(6) 7 M. H. C. R. 121.
(7) 2 M. 209.
(8) 9 M. 466.
(9) 10 M. 69.
(10) 20 B. 53.
(11) 23 B. 539.
(12) 31 B. 25; 8 Bom. L. R. 770.
(13) 52 P.W.R. 1907: 36 P.R. 1909; 1 Ind. Cas. 697.
(14) 8 C. 975.
(15) 14 C. 592.
(16) 3 C. L. J. 316.
(17) 6 C. L. J. 621.

reduces itself to one of law upon facts admitted or proved beyond controversy, it is not only competent to the Court but expedient in the interest of justice to entertain the plea of adverse possession, if such a case arises on the facts stated in the plaint and the defendant is not taken by surprise. The true test, therefore, to be applied to determine whether the plea of title by adverse possession should be allowed to be urged though not explicitly raised in the plaint, is, how far is the defendant likely to be prejudiced if the point is permitted to be taken. Now the case before us is obviously of a somewhat peculiar description. The parties themselves were possibly ignorant of their true rights under the Indian Succession Act till their legal advisers made the discovery in the course of this litigation. In this view it does seem probable that upon the death of the husband, the plaintiff did enjoy possession of his entire half share as if the rights of the parties were governed by the Hindu Law and she may have done so to the exclusion of her sister-in-law, Mondakinee, if not also of her brother-in-law Sasi Bhusan. It has been asserted, on the other hand, that the plaintiff was in possession as a co-sharer and the burden is upon her to prove that her possession was adverse. A question of some nicety may also arise as to the true position, if it should be found that the possession was adverse to one of the two persons and not to the other. We are satisfied that the true bearing of these questions was not considered, possibly not appreciated at all in the Court below and in the interest of justice it is obviously necessary that the question should be examined. The second ground urged on behalf of the appellant must consequently prevail.

The result, therefore, is that this appeal must be allowed and the decree of the District Judge discharged in so far as it modifies the decree of the Subordinate Judge. The case will be remanded to the District Judge in order that he may determine whether in addition to the half share inherited by the plaintiff from her husband, she has acquired a good title by adverse possession for the statutory period to the other half share which would otherwise belong to the brother and sister of Hari Pada. The District Judge will frame an issue on this point and allow an opportunity to the parties to adduce evidence in support of their respective allegations. Such evidence may be taken by the District Judge himself or by the Subordinate Judge under his directions. The District Judge will decide the question of title by adverse possession as also any other question that may incidentally arise. The defendant No. 1 will get half the costs allowed to him by the Court of appeal below in respect of both the lower Courts. The costs of this appeal will abide the result.

Appeal allowed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 1602 OF 1909.

August 9, 1910.

Present:—Mr. Justice Mookerjee and Mr. Justice Sharf-ud-Din.

CHAMPAKLATIKA MITRA—DEFENDANT—APPELLANT

versus

NAFAR CHANDRA PALCHOWDHURY—PLAINTIFF—RESPONDENT.

Landlord and Tenant—Amalnamah, *construction of*—*Tenant or Licensee*—*Present demise*—Amalnamah *for reclamation of waste land*—*Ejectment*—*Bengal Tenancy Act (VIII of* 1885*)*, *ss.* 10, 89, 155, 178, *sub-s.* (1) *cl.* (c).

An *amalnamah*, neither stamped nor registered, recited that in anticipation of the execution of a proper *mourasi mokarari* lease of waste land the plaintiff had agreed to place the defendant in possession of the land, that out of the total sum of Rs. 2,000 payable as premium, Rs. 500 would be paid at a certain time, and the remainder by equal instalments in two years; that in default of the payment of the bonus, the *amalnamah* should stand cancelled; that for two years the land was to be held rent-free, and after that at a progressive rent; and that in the event of failure to cultivate the land in the next two years, the grantor would be at liberty to re-enter:

Held, that there was a present demise and not merely an agreement to demise, and the possession of the defendant was that of a tenant.

Whether there was a present demise or merely an agreement to make a demise in future, must depend upon the paramount intention of the parties.

Purmanand Das Jewan Das v. *Dharsey Virji*, 10 B. 101, referred to.

The proviso to section 178 does not exclude the operation of section 155 of the Bengal Tenancy Act.

Therefore, a landlord is not entitled to take possession of the premises by force or to sue and recover possession without fulfilment of the conditions prescribed by section 155, that is, without serving a notice under that section.

CHAMPAKLATIKA *v.* NAFAR CHANDRA.

Appeal from the decree of the District Judge of 24-Pergannahs, dated March 2, 1909, modifying that of the Third Sub-Judge of that district, dated July 3, 1908.

Dr. *Rash Behary Ghosh*, Babus *Harendra Narain Mitra* and *Sarat Chandra Mookerjee*, for the Appellant.

Babus *Dwarka Nath Chakravarti* and *Amarendra Nath Bose*, for the Respondent.

Judgment.—This is an appeal on behalf of the defendant in an action for recovery of possession of immovable property and mesne profits.

The disputed land is admittedly the property of the plaintiff-respondent. On the 29th December 1904, he granted an *amalnamah* to the defendant-appellant, the terms of which we shall presently examine. It is sufficient to mention at this stage that in February 1906, the plaintiff re-entered upon the land and settled it with other tenants. The result was that the defendant brought a suit under section 9 of the Specific Relief Act which was decreed in her favour on the 26th May 1907. The plaintiff thereupon commenced the present action on the 28th August 1907 for establishment of his title, for declaration that the defendant had not acquired any right under the *amalnamah* and that if she had, her right had been extinguished by breach of the conditions named therein, and also for recovery of possession and mesne profits, should the defendant, in the interval, obtain possession of the disputed land by execution of the decree in the possessory suit. The defendant did, as a matter of fact, execute the decree and obtain delivery of possession on the 13th December 1907. She resisted the claim substantially on the ground that she was a tenant under the plaintiff, that her interest had not terminated and that, in any event, the plaintiff was incompetent to bring the present action before he had fulfilled the requirements of section 155 of the Bengal Tenancy Act. The Subordinate Judge made a contingent decree in favour of the plaintiff. He directed the defendant to pay the balance of the *selami* and imposed the condition that, upon default, the suit would stand decreed. If, on the other hand, the premium was paid, the decree directed the plaintiff to execute a registered lease in favour of the defendant. Against this decree, the defendant appealed to the District Judge and a cross-appeal was filed on behalf of the plaintiff. The District Judge has held that the plaintiff is entitled to recover possession and mesne profits. The defendant has now appealed to this Court and on her behalf, it has been contended that the District Judge has taken an erroneous view of the effects of the provisions of section 155 of the Bengal Tenancy Act, that they are applicable to the tenancy in question notwithstanding the provisions of section 178, and that consequently the plaintiff is not entitled to a decree for ejectment. This argument has been controverted on behalf of the respondent, and it has been contended that the effect of the *amalnamah* was to place the defendants in the position of a licensee, that she was at no time a tenant of the plaintiff, and that consequently no question could arise as to the rights of the plaintiff to eject her without recourse to the procedure laid down in section 155 of the Bengal Tenancy Act.

The first point which requires consideration is as to the true position of the defendant. Was she a licensee or was she a tenant under the plaintiff? The learned Vakil for the respondent has suggested that the defendant was a licensee, because there was no present demise in her favour by the *amalnamah* and in support of this position he has relied upon the case of *Panchanan Basu* v. *Chandi Charan Misra* (1). To determine whether the contention of the respondent is well-founded, it is necessary to examine the terms of the *amalnamah*. This document, which was neither stamped nor registered, recites that the defendant had applied for the grant of a *mourasi mokarari chakdari* lease from the plaintiff in respect of about 1,000 *bighas* of land situated in Sunderbans; and that in anticipation of the execution of a proper lease, the plaintiff had agreed to place the defendant in possession of the land upon certain specified conditions. The premium for the grant was settled at the rate of Rs. 2 per *bigha*, and a covenant was inserted to the effect that out of the total sum of Rs. 2,000 payable as premium one-fourth, that is, Rs.500, would be paid in *Magh* 1311, and the remainder, that is, Rs. 1,500 by equal instalments in the month of *Magh* in each of the years 1312 and 1313. The document further expressly states that in default of payment of bonus, the *amalnamah* would stand cancelled and cease to be operative. The next clause of the instrument provides for the payment

(1) 14 C. W. N. 874; 6 Ind. Cas. 443.

of rent. During the years 1312 and 1313 the land was to be held rent-free. In the year following, rent was to be paid at the rate of annas eight per *bigha*. In 1315 the rate was to be Re. 1 per *bigha*. In 1316 the rate would be Re. 1-8 a *bigha*, which was described as the full rent payable. The only other portion of the document to which reference need be made is the fifth paragraph. This paragraph recites that in 1312 the applicant for the lease would bring under cultivation 250 *bighas* of land, that the whole would be brought under cultivation in 1313 and that in the event of failure to cultivate the land in 1312 and 1313, the grantor would be at liberty to re-enter and settle the land with other tenants. Upon a consideration of the various provisions we have set out, it is manifest that there was a present demise and the suggestion that there was a mere agreement for a future demise is not sustainable. Two circumstances are, in our opinion, conclusive. In the first place, although upon non-payment of the premium, as provided in the document, there might be a forfeiture, yet the tenancy was obviously intended to begin from 1312. There could not possibly be any forfeiture till Magh 1313 when the last instalment of the bonus would be payable. But the document expressly provides that the land would be held rent-free in the years 1312 and 1313, in other words, the possession of the grantee would be that of a tenant during these years. In the second place, as there was to be a forfeiture if the whole of the land was not brought under cultivation by the year 1313, the possession of the grantee would be that of a tenant in 1312. To put the matter in another way, if no tenancy was intended to be created from the very beginning of the year 1312, no question could possibly arise as to the forfeiture of a tenancy by reason of failure to pay the premium or to cultivate the lands. In our opinion, it cannot be seriously disputed that the intention here was to create a present demise, and the possession of the defendant was that of a tenant. In support of this view reference may be made to the decision in *Parmanand Das Jewan Das* v. *Dharsey Virji* (2), where Sir Charles Sargent, C. J., observed that the answer to the question whether there was a present demise or merely an agreement to make a demise in future, must depend upon the paramount intention of the parties [*Jones* v. *Reynolds* (3) and *Chapman* v. *Towner* (4)]. In fact, the tests which were applied by the learned Chief Justice in that case are conclusive in respect of the case now before us. We must, therefore, examine the rights and liabilities of the parties on the assumption that the position of the defendant was that of a tenant under the plaintiff. But it is needless, for our present purpose, to determine the precise position of the defendant as tenant and to what extent her right might have been affected by the omission of the landlord to execute in her favour a registered instrument; the decisions of this Court in the cases of *Bibi Jawahir Kumari* v. *Chatterput Singh* (5) and *Singheeram* v. *Bhaghat Chander* (6), tend to show that her right would not in substance be affected by such omission on the part of the landlord. But whatever her position might be if she was a tenant, the question arises whether it was not obligatory upon the plaintiff to comply with the requirements of section 155 of the Bengal Tenancy Act.

Section 155 provides—we quote only so much of the section as is applicable to the case before us—that a suit for ejectment of a tenant on the ground that he has broken a condition on breach of which he is, under the terms of a contract between him and the landlord, liable to ejectment, shall not be entertained, unless the landlord has served in the prescribed manner a notice on the tenant specifying the particular misuse or breach complained of and where the misuse or breach is capable of remedy, requiring the tenant to remedy the same, and in any case to pay reasonable compensation for the misuse or breach, and the tenant has failed to comply within a reasonable time with that request. It is not disputed that if section 155 is applicable, the present suit must fail. But it has been argued on behalf of the respondent that the section is inapplicable, because as the *amalnamah* was granted in view of a lease for the reclamation of a waste land, under the proviso to section 178 of the Bengal Tenancy Act, the operation of section 155 is excluded. Now, clause (*c*) of sub-section (1) of section 178 provides that nothing in any

(2) 10 B. 101.

(3) L. R. 1 Q. B. 506 at p. 516; 1 G. and D. 62; 10 L. J. Q. B. 193.

(4) 6 M. and W. 100; 9 L. J. Ex. 45.

(5) 2 C. L. J. 343.

(6) 11 C. L. J. 543; 6 Ind. Cas. 632.

contract between a landlord and a tenant made before or after the passing of the Bengal Tenancy Act, shall entitle a landlord to eject a tenant otherwise than in accordance with the provisions of the Act. The provision mentioned is contained in section 89 which lays down that no tenant shall be ejected from a tenure or holding except in execution of a decree. This section is to be read along with section 10, which lays down that a holder of a permanent tenure shall not be ejected by the landlord except on the ground that he has broken a condition on breach of which he is, under the terms of a contract between him and his landlord, liable to be ejected. It is clear, therefore, that if section 178 sub-section (1) clause (*c*) stood by itself, read with section 10 and section 89, the defendant could not possibly be ejected by the plaintiff without recourse to a suit. When, therefore, the plaintiff took the land into his own hands and forcibly dispossessed the defendants in February 1906 on the allegation that there had been a breach of one of the terms of the lease, his conduct was clearly unlawful. The only course open to him was to proceed in accordance with the statutory provisions on the subject. But it is suggested that the effect of the proviso to section 178 is to exclude the operation of section 155 and these sections taken together render section 89 inapplicable. In our opinion, there is no foundation for this contention. The proviso to section 178, to which reference is made, lays down that nothing in the section shall affect the terms and conditions of a lease granted *bona fide* for reclamation of waste land. It is difficult to appreciate what terms and conditions of the lease would be affected if we hold that the landlord must proceed under section 155 of the Bengal Tenancy Act. The *amalnamah* does not provide either expressly or by implication that in the event of a breach of one of its conditions, the landlord would be entitled to take possession of the premises by force or that he would be entitled to sue and recover possession without fulfilment of the conditions prescribed by section 155. In our opinion, it is reasonably plain that the proviso to section 178 does not exclude the operation of section 155 of the Bengal Tenancy Act. In this view the decree made by the District Judge cannot be supported.

The result, therefore, is that this appeal must be allowed, the decree of the District Judge discharged and the suit dismissed with costs in all the Courts.

Appeal allowed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 2249 OF 1908.

August 24, 1910.

Present:—Mr. Justice Mookerjee and Mr. Justice Teunon.

Kumar SARAT CHANDRA SINHA—PLAINTIFF—APPELLANT

versus

NRITYA GOPAL BISWAS AND OTHERS—RESPONDENTS.

Evidence Act (I of 1872), s. 92—Oral evidence—Alteration of terms of registered lease—Conduct of parties—Payment of reduced rent—Evidence, whether admissible—Declaratory decree—Landlord's title in jeopardy from aggression of neighbouring Zemindar*—Controversy between two sets of tenants, whether gives right to declaratory decree.*

Oral evidence is not admissible to prove a verbal surrender and abatement of rent of a holding held under a registered lease, nor is the conduct of the parties, for instance, payment of rent at a reduced rate, admissible to prove the same.

Dwarka Nath Chattopdhya v. *Bhagoban Panda*, 7 C. L. R. 577, *Mayandi Chetti* v. *Oliver*, 22 M. 261, *Karampalli* v. *Thekku Vittil*, 26 M. 195 and *Lakhatullah* v. *Bishambhar*, 6 Ind. Cas. 577, relied on.

It is open to a landlord, where his title is in jeopardy from the aggression of a neighbouring *Zemindar* and may be damaged by a denial of his rights to the land, to bring a suit for the purpose of declaration of his rights as against such wrong-doers, and for possession of the land as against them.

Bissesuri Dabea v. *Baroda Kant Roy Chowdhury*, 10 C. 1076, followed.

But that doctrine is not applicable to a case where the controversy is between two sets of tenants each claiming the disputed land to fall within his tenancy, for the controversy does not jeopardise the rights of the plaintiff.

Appeal from the decree of the District Judge of Jessore, dated July 31, 1908, affirming that of the Sub-Judge of that District, dated December 10, 1907.

Babus *Jogesh Chandra Roy*, *Shoroshi Charan Mitter* and *Nares Chandra Sinha*, for the Appellant.

Babus *Ram Charan Mitra*, *Akhoy Kumar Banerji*, *Hari Charan Sarkhel* and *Hara Prosad Chatterji*, for the Respondents.

Judgment.—This is an appeal on behalf of the plaintiff in a suit for recovery of possession of land and mesne profits.

The plaintiff alleged in the plaint that the disputed land was comprised in a tenancy held under him by the defendants, who are

arranged in two sets. The first eight defendants, who may be described as the Biswas defendants, are interested in an one-third share of this tenancy; the ninth defendant, who may be described as the Ghose defendant, is interested in the remaining two-third share of the tenancy. The plaintiff alleges that the disputed land was comprised within the two-thirds share of the tenancy held by the Ghosh defendant, that the Biswas defendants wrongfully kept the Ghosh defendant out of possession, that consequently the Ghosh defendant on the 13th April 1904 surrendered this land in favour of the plaintiff, and obtained a reduction of the rent payable under the lease granted in his favour on the 2nd June 1897. The plaintiff, therefore, seeks to recover possession of the disputed land together with mesne profits in respect thereof.

The Biswas defendants have resisted the claim substantially on the ground that they were not in possession of any portion of the disputed land which was not covered by their one-third share of the tenancy. The Ghose defendant has resisted the claim on the ground that the verbal surrender alleged by the plaintiff was not true, and even if true, it was not operative in law; consequently, the plaintiff was not entitled to recover possession.

Upon these allegations seven issues were raised in the Court of first instance, one of which was to this effect: "Whether the plaintiff had any cause of action against the defendants?" The learned Subordinate Judge held that the oral evidence was not admissible to prove the alleged partial surrender and, reduction of rent, that consequently the tenancy of the Ghosh defendant must still be regarded as operative: and that in this view the plaintiff was not entitled to recover possession of the land. On appeal the learned District Judge has affirmed this decision.

The plaintiff has now appealed to this Court, and on his behalf the decision of the District Judge has been assailed on three grounds, namely, *first*, that notwithstanding the provisions of section 92 of the Indian Evidence Act, it was open to the plaintiff to prove the verbal surrender and abatement of rent by oral evidence; *secondly*, that if oral evidence was not admissible, evidence of conduct was admissible for the purpose and, *thirdly*, that the plaintiff ought to be allowed to obtain a declaratory decree on the footing that the Ghosh defendant was still a tenant under him in respect of the disputed land. In our opinion, there is no foundation for any of these contentions.

In so far as the first ground urged on behalf of the appellant is concerned, it is clear that under section 92 of the Evidence Act, oral evidence was not admissible to prove the alleged surrender and abatement of rent. Section 92 provides that "when the terms of any such contract, (that is, a contract mentioned in section 91), grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives-in-interest, for the purpose of contradicting, varying, adding to, or substituting from its terms." The fourth proviso to the section lays down that "the existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property, may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents." It is conceded in the case before us that the lease in favour of the Ghosh defendant granted on the 2nd June 1897 was duly registered. Consequently, under the fourth proviso to section 92, the existence of a distinct subsequent oral agreement to rescind or modify the original contract cannot be proved. The learned Vakil for the appellant has placed reliance upon the decision of this Court in the case of *Khonkar Abdur Rahman* v. *Ali Hafez* (1) to show that oral evidence is admissible to establish the subsequent surrender and abatement of the rent. That decision, however, when carefully examined, shows that oral evidence is not admissible for the purpose. In fact there is a series of decisions of this Court which completely negative the contention of the appellant. In the case of *Dwarka Nath Chattopadhya* v. *Bhogoban Panda* (2), an attempt was made to prove that after a lease had been granted, rent was reduced by a verbal arrangement

(1) 3 C. W. N. 351; 28 C. 256
(2) 7 C. L. R. 577.

because it had been found that the landlord was entitled not to the entire superior interest but only to a portion thereof. It was ruled by this Court that oral evidence was not admissible to prove the alleged verbal arrangement and consequent reduction of rent. The same view was adopted in the cases of *Banko Behari Sanyal* v. *Shama Churn Bhattacharji* (3); *Radha Rama Chaudhry* v. *Bhawani Prosad Bhomik* (4). A similar view has been adopted by the Madras High Court in the cases of *Mayandi Chetti* v. *Oliver* (5) and *Karampalli Muni Kurup* v. *Thekku Vittil Muthorakutti* (6). In the first of these cases, it was alleged that the lessor of certain land, held by the lessee under a registered deed of lease, had agreed to a reduction in the rent. The agreement was not reduced to writing but the rent was thereafter paid and accepted at the reduced rate. In a suit brought to recover arrears of rent at the rate reserved in the registered lease, it was held that under proviso 4 to section 92 of the Indian Evidence Act, an agreement to accept a reduced rent could not be implied or inferred from the acts and conduct of the parties; and an unwritten agreement, if so implied, amounts to an oral agreement within the meaning of the proviso. This view is also supported by the case of *Lakhatulla* v. *Biskambar Roy* (7), where it was ruled by Jenkins, C. J. that an agreement is none the less oral because it is to be inferred from the conduct of the parties. Oral evidence is, therefore, not admissible to prove the variation alleged by the plaintiff, and the first argument advanced on behalf of the appellant must be overruled

In so far as the second argument is concerned, it is suggested that evidence of conduct was admissible to prove that there had been a subsequent surrender and abatement of rent. In support of this proposition reliance has been placed upon the case of *Khonkar Abdur Rahman* v. *Ali Hafez* (1). The argument is also sought to be supported by the case of *Shama Charan Mondol* v. *Heras Mollah* (8), in which reference was made to the decision of a Full Bench of this Court in *Preo Nath Shah* v. *Madhusudan Bhuiya* (9). It has been further urged that the argument receives support from the cases of *Beni Madhab Gorani* v. *Lal Moti Dassi* (10) and *Satyesh* v. *Dhunpul* (11). But even if we assume that these cases give a correct exposition of the law, the difficulty of the appellant is that in the Courts below no suggestion was made that any evidence of conduct was admissible to prove the alleged partial surrender and abatement of rent. In this Court the learned Vakil for the appellant, when invited to specify the conduct upon which his client relies in support of the alleged oral variation of the original agreement, stated that the only conduct he could mention was payment of rent at a reduced rate. But that is manifestly insufficient to establish the alleged surrender because whether there was a surrender or not, abatement of rent would be consistent with the case that the tenant upon failure to obtain possession of all the lands comprised in his share of the tenancy, had, under section 52 of the Bengal Tenancy Act, obtained an abatement of the rent. We may add that there was no suggestion in the plaint or in either of the Courts below that any evidence of conduct was available to establish the alleged surrender. It is extremely unlikely that any such evidence can be available, because the allegation of the plaintiff is that the surrender took place on the 13th April 1904 and the present action was commenced on the 14th September 1906. It is improbable that there could have been any such conduct in the interval as would justify an inference that there had been a partial surrender of the land and a permanent reduction of the rent. In our opinion, there is no substance in the second contention advanced by the appellant which is consequently overruled.

In so far as the third contention urged on behalf of the appellant is concerned, it is plainly inconsistent with the position taken up in the first two arguments addressed to us. It has been contended, on the authority of the decision in *Bissesuri Dabeea* v. *Baroda Kanta Roy Chowdhry* (12), that if the plaintiff is not entitled to obtain a decree for possession of the disputed land, a decree for

(3) 2 C. W. N. cclxv.
(4) 5 C. W. N. ccxcvi.
(5) 22 M. 261.
(6) 26 M. 195.
(7) 6 Ind. Cas. 577.
(8) 26 C. 160.
(9) 25 C. 603.
(10) 6 C. W. N. 242.
(11) 24 C. 20.
(12) 10 C. 1076.

a declaration of his title, and for a further declaration that he is entitled to possession through his tenant, the Ghosh defendant, may be made in his favour. In our opinion, there is no foundation for this contention and the case on which reliance is placed is distinguishable on two grounds. In the first place, in the case of *Bissesuri Dabeea* v. *Baroda Kanta Roy Chaudhry* (12), the plaintiffs were unable to recover rents from their *nim howladars* because the latter had been dispossessed from the land of their tenancy by a neighbouring *Zemindar*; accordingly they sued for a declaration of their *howla* rights in the estate and for possession as before, that is, for possession of the land through the *nim howladars*. Under the circumstances, it was held by this Court that it was open to the landlord, where his title was in jeopardy from the aggressions of a neighbouring *Zemindar* and might be damaged by a denial of his rights to the land, to bring a suit for the purpose of declaration of his rights as against such wrong-doers and for possession of the land as against them. This doctrine has no application to the circumstances of the present case, if it be true that the Ghosh defendant has been dispossessed from the disputed land by the Biswas defendants. The Biswas defendants claim to occupy the disputed land as included in their one-third share of the tenancy. They, as well as the Ghosh defendant, admit that the disputed land is included within the *Zemindari* of the plaintiff. The controversy is only between the two sets of defendants; the Biswas defendants allege that the disputed lands are included in their share of the tenancy, the Ghosh defendant in his turn claims them as included within his share. Plainly, this controversy does not jeopardise the rights of the plaintiff. In the second place, the case of the plaintiff throughout has been not merely in the Courts below, but also in this Court, that the Ghosh defendant has surrendered possession of the disputed land, that his tenancy has terminated, and that consequently the plaintiff has become entitled to recover the land from the Biswas defendants as trespassers. He cannot now be permitted to turn round and urge that the tenancy of the Ghosh defendant still continues operative and that he is entitled to possession only through the Ghosh defendant as his tenant. To allow the plaintiff to do so, would be, in the language of Mr. Justice Straight, "to permit a plaintiff, who has come into Court with one case and hopelessly failed to prove it, to succeed upon another case and that directly in antagonism with his primary allegation." *Hamilton* v. *Land Mortgage Bank* (13). The third ground, therefore, is wholly unsustainable.

The result is that the decree of the Court below is affirmed and this appeal is dismissed with separate costs for each set of defendants.

Appeal dismissed.

(13) 5 A. 456 at p. 459

CALCUTTA HIGH COURT.
CIVIL RULE NO. 3039 OF 1910.
August 29, 1910.

Present:—Mr. Justice Mookerjee and Mr. Justice Teunon.

NUNDA LAL CHOUDHURY—DECREE-HOLDER—PETITIONER

versus

KALA CHAND CHOUDHURY—CLAIMANT—OPPOSITE PARTY.

Bengal Tenancy Act (VIII of 1885), ss. 148A, 158 B, sub-s. (2), 170—Suit by co-sharer landlord for his share of rent making co-sharer party and offering to raise valuation if anything found due to co-sharer—Decree for arrears due on account of holding—Claim not allowable in such case—Civil Procedure Code (Act XIV of 1882), s. 278—Civil Procedure Code (Act V of 1908), O. XXI, r. 58.

Certain co-sharer landlords in a suit for rent stated that they had not been able to obtain precise information as to what might be due to their co-sharer whom they made *pro forma* defendant, but they had reason to believe that nothing was due to him and that they consequently sued for what was due to themselves but they offered to increase the valuation of the suit if it should turn out in the end that rent was still due to their co-sharer. Neither the co-sharer nor the tenant entered appearance and an *ex parte* decree was passed:

Held, that, as the co-sharer did not appear, the plaintiffs were entitled to proceed on the assumption that nothing was due to him, and the decree, therefore, was a decree for the whole sum then due to the entire body of landlords, and the plaintiffs were entitled to treat the decree as one for arrears of rent due in respect of the entire holding within the meaning of section 170 sub-section (1) of the Bengal Tenancy Act so as to exclude the application of Rule 58 of Order XXI of the Civil Procedure Code, 1908, and, therefore, no claim could be allowed to be made to the holding which was put up for sale in execution of the decree.

Rule against the order of the Munsif of Howrah, dated April 2, 1910.

Babu *Monmotho Nath Roy*, for the Petitioner.

NANDA LAL *v.* KALA CHAND.

Babus *Sarat Chandra Roy Chowdhury* and *Khirode Lal Sen*, for the Opposite Party.

Judgment.—We are invited in this Rule to set aside an order allowing a claim preferred under Rule 58 of Order XXI of the Code of Civil Procedure of 1908. The petitioners obtained a decree on the 17th May 1909, for arrears of rent due in respect of the disputed holding, in a suit which they had commenced on the 14th April. The plaintiffs were interested in a three-fourth share of the superior interest as landlord. The holder of the remaining one-fourth share was joined as a *pro forma* defendant in addition to the recorded tenant against whom the claim for rent was made. The plaintiffs alleged in their plaint that the annual rent was Rs. 14 a year, that it was jointly payable to themselves and the *pro forma* defendant that the rent due for their share was in arrears, that they had not been able to ascertain whether the rent due for the share of the *pro forma* defendant had been paid, but that they had reason to believe that it had been paid. They consequently brought the suit for recovery of what they believed to be the total amount of rent due; but they stated that if it transpired that any portion of the rent due to the *pro forma* defendant was still unpaid, they would increase the value of the suit and pay additional Court-fees. A notice was served upon the recorded tenant as also upon the *pro forma* defendant neither of whom entered appearance. The result was that an *ex parte* decree was made for the amount claimed. The question for consideration is, whether the decree is of such a nature as to attract the operation of section 170 of the Bengal Tenancy Act, and thus to exclude the application of Rule 58 of Order XXI of the Code of 1908, which corresponds to section 278 of the Code of Civil Procedure of 1882. The plaintiffs assert that the decree obtained by them is a decree for arrears due on account of the holding within the meaning of sub-section (1) section 170 of the Bengal Tenancy Act. The claimant asserts that section 170 has no application, inasmuch as the decree is really one for money obtained by co-sharer landlords in respect of their share only of the rent. After a careful consideration of the arguments addressed to us, we have arrived at the conclusion that the contention of the petitioner is well-founded and must prevail.

It is clear from an examination of the plaint that the suit was intended to be one for the entire amount of rent due. The plaintiffs expressly stated that they were aware of what was due to themselves, that they had not been able to obtain precise information as to what might be due to their co-sharer, but that they had reason to believe that nothing was due to him. They offered to increase the valuation of the suit, if it should turn out in the end that rent was still due to their co-sharer. Under these circumstances we must hold that the suit was one for the whole amount due; indeed, the suit could never have been intended as one by co-sharer landlords for their share only of the rent, because the plaintiffs did not even allege that they could collect rent separately. The co-sharer of the plaintiffs did not enter appearance in the suit; consequently, they were entitled to proceed on the assumption that nothing was due to him and the decree, therefore, which was made in their favour, was a decree for the whole sum then due to the entire body of landlords. Consequently irrespective of the provisions of section 148A of the Bengal Tenancy Act, the plaintiffs are entitled to treat the decree now under execution as one for arrears of rent due in respect of the entire holding. We are also of opinion that if it were necessary for the plaintiffs to rely upon the provisions of section 148A of the Bengal Tenancy Act, their position would be unassailable. That section provides that where a co-sharer landlord, who has instituted a suit to recover the rent due to all the co-sharer landlords in respect of an entire tenure or holding and has made all the remaining co-sharers parties defendants to the suit, is unable to ascertain what rent is due for the whole tenure or holding, or whether the rent due to the other co-sharer landlords has been paid or not owing to the refusal or neglect of the tenant or of the co-sharer landlord-defendant to the suit to furnish him with correct information on these points or on either of them, such plaintiff co-sharer landlord shall be entitled to proceed with the suit for his share only of the rent, and a decree obtained by him in a suit so framed shall be as effectual as a decree obtained by a sole landlord or an entire body of landlords in a suit brought for the rent due to all the co-sharers. In the case before us, the plaintiffs asserted that they had

not been able to obtain information from their co-sharer as to whether any amount of rent was due to him. The co-sharer who was made a party to the suit did not enter appearance. The tenant against whom the claim was made also did not enter appearance. Under such circumstances the plaintiffs could proceed with their suit under section 148A of the Bengal Tenancy Act. But the learned Vakil for the opposite party invited our attention to sub-section (2) of section 158 B and pointed out that the notice contemplated by that section had not been served upon the co-sharer landlord. This is immaterial because if the notice had not been served, there is time yet to serve the necessary notice upon the co-sharer, as execution has been arrested by the claim which has been preferred. The facts disclosed make it reasonably plain that this is an attempt by the transfree of a holding, which is alleged by the landlords to be non-transferable, to get a recognition of his purchase by means of a claim under Rule 58 of Order XXI of the Code in contravention of the provisions of sub-section (1) of section 170 of the Bengal Tenancy Act. We may further observe that the claimant is not without a remedy if he has any real grievance. If by his purchase of the property, he is entitled, as a matter of right, to claim recognition from the landlords, he may, upon the allegations made here, maintain a suit for a declaration that the decree obtained against the recorded tenant is not binding upon the property in his hands.

The result is that this Rule is made absolute and the order of the Court below discharged. The petitioner will have his costs here and in the Court below. We assess the hearing fee in this Court at 2 gold *mohurs*.

Rule made absolute.

CALCUTTA HIGH COURT.

CRIMINAL APPEAL No. 677 OF 1910.

September 13, 1910.

Present:—Mr. Justice Holmwood and Mr. Justice Doss.

ASFAR SHEIKH—ACCUSED—APPELLANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 303—Jury—Unanimous verdict of jury—Questioning jury—First information, use to be made of, whether evidence—Misdirection—Omission—Absconding of accused, value of.

A Judge is not justified in questioning the jury after they have given an unanimous verdict.

The first information is not evidence in the case. It is tendered by the Crown for such use as the defence may be able to make of it and to test the consistency of the prosecution evidence. The most use which a Judge can make of it is to say that although it gave a different account of the occurrence from that in the evidence, yet it can be reconciled with the evidence. It is misdirection on the part of the Judge to ask the jury to accept the statement in the first information in preference to the evidence in the case.

Where the Judge thought it necessary to put the fact that no evidence was adduced for the defence prominently before the jury, he was bound to qualify it by pointing out to the jury that the defence was not bound to call any evidence, that they could rely on the prosecution evidence, as far as it could help them, and that they were entitled to the benefit of any doubt.

Where it was proved that after the alleged occurrence the accused and the villagers absconded, the Judge should point out to the jury that absconding is a matter which is equally consistent with innocence as with guilt and that it could only be considered in connection with the rest of the evidence and that it is in itself a circumstance of no weight.

Appeal against the order of the Sessions Judge of Mymensingh, convicting the accused of an offence under section 304, Indian Penal Code, and sentencing him to undergo rigorous imprisonment for 5 years.

Babu *Debendra Narain Bhattacharjee*, for the Accused.

Mr. *Orr*, for the Crown.

Judgment.—We are of opinion that there must be a re-trial in this case. We do not desire to say anything as regards the facts or the merits of the case, but there are one or two misdirections and certain omissions, and we cannot find that the learned Judge was justified in questioning the jury after they had given an unanimous verdict under section 325 which section was included in the charge under section 304.

The first of the misdirections is that the learned Judge asks the jury to accept the statement in the first information in preference to the evidence in the case and speaks of the introduction of the fiction of the subsequent quarrel in the jute field.

Now, the first information is not evidence in the case. It is tendered by the Crown for such use as the defence may be able to make of it and to test the consistency of the prosecution evidence. The most use, therefore, that the learned Judge could have made of it, was, as he subsequently seems to have pointed out, to say that although it gave a different account of the occurrence from

that in the evidence, yet on the Sub-Inspector's evidence it could be reconciled with that evidence. That is the highest at which he could put it. Then the jury would have had an opportunity of judging whether in that view the positive evidence in the case could be believed.

Then there is a second misdirection, namely, that there was no suggestion that any one other than the accused was the culprit.

Now, apart from the fact that witness No. 5 was asked whether two other men did not beat Gomez with *lathis*, the written statement of the accused gives an account, a general account, it is true, of the occurrence, which certainly suggests that he was not the culprit. He says that the two villagers quarrelled and one villager chased the other across the field and he, therefore, does not know what happened. That surely was a suggestion that whatever wounds Gomez received, were received in that chase. But there are, in addition to these misdirections, omissions, and omissions of very great importance. The charge ends abruptly with the statement "no evidence adduced for the defence." If the Judge thought it necessary to put this fact so prominently before the jury, at least he was bound to qualify it by pointing out to the jury that the defence was not bound to call any evidence, that they could rely on the prosecution evidence as far as it could help them and that they were entitled to the benefit of any doubt. From the abrupt way in which this sentence is placed in the charge, we cannot be satisfied that the learned Judge really put these simple considerations before the jury.

Then there is a question and a very important question which arises on the medical evidence. The medical witness says that the wound on the neck was directed downwards and inwards from the left to right side of the neck; and the evidence also is that the accused was a man very much shorter than the deceased. It should, therefore, have been pointed out to the jury that the direction of the wound was a point worthy of consideration and that it was for them to determine whether it was possible for the accused to have raised his hands to sufficient height to strike downwards at the deceased's neck.

There is a further omission when the learned Judge points out to the jury in the Sub-Inspector's evidence that he found the accused and the other villagers absconding and he follows it up directly by the sentence "under these circumstances can the jury doubt," as if the absconding of the villagers and of the accused was a matter which strengthened the case for the prosecution, instead of pointing out to the jury, as he should have done, that absconding is a matter which is equally consistent with innocence as with guilt and that it could only be considered in connection with the rest of the evidence and it was for the jury to attach any weight to it which the rest of the evidence enabled them to do, but that it is in itself a circumstance of no weight.

For all these reasons, we set aside the conviction and sentence and direct that there be a re-trial with the aid of another jury.

Conviction set aside.

CALCUTTA HIGH COURT.

CRIMINAL REFERENCE No. 3 OF 1910.

September 14, 1910.

Present:—Mr. Justice Holmwood and Mr. Justice Doss.

CORPORATION OF CALCUTTA

versus

MUZAFFER HOSSEIN KHAN.

Calcutta Municipal Act (III B. C. of 1899*)*, *ss.* 407, 408, 409, 574—"*Owner*" *in s.* 407, *meaning of—Owner of land—Owner of* bustee—*Notice—Standard plan.*

The word "owner" in section 407 of the Calcutta Municipal Act does not include "owner of huts" also so as to make it obligatory on the General Committee to hear the objections of "owners of huts" under section 407 before the approval of the standard plan.

The Municipality does not proceed against any body under section 408. They issue notices in three different kinds of cases. If huts belonging to the occupiers have to be removed, a notice need be issued to them; if they disobey, they are liable to prosecution under section 574. If improvements are to be done which can be exclusively done by the owners of the land, the same rule applies. If the standard plan includes work which has to be done partly by the owners of the huts and partly by the owner of the land, and a notice is issued under section 408 on either or both of them, and it is disobeyed, the party in default is still liable to be prosecuted under section 574. If the whole of the work has to be done by the owners of the huts then the cancelling of the notice on the owner of the land does not oust the jurisdiction of the Municipality under section 409. If, on the other hand, the Municipality have cancelled the notice on the owners of the *bustee* land but still require him to carry out any portion of the work, it is clear that they must serve fresh notice on the owner of the *bustee* before they can become vested with any jurisdiction under section 409.

CORPORATION OF CALCUTTA *v.* MUZAFFAR HUSSAIN.

Reference under section 432, Criminal Procedure Code, made by the Municipal Magistrate of Calcutta on June 11, 1910, for the opinion of the High Court.

Babu *Debendra Chandra Mallik*, for the Municipality.

Babu *Monmotho Nath Mukherjee*, for Muzaffer Hossain Khan.

Judgment.—This is a reference under section 432, Criminal Procedure Code, by the Municipal Magistrate of Calcutta in his capacity as Presidency Magistrate asking this Court to give its opinion upon three questions which arose at the hearing of the case before him. The first of these questions is the only one which can be considered to be really a question of law. The other two are questions of what is the correct practice to be followed in such cases. However, we think, it is within our competency and would be right to give our opinion on the other two questions as well.

The first question is whether, having regard to the definition of the word "owner" in section 3 clause (32) of the Municipal Act, and having regard to the fact that rates for the *bustee* are paid by the owner of the land of the *bustee* under section 180 (to be recovered in part from the owner of each hut as provided by section 182), the word "owner" in section 407 includes "owners of huts" also so as to make it obligatory on the General Committee to hear the objections of "owners of huts" under section 407 before the approval of the standard plan.

We think that this question must be answered in the negative, and that not because of anything in the definition in section 3 which covers the word owner throughout the Act; but because reading the sections which relate to the improvements of *bustees* from section 400 to section 407 consecutively, it is perfectly clear that the objections of the owner, if any, refer to the owner as described in section 405, and section 401 sub-section 2 makes it clear that the notice as regards the improvement is to be served on the owners of the *bustee* and that the owners of the *bustee* are allowed to make objections; and no other objections are referred to. The owners of huts, which have to be removed in conformity with the standard plan, are treated under section 404 and compensation is provided for them. Section 407 and the following sections depend upon section 406 and are to be considered only applicable in urgent cases, but the same principle applies. We, therefore, think that there is no obligation on the Municipality to serve notices on the owners of huts.

With regard to the second question, which is whether the General Committee can under section 408 proceed partly against the owner of the land of the *bustee* and partly against the owners or occupiers of the huts situated on the same *bustee*, we have only to remark that the Municipality does not proceed against any body under section 408. They issue notices in three different kinds of cases; primarily, if huts have to be removed which belong to the occupiers of those huts and nothing else has to be done, a notice need only be issued to the owners of those huts, and if they disobey that notice or if after objection their objection is disallowed and they do not remove the huts, they are liable to prosecution under section 574. In the same way if the improvements are such as can be exclusively done by the owners of the land, the same rule applies to the owners of the land. But, if, as generally happens, the standard plan includes work which has to be done partly by the owners of the huts and partly by the owner of the land and a notice is issued under section 408 on either or both of them and it is disobeyed, or after objection, not carried out, then the party in default is still liable to be prosecuted under section 574.

This brings us to the third question with regard to jurisdiction of the Municipality under section 409, whether the General Committee can cause all or any of the improvements or any portion thereof which are not duly carried out in accordance with the notice under section 408, to be carried out under section 409 after cancelling the said notice under section 408 previously served upon the owner of the *bustee* calling upon him to carry out the said improvements. This depends upon the facts as we have already pointed out. If the whole of the work has to be done by the owners of the huts, then the cancelling of the notice on the owner of the land does not oust the jurisdiction of the Municipality under section 409. If, on the other hand, the Municipality have cancelled the notice on the owner of the *bustee* land but still require him or her to carry out any portion of the work, it is clear that they must serve fresh notice

on the owner of the *bustee* before they can become vested with any jurisdiction under section 409. These are matters which depend upon the facts of each case.

Let the record be sent down to the Municipal Magistrate with this expression of our opinions.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 486 OF 1909.

June 26, 1910.

Present:—Mr. Justice Karamat Husain.

Musammat AKBARI—DEFENDANT—APPELLANT

versus

Sayad BASHIR ALI—PLAINTIFF—RESPONDENT.

Evidence Act (I of 1872), s. 108—Unheard of for seven years—Presumption of death—Presumption as to the time of death—Burden of proof.

Section 108 of the Evidence Act raises a presumption of death at the end of a continuous absence of seven years and not at the time when the question is raised or the suit is instituted. The party, on whom the burden of proving the life of the absentee lies, cannot get rid of that burden by admitting the absentee's death at some subsequent time.

Fani Bhushan Banerji v. *Suraj Kant Roy Choudhri*, 35 C. 25; 5 L. C. J. 649; 11 C. W. N. 883; *Narki* v. *Musammat Phikia*, 14 C. W. N. 341; 37 C. 103; 11 C. L. J. 138; 5 Ind. Cas. 709, *Moolla Cassim* v. *Moolla Abdul Rahim*, 33 C. 173; 2 C. L. J. 236; 15 M. L. J. 317; 7 Bom. L. R. 892; 2 A. L. J. 798; 10 C. W. N. 33; 32 I. A. 177; *In re Phenes Trust*, 2 Ch. A. 139; 39 L. J. Ch. 316; 22 L. T. 111; 18 W. R. 303; *Narayan Bhagwant* v. *Srinivas Trimbak*, 8 Bom. L. R. 226, referred to.

Second appeal from the decision of the District Judge of Moradabad, dated the 16th of March, 1909.

Mr. *Ghulam Mujtaba*, for the Appellant.

Mr. *Surendronath Sen*, for the Respondent.

Judgment.—This was a suit for sale on a mortgage of the 7th of July 1897 executed by one Kallan predecessor-in-title of the defendants Nos. 1 to 5. Defendant No. 6 is a transferee of a portion of the mortgaged property defendants Nos. 1, 2 and 6 appeared and resisted the suit with reference to one-third share in one of two houses on the ground that it belonged to one Salim who died after Kallan. The Court of first instance finding that Salim predeceased Kallan gave the plaintiff a decree which was upheld in appeal by the lower appellate Court. The lower appellate Court in its judgment observes: "The only question in this appeal is whether one Salim died before his brother Kallan, the executant of the bond in suit. The learned Munsif has found that he died". At the end of its judgement the lower appellate Court says: "The learned Munsif was, in my opinion, right in believing that in fact he has not been heard of as stated by the plaintiff's witnesses." The defendant has preferred a second appeal to this Court and two pleas are taken. The first is that the burden of proving that Salim predeceased Kallan lay on the plaintiff and secondly, that the provisions of section 108 of the Indian Evidence Act raise a presumption as to the fact of the death only and not as to the time of death. In support of the pleas taken in appeal, reliance is placed upon the following cases:

(1) *Fani Bhushan Banerji* v. *Surjya Kanta Roy Chaudhuri* (1) and special stress is laid on the following remarks of Geidt, J., who says: "The question for which provision is made in that section is the question whether a man is alive or dead, that is whether he is alive or dead when the question is raised, not whether he was alive or dead at some antecedent date, and the presumption that may, in certain circumstances, be raised is a presumption that the man is dead when the question is raised and not a presumption that he was dead at some antecedent date. If we were to accede to the appellant's contention, we should be reading section 108 as though it ran when the question is whether a man was alive or dead on a certain date, and it is proved that he had not been heard of for seven years before that date by those who would naturally have heard of him if he had been alive on that date, the burden of proving that he was alive on that date is shifted to the person who affirms it." Such a construction would be an extension of the scope of the section which is not warranted by its wordings.

(2) *Musammat Narki* v. *Musammat Phekia* (2). The learned Judges observe as follows:—In *Fani Bhushan Banerji* v. *Surja Kanta Roy Chaudhuri* (1), it is expressly laid down by Geidt, J., that the presumption that arises on a man not having been heard of for seven years is a presumption that

(1) 35 C. 25; 5 C. L. J. 649; 11 C. W. N. 883.

(2) 14 C. W. N. 341; 37 C. 103; 11 C. L. J. 138; 5 Ind. Cas. 709.

he is dead at the time when the question s raised, that is, in this case at the date of the suit, and not at some antecedent date, that is, at the time of Halkori's death in 1872. The judgment of Maclean, C. J., seems on the facts mentioned in the judgment of Geidt, J., to be to the same effect. A similar view was expressed by the Burmah Chief Court in the case of *Moolla Cassim* v. *Moolla Abdul Rahim* (3) and was accepted by the Privy Council. This is not the English law as may be seen in the judgment in the leading case of *In re Plene's Trusts* (4) and the cases therein cited and were the matter *res integra*, we are not sure that we should attribute to the words of section 108 the effect that is given to them in the cases we have mentioned. As it is, however, we have to hold that though a plaintiff alleging Mangru's death in 1869 would not have had to prove it then, the present plaintiff must prove that he was dead three years later. This state of law may give rise to some highly anomalous situation as would be the case, had Mangru's estate been administered in 1872. But in the present case the plaintiff to make good her claim must prove that her father was entitled to 16 annas of what he purported to give her and to do this must establish that Mangru died before his father which she has failed to do."

(3) *Narayan Bhagwant* v. *Sriniras Trimbak* (5), in which Jenkins, C. J., is reported to have said: "We, therefore, have merely to consider whether the Judge was bound as a matter of law by anything contained in section 108 of the Evidence Act, to hold that Trimbak died before Appa. In our opinion, he clearly was under no such obligation. That section according to its terms does not require that the Court should hold the person dead at the expiration of the seven years therein indicated, but merely provides that the burden of proving that he is alive at the time of the suit is shifted to the person who affirms it."

(4) *In re Phenes Trusts* (4). Reliance is placed on the following passage at page 147: "The Exchequr Chamber adopted the doctrine of the Court of Queen's Bench in these terms (2 M. and W. 914), *viz.* 'We adopt the doctrine of the Court of Queen's Bench that the presumption of law relates only to the fact of death, and the time of death whenever it is material must be a subject of distinct proof.'"

On the authority of the rulings quoted above, the learned Vakil for the appellant says that in this case the fact of the death of Salim is admitted and the dispute is as to whether he died before Kallan or after him. This involves the determination of the point of time at which Salim died. Under these circumstances he says that the burden of proof lay on the plaintiff to prove that Salim predeceased Kallan.

The learned Vakil for the respondent, on the other hand, submits that it is unnecessary to prove the death of Salim, that it is sufficient to prove that he has not been heard of for seven years from a particular date by those who would have heard of him if he had been alive, that under section 108 of the Evidence Act he is presumed to be dead after the lapse of seven years from the date on which he was last heard of and that the interpretation put upon that section in *Fani Bhushan Banerji* v. *Surja Kant Roy Chaudhary* (1) and the cases which follow it is incorrect. He relies upon.

(*a*) Best on Evidence, page 340.
(*b*) Taylor on Evidence Vol. I, page 171.
(*c*) Phipson on Evidence page, 628.
(*d*) Wigmore, Vol. II page 3579.
(*e*) *Doe dem. Knight* v. *Nepean Bart* (6).
(*f*) *Rhodes* v. *Rhodes* (7)
(*g*)
(*h*) *Moolla Cassim* v. *Moolla Addul Rahim* (3).

The English law on this subject is very clear. Under that law a person, who has not been heard of for seven years by those who, if he had been alive, would be likely to have heard of him, is presumed to be dead, but there is no presumption as to the time during the seven years at which he died. (1)

(3) 10 C. W. N. 33; 33 C. 173 at p. 176; 2 C. L. J. 236; 15 M. L. J. 317; 7 Bom. L. R. 892; 2 A. L. J. 798; 32 I. A. 177.

(4) 3 Ch. A. 139; 39 L. J. Ch. 316; 22 L. T. 111: 18 W. R. 363.

(5) 8 Bom. L. R. 226.

(6) 5 B. and Ad. 86; 2 M. and W. 895.

(7) 36 Ch. D. 586; 56 L. J. Ch. 825; 57 L. T. 652.

(1) Thus the presumption of death arises whenever seven years' unexplained absence is proved; but when it is necessary to establish the death at any precise period with-

To the same effect are the passages from Best (2) and Taylor (3).

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in the seven years the question must be decided on the evidence adduced in each specific case (see *infra*), pp. 626-27. A person, who has not been heard of for seven years by those who, if he had been alive, would be likely to have heard of him, is presumed to be dead, but there is no presumption as to the time during the seven years at which he died. *Re Phene's Trusts*, 5 Ch. App. 139; *Re Lewes's Trusts*, 6 Ch. App. 356; *Re Rhodes*, 36 Ch. D. 586; *R.* v. *Lumley*, L. R. 1 C. C. R. 196 and see a series of articles on this presumption Sol. Jo. Feb. 15, 1890, *et seq* p. 628.

There is no presumption of law as to the continuance of life (ante pp. 89-90). As to survivorship, if A is proved to have died in a certain year and B to have been last heard of more than seven years prior thereto, A will be presumed to have survived B [*Re Thompson*, 39 Ir. L. T. Jo. 372; *Re Callan*, *id.* Phipson on Evidence p. 628.

(2) The fact of death may, however, be proved by presumptive as well as by direct evidence. When a person goes abroad, and has not been heard of for a long time, the presumption of the continuance of life ceases at the expiration of seven years from the period when he was last heard of, though the burden of proof that he was alive at a particular time within that period, so as to be entitled as legatee to a share of a testator's estate as having survived the testator, lies upon those claiming under him, and must be proved by affirmative evidence. And the same rule holds generally with respect to persons who are absent from their usual places of resort, and of whom no account can be given. But there is no fixed limit of seven years, and the death of a man of seventy-three when last heard of has, on proof of sufficient inquiries, been acted on three years after his disappearance. This is incorrectly spoken of in some books as a presumption of law; but it is in truth a mixed presumption, said to have been adopted—so far as the seven years' limit goes—by analogy to the statute law on two important subjects, the repealed, but re-enacted 1 Jac. 1, c. 11, s. 2, and the still unrepealed 18 and 19 Car. 2, c. 11, s. 2, the former of which exempted from the penalties of bigamy any person whose husband or wife had remained beyond the seas for seven years together or had been absent the one from the other for seven years together in any parts within the King's dominions, the one of them not knowing the other to be living within that time; and the latter still enacting that persons for whose lives leases for lives shall have been granted, who shall remain beyond the seas, or elsewhere absent themselves in the realm for more than seven years, shall, thereupon, in the absence of proof to the contrary, be deemed naturally dead with the addition, however, of the curious proviso practically nullifying in many cases the value of the statute, that if the person whose death has been so presumed, "shall return again from beyond the seas, or shall, on proof in any action, be made appear to be living" the title is then to be revested in the lessee. Best on Evidence, Tenth Edition by J. M. Lely pp. 340-341.

(3) The presumption of life will, however, certainly on the one hand, continue for a period exceeding half a century, unless proof be given either that the party has not been heard of by those persons who would naturally have heard of him had he been alive, or at least that search has been ineffectually made to find him. On the other hand, if evidence be furnished of a person's continuous unexplained absence from home, and of the non-receipt of intelligence concerning him after the lapse of seven years, the presumption of life ceases, and the burden of proof is devolved on the party denying the death. Thus, where a person whose life is insured has not been heard of for seven years, those who have effected the insurance are, at the end of that period, entitled to have it paid. The fixing of this arbitrary period of seven years is explained by its having been inserted in the old statutes concerning leases for lives and since, by analogy been adopted in other cases. A period of seven years is also recognized in the various Acts relating to bigamy. Under the last named statutes, on an indictment, if it appears that the prisoner and his first wife lived apart for seven years before the second marriage, mere proof that the first wife was alive at the latter time will not warrant a conviction, but affirmative evidence that the accused was aware of this fact must be given. Although, however, a person who has not

The law in America is the same (4).

For the sake, of easy reference I quote some of the authorities referred to in Best and other books which lay down the law (5).

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been heard of for seven years is presumed to be dead, the law raises no presumption as to the time of his death, and if any one who seeks to establish the precise period during those seven years, at which such person died, must do so by actual evidence. Taylor on Evidence, Tenth Edition by Hume Williams, K. C., Vo. I, pp. 194, 195.

(4) **Same** (2) **Life and Death.**

It is not possible to say that there is a genuine presumption of *life* with a uniform application. The state of the pleadings will show whose duty it is to prove life at a certain time; and upon his showing life at a preceding time, the Court will usually leave it to the Jury to say whether he has proved his case, but may sometimes apply a genuine presumption shifting the duty of producing evidence, upon the circumstances of the particular case. But there is a genuine presumption of long standing and of universal acceptance to aid proof of *death*. It is generally said to arise from the fact of the person's continuous absence from home for seven years, unheard of by the persons who would naturally have received news from the absentee. The phrasings differ, however, sometimes the absence is stated to be from the jurisdiction; sometimes the element of non-receipt of news is not noticed; moreover, the practice is not uniform in defining the precise point, or combination of facts, at which the burden of producing evidence shifts to the opponent. But the general presumption is unquestioned. Wigmore on Evidence, Vol. IV, s. 2531.

(5) As to the period when the brother might be supposed to have died, according to the Statute 19 Car. 2 c. 6 with respect to leases dependent on lives, and also according to the statute of bigamy (1 Jac. c. I. 11), the presumption of the duration of life, with respect to persons of whom no account can be given, ends at the expiration of seven years from the time when they were last known to be living. Therefore, in the absence of all other evidence to show that he was living at a later period, there was fair ground for the jury to presume that he was dead at the end of seven years from the

It remains to be seen if the law of British India as to the presumption of death is

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time when he went to sea on his second voyage, which seems to be the last account of him. That was about the years 1778, which would carry his death to about 1785. (85) Easts Report Volume VI 1805.

A Testator, by his will dated in 1828, bequeathed a fifth of his residue to W. R. E. R. and J. R. and all other children of J. R. the elder, and the issue of such of his children as should have departed this life, such issue to take such portion of the fifth as their parents would have taken if living. The testator died in 1829. J. R. the elder had two children besides those named in the Will. One of them, N. R. went abroad in 1809 and had not been heard of since 1815. Both before and after the testator's death endeavours were made, by inquiries and advertisements, to ascertain whether N. R. were living or dead, but without success:—Held, that he must be presumed to have died before the date of the Will but nevertheless that his children were entitled to the share which he would have taken if he had survived the testator. *Rust* v. *Baker*, Simon's Reports. Vol. VIII (1835-1837) page 443.

Still it is necessary to determine the first and principal point in the case, because if the learned Judge's direction was also wrong as to that the lessor of the plaintiff would be entitled to retain the verdict, although he obtained it on another ground. The Court is, therefore, called on to review the decision of the Court of King's Bench in *Doe* v. *Nepean*. The doctrine there laid down is that where a person goes broad, and is not heard of for seven years, the law presumes the fact that such person is dead, but not that he died at the beginning or the end of any particular period during those seven years, that if it be important to any one to establish the precise time of such person's death, he must do so by evidence of some sort, to be laid before the jury for that purpose, beyond the mere lapse of seven years since such person was last heard of. After fully considering the argument at the bar, we are all of opinion that the doctrine so laid down is correct. It is conformable to the provisions of the Statute of James I, relating to bigamy, more particularly to the Statute 19 Car. 2 c. 6 relating to

identical with or diffierent from the English law. Section 108 of the Indian Evidence Act enacts that law in the following terms: — "Provided that when the

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this very matter, the words of which distinctly point out, the presumption of the fact of death, but not at the *time*. It is conformable also to decisions on questions of bigamy and on policies of insurance, and it is supported and confirmed by the case of *Rex* v. *Inhabitants of Harborne*. It is true, the law presumes that a person shewn to be alive at a given time remains alive until the contrary be shewn for which reason the onus of shewing the death of Matthew Knight lay in this case on the lessor of the plaintiff. He has shewn the death by proving the absence of Matthew Knight and his not having been heard of for seven years, whence arises, at the end of those seven years, another presumption of law, namely that he is not then alive, but the onus is also cast on the lessor of the plaintiff of shewing that he has commenced his action within twenty years after his right of entry accrued, that is after the actual death of Matthew Knight. Now when nothing is heard of a person for seven years, it is obviously a matter of complete uncertainty at what point of time in those seven years he died, of all the points of time, the last day is the most improbable, and most inconsistent with the ground of presuming the fact of death. That presumption arises from the great lapse of time since the party has been heard of because it is considered extraordinary if he was alive that he should not be heard of. In other words it is presumed that his not being heard of has been occasioned by his death which presumption arises from the considerable time that has elapsed. If you assume that he was alive on the last day but one of the seven years, then there is nothing extraordinary in his not having been heard of on the last day, and the previous extraordinary lapse of time during which he was not heard of, has become immaterial by reason of the assumption that he was living so lately. The presumption of the fact of death seems, therefore, to lead to the conclusion that the death took place some considerable time *before* the expiration of the seven years.

It is true, the doctrine will often practically limit the time for bringing the action of ejectment in such cases, and circumstances may be supposed, as of a lease for seven years commencing on the death of A or of a promissory-note payable two months after A's death, and many other cases which might be put, in which it would be difficult to carry into effect certain contracts or to have remedies for the breach of them; if the parties interested, instead of making enquiry respecting the person on whose life so much depended, chose to wait for the legal presumption such inconveniences may, no doubt, arise, but they do not warrant us in laying down a rule that the party shall be presumed to have died on the last day of the seven years, which would manifestly be contrary to the fact in almost all instances. No such rule is enacted by the statute nor is any (one) authority adduced in which any such rule has been laid down. It is not necessary to make any election between the beginning of seven years and the end of them, and the period to which the death should be referred, as seems at one time to have been assumed. We adopt the doctrine of the Court of King's Bench, that the presumption of law relates only to the fact of death and that the time of death whenever it is material must be a subject of distinct proof. Meeson and Welsby's Reports. Volume II (1836-37) pages 9, 12, 13, 14.

In this case Elizabeth How died on the 20th February 1857, leaving a Will bearing date the 25th of January in the same year. It appeared that her husband left England for the United States, North America, in February 1850 he was known to have arrived at New York on the 6th of April, following to have quitted the ship on the 8th of April and to have gone by steam boat to Albany in the State of New York on the 9th of April, since which time nothing had been heard of him. His wife had caused enquiries to be made for him in the United States in Australia, at the Cape of Good Hope, and elsewhere, and had caused advertisements for him to be inserted in the *Albany Evening Journal* and the *New York Heral* in the year 1856. Since Mrs. How's death George Barter, the executor named in her Will, had continued these enquiries and had advertised for him in a Melborne paper but without hearing any tidings of him. Application for

question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been

probate had been delayed till the present date, because the disposition of the property in the Will was made contingent in the following words "if my husband Edmund How does not return in 12 months after my decease"

On an affidavit of Mr. Barter to the above facts.

Dr. Deane Q. C., moved the Court to decree probate to the executor of the Will of Elizabeth How, as having died a widow. He submitted that the lapse of seven years since Edmund How had been heard of would warrant the Court in granting probate in that form.

Sir C. Cresswell. I think you are entitled to have your motion granted. Seven years have fully elapsed since the husband was heard of which is a fair ground for presuming that a person is dead, but not for presuming that he died at the beginning or at the end of seven years (*a*). Here there is ground for supposing that this person died some time ago. If he had remained in Albany, he would probably have been known there but not having been known it is probable that he died very soon after his arrival there. You may fairly assume that he was dead before the date of his wife's death. Swabey and Tristram's Report Volume I 1858-1860 page 53-54.

If a person has not been heard of for seven years, there is a presumption of law that he is dead, but at what particular time within that period he died is not a matter of presumption, but of evidence and the onus of proving that the death took place at any particular time within the seven years lies upon the person who claims a right to the establishment of which that fact is essential. There is no presumption of law in favour of the continuance of life, though an inference of fact may legitimately be drawn that a person alive and in health on a certain day was alive a short time afterwards.

A testator died on the 5th of January 1861 having bequeathed his residuary estate equally between his nephews and nieces. One of his nephews N was born in 1829, had gone to America in 1853, had frequently written home till August 1858, when he wrote from on board an American ship of war but from that time no letter had been received from him, and nothing was afterwards heard about him, except that he was entered in the books of the American Navy as having deserted on the 16th of June, 1860, while on leave.

Held (reversing the decision of James, V. C.) that his personal representative had not established a title to any share of the testator's estate, and that it must be divided among the nephews and nieces who were proved to have survived the testator. Law Reports Equity Series Volume V (1869-70.) Page 139.

Where a legatee has not been heard of for seven years, his death will be presumed; and the onus of proving that he survives the testator lies upon those who claim under him. In the absence of such proof the legacy will be paid to the residuary legatee or the next-of-kin of the testator, as the case may be.

Johan Lewes, by his Will, gave pecuniary legacies to his son Thomas Lewes, and gave the residue of his estate to Lieut.-Colonel J. Lewes. Johan Lewes died on the 20th of February 1860-Thomas Lewes left England in 1858, and went to Australia, whence he wrote a letter, dated the 3rd of January 1859 since which nothing had been heard of him. The legacies were paid into Court, and the residuary legatee petitioned for payment on the ground that, in the absence of proof that the legatee survived the testator, the legacy must be taken to have lapsed. The Vice-Chancellor Malius made an order for payment accordingly, considering himself bound by *In re Phene's Trusts*. The case is reported where the facts are more fully stated.

The next-of-kin of Thomas Lewes, one of whom had been appointed to represent him, appealed.

Mr. Hardy, Q.C., and Mr. Bevir, for the appellants :—We are prepared to dispute *In re Phene's Trusts* if necessary, but there is a material difference between the cases, for in this case the presumption is that the legatee survived, and it is for the residuary legatee to prove the contrary. The claimant is only a residuary legatee who takes under the Will, and has no better title than the pecuniary legatee. In *Re Green's*

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alive, the burden of proving that he is alive is shifted to the person who affirms it."

The plain meaning of the section is that when the question is whether a man is alive or dead at a particular time and it is proved that he was not heard of for seven years preceding that time by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive at that particular time is shifted to the person who affirms that he is alive. The interpretation put upon it in *Fani Bhushan Banerji* v. *Surja Kant Roy Chudhuri* (1) is that the question for which provision is made in that section is the question whether a man is alive or dead, that is, whether he is alive or dead when the question is raised, not whether he was alive or dead at some antecedent date, and the presumption that may, in certain circumstances, be raised is a presumption that the man is dead when the question is raised and not a presumption that he was dead at some antecedent date. The time "when the question is raised" has been taken in

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Settlement shews that at the end of seven years there is a presumption of death, but there is no presumption of the precise period: *Doe* v. *Nepean*. Certainly none that the legatee died the day after he was last heard of. Moreover, in this case the residuary legatee has applied for the money, and has to prove his case.

Mr. Glasse, Q.C., and Mr. Bagshawe, for the respondent, were not called upon.

Sir W.M. James, L.J.:—

This case is entirely covered by *In re Phene's Trusts*. The Vice-Chancellor says that he is bound by the rule in that case, that a legatee must establish his title by affirmative proof. The rule of law laid down in *Doe* v. *Nepean* (11) that where any person has to prove the fact of death, he proves it by presumption of law from the lapse of time, but when he has to prove the time of death, he must prove it affirmatively, for there is no presumption that the death took place at any time in that seven years. If any thing is to be presumed it would be according to *Doe* v. *Nepean* (11), that the death took place on the first day of the seven years. Death is presumed from the person not being heard of for seven years, and whoever has to make out the case of death at any particular time must prove it by affirmative evidence, and those who claim under a person who is said to have survived a particular period must prove the fact. Here the onus of proof is on those who claim under the legatee, and they have not succeeded. It is impossible to suggest any principle of common law or common sense by which it can make any difference whether the residuary legatee or the next-of-kin are the claimants.

Sir G. Mellish, L. J.:—

I am of the same opinion. If at the end of seven years a preson has not been heard of, the presumption is that he is dead but there is no presumption as to when, during the seven years, he died. The person upon whom it rests to prove the affirmative, either that the legatee was alive or that he was dead at a particular period, must establish the proposition by distinct evidence, and not by showing merely that he was alive at the beginning of the period. I do not think it signifies whether the petition is presented by the residuary legatee or by the representatives of the particular legatee. It would be absurd to make the determination of the question depend upon that, as the executor might then have to keep legacy for ever. The question is upon whom the onus really lies. The representative of the legatee have to make out that the legatee was alive at the death of the testator, for the residuary, legatee can say that he is entitled to everything except what is proved not to come to him. The rule is now clearly established on a right basis, and the appeal must be dismissed with costs. Law Reports Equity Series Vol. VI, (1870-71), pp. 357, 358.

In September 1892, P. who was then twenty-four years of age, disappeared, and he had never since been heard of. Under his father's Will he was entitled to a share of the residuary estate in the event of his surviving the testator. The testator died in June, 1893. Upon a summons taken out by the trustees in 1900 to have it determined how P's share ought to be dealt with:—Held, that P. must be presumed to be dead, and, in the absence of proof that he had survived the testator, the Court, without making any declaration as to the date of P.'s death, gave the trustees liberty to distribute his share on the footing that he had predeceased the testator. Law Reports Ch. D. Vol. I, 1902, page 723.

Mussamat Narki v. *Musammat Phikia* (2) to mean " the date of the suit."

The above interpretation with due respect is not sound. According to that interpretation an absentee is not presumed to be dead at the *end of seven years from the date on which he was last heard of*, but is presumed to be dead when the question is raised, *i. e.*, the date of the institution of the suit *after seven years*. This view is a unique departure in the law of presumption without any principle to support it. One of the strange results that follow is that if a suit is brought immediately after seven years, the absentee may be presumed to be dead on the lapse of seven years, but if the institution of the suit is put off for two, five, seven or nine years, the presumption of the death of the absentee is also put off for a corresponding number of years. The difficulty is noticed in *Musammat Narki's case* (2).

Another result is that a remainder man is not entitled to his estate at the end of seven years from the date on which the life-tenant is last heard of but on the institution of a suit after seven years. A third result is that limitation in cases of transfer by a Hindu widow unheard of for seven years runs from the date, on which the reversioner brings his action against the transferee after the seven years and not from the date on which those years end. A fourth result is that in a case by a Muhammadan for his share in the assets of an absentee, the succession opens out not at the end of seven years from the date on which he was last heard of but on the date of the suit. In short rights and liabilities which accrue on the death of a person are not to accrue in case of his continuous absence on the expiration of seven years from the date on which he was last heard of, but to accrue on the date of the suit in respect of those rights and liabilities after the seven years.

The view taken by Geidt, J., is based on the use of the present indefinite tense in section 108 of the Indian Evidence Act. But every student of the English language is familiar with the fact that the use of the present indefinite is not limited to denote what is present. It also denotes what is always and necessarily true irrespective of any time. "Man is mortal." "Gold is heavier than silver." " Two and two make four," "Things, which are equal to the same thing, are equal to one another." and "Evaporation reduces temperature" are examples. It is the peculiarity of the English language which necessitates the use of the present indefinite in affirming the permanent attributes and necessary connections. Logically speaking, the notion of time, present, past or future, forms no component element of such propositions. They are expressed in Arabic without any verb. Legal commands when expressed in the form of propositions are analogous to propositions which denote necessary connections and hence the present indefinite is the form employed but the relation expressed is as true of the past and of the future as of the present.

Further, other considerations go against that view. There is no connection between the date of the suit and the date on which the question arises. If B institutes a suit on the 1st of January 1910 and alleges in his plaint that C was last heard of on the 1st of January 1900 and that he must be presumed to be dead before the 2nd January 1908. The defendant denies the allegation. The issue in such a case will be:—Is or is not C to be presumed to have died before the 2nd of January 1908? It is thus clear that the question arises with reference to the 2nd of January 1908 and not with reference to the date of the suit.

Section 105 of the Indian Evidence Act runs as follows:— " When a person is accused of any offence, the burden of proving the existence of any circumstances bringing the case under any of the General Exceptions ... ... *is* upon him and the Court shall presume the absence of such circumstances."

Now suppose that a man is accused on the 15th of March 1910 of the commission of a crime on the 15th of April 1890. The question whether he is entitled to the benefit of any of the General Exceptions would, owing to the use of the present tense, according to the view taken by the learned Judges of the Calcutta High Court, be on the 15th of March 1910. The accused person could not, therefore, prove that on the date of the alleged crime, *i. e.*, the 15th April 1910, he was entitled to the benefit of any of the General Exceptions. Such an interpretation of section 105 could hardly be defended. If time were essential in such propositions, one might say that the sections, which enact that

the Court *shall* presume, debar the Court from presuming in the present time. Sections 106, 109, 110, 111 and 114 of the Indian Evidence Act are couched in the present indefinite tense and it seems unreasonable to hold that the presumptions sanctioned by those sections are limited to the present *i. e.*, the time at which the question is raised or the time at which the suit is instituted. It is contended by the learned Vakil for the appellant that as the parties are agreed as to the fact of death and are disagreed as to the date of death section 103 has no application. That section as I have stated raises the presumption of death at the end of a continued absence of seven years and the party on whom the burden of proving the life of the absentee lies cannot get rid of that burden by admitting the absentee's death at some subsequent time.

For the above reasons, I hold that the view taken by the lower appellate Court is right and dismiss the appeal with costs.

Appeal dismissed.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 307 OF 1909.
(CRIMINAL REVISION PETITION No. 215 OF 1909.)

September 16, 1910.

Present:—Sir Arnold White, KT., Chief Justice.

VEYYA MANIKIYAM AND OTHERS—PETITIONERS

versus

V. VENKAIYA AND OTHERS—RESPONDENTS.

Criminal Procedure Code (Act V of 1898), s. 146—Enquiry as to possession—Conflicting claims based on different titles—Refusal of Magistrate to decide as to possession—Jurisdiction.

Where in an enquiry as to possession, the parties put in claims based on different titles, one claiming under a Will, another under a partition, settlement and Will and the Magistrate, holding that he was unable to decide as to the question of possession, ordered that the property do remain under Court attachment till the parties had settled their differences in a Civil Court:

Held, that the Magistrate acted without jurisdiction and should have decided on the question of possession,

Neelammegam Pillay v. *Murugappa Mudeley*, 2 Weir. 110, referred to.

Petition, under sections 435 and 439 of the Criminal Procedure Code, praying the High Court to revise the judgment of the Deputy Magistrate, Ellore Division, of 15th January 1909, in Miscellaneous Case No. 17 of 1908.

Facts of the case are sufficiently clear from the following order of the Magistrate.

"This is a dispute under section 145, Criminal Procedure Code for the possession of certain lands belonging to one Vezzu Ratnam who died in March 1908."

"The chief petitioner is the 2nd wife of Ratnam, the chief counter-petitioner is his son by his 1st wife. The petitioner says that the Counter-petitioner and her husband divided the ancestral property some years before. There is no partition deed. Then in 1907, the deceased Ratnam executed a deed of settlement in favour of the petitioner. The counter-petitioner protested to the Sub-Registrar against its registration but unsuccessfully. Then there is the Will said to have been executed by Ratnam shortly before his death, which the counter-petitioner questions.

"It is evident from all this that the dispute is one of succession to the estate of the deceased and involves the decision of the exact value to be attached to the settlement deed and the Will not to mention the alleged partition. I am unable to decide this, nor is this the proper Court for such a decision.

"The dispute is admittedly as regards the following lands

* * * *

"As I am unable to decide the possession of these lands and I am satisfied there is likelihood of a breach of the peace in regard to these lands, I direct their attachment until a competent Civil Court has determined the rights of the parties thereto, or the person entitled to possession thereof.

"The Tahsildar of Ellore will be appointed Receiver of these lands."

Order.—I think it is clear it cannot be said in this case that the Magistrate was unable to satisfy himself on the question of possession within the meaning of section 146 of the Code and that the order was consequently made without jurisdiction. See *Neelammegam Pillay* v. *Mugappa Mudeley* (1).

The order must be set aside.

Order set aside.

(1) 2 Weir. 110.

MAHALINGA PATHAN *v.* TIRUMALAI PILAAI.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 823 OF 1909.

September 20, 1910.

Present:—Mr. Justice Munro and Mr. Justice Sankaran Nair.

MAHALINGA PATHAN—APPELLANT

versus

TIRUMALAI PILLAI—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. VII, R. 7—Suit for cancellation of sale-deed by vendor and for recovery of properties—Decree for unpaid purchase money—Jurisdiction.

In a suit for the cancellation of a sale-deed and for recovery of properties comprised in the sale on the ground of failure of consideration, the Court is justified, on the principle of Order VII, Rule 7 of the Civil Procedure Code (Act V of 1908), in giving the plaintiff vendor a decree for the amount of the purchase money that, it finds, was not paid to him.

Second appeal against the decree of the District Court of South Arcot, in A. S. No. 160 of 1908, presented against the decree of the District Munsif of Vridachalam, in O. S. No. 123 of 1907.

Facts of the case are fully set forth in the following judgment of the District Judge :—

This is an appeal by the defendant in O. S. No. 123 of 1907 on the file of the District Munsif of Vridachalam. The suit was for a declaration that the sale-deed, dated 4th October 1906 (Exhibit I), executed by plaintiff in favour of defendant is void for want of consideration, to cancel the sale-deed and to recover possession of the properties referred to in the sale-deed together with subsequent mesne profits. The District Munsif found that Rs. 200 a portion of the purchase money had not been paid and gave plaintiff a decree for this amount.

2. It is contended that the suit being one to cancel the sale deed the District Munsif had no right to give plaintiff a decree for money. The general rule is that the plaintiff is not entitled to relief not founded on the pleadings; but as observed in *Gokal* v. *Srimal* (1) "Where on the pleading, the issue and the evidence, the relief is clear, the general rule does not apply". In the present case it was clear from the plaint that the sale-deed was supported by consideration for plaintiff admitted that he had received a promissory-note for Rs. 120 in part payment, consequently plaintiff was not entitled to ask for the cancellation of the sale-deed, and the plaintiff should have been told so at once On the plaint allegations that relief that plaintiff was entitled to, was the recovery of the balance of unpaid purchase money. The fact that plaintiff asked for a relief to which he is not entitled is no reason why he should not get the relief to which he is entitled. He prayed for such other relief as the Court may think fit and, therefore, the Court was justified in granting him the relief to which he was entitled in the case of *Yelumalai Chetti* v. *Srinivasa Chetti* (2) and *Inayat Singh* v. *Izzat-un-nissa Begam* (3)

3. Defendant's pleader relying on the case of *Neelakandhan Namudripad* v. *Ananthakrishna Iyer* (4), contends that plaintff is not entitled to a decree for money as plaintiff has not paid Court-fee on the claim for money. Now section 17 of the Court Fees Act refers to a suit that embraces two or more distinct subjects. The present suit does not embrace two or more distinct subjects. The cause of action is the non-payment of a portion of the purchase money. In the case of *Neelakandhan Namudripad* v. *Ananthakrishna Iyer* (4) it was observed: "It may be that where reliefs are claimed in the alternative with reference to the same cause of action section 17 would not govern the case." I am unable to accept the contention on behalf of the defendant. I find that the District Munsif was justified in giving plaintiff a decree for money.

4. The next point for determination is whether defendant failed to pay Rs. 200 to plaintiff on the date of Exhibit I. It is clear, in my opinion, from the evidence of plaintiff's witnesses that defendant did not pay Rs. 200 to plaintiff on 4th October 1906. I agree with the District Munsif that the evidence of plaintiff's witness No. 3 is very satisfactory. I find that the defendant failed to pay Rs. 200 to plaintiff and dismiss this appeal with costs.

Judgment.—We think the principle of Order VII, Rule 7 of the Code of Civil Procedure, justifies the grant of the decree for money.

The second appeal is dismissed with costs.

Appeal dismissed.

(1) 6 Bom. L. R. 288 at p. 290.

(2) 29 M. 294.

(3) 27 A. 97 (F. B.)

(4) 30 M. 61; 16 M. L. J. 462; 1 M. L. T. 426.

SADHU CHARAN *v.* SARBAMANGALA DASI.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 107 OF 1909.

September 5, 1910.

Present:—Mr. Justice Richardson.

SADHU CHARAN PAL—DEFENDANT No. 1 —APPELLANT

versus

SARBAMANGALA DASI—PLAINTIFF—RESPONDENT.

*Injunction, suit for—Restraining defendant, as under-*raiyat, *from building* pucca *house—Permanent lease granted by* raiyat *to under-*raiyat*—Lease registered, rights of under-*raiyat *under—Bengal Tenancy Act (VIII of* 1885*), ss.* 49, 85, 160*cl.* (*c*).

The defendant, an under-*raiyat* of the plaintiff, was in occupation of *bastee* land under a written lease granted by the plaintiff and purporting to be of a permanent character. The lease had been admitted to registration notwithstanding the provisions contained in clause (2) of section 85 of the Bengal Tenancy Act.

The plaintiff sued for a perpetual injunction restraining the defendant from building a *pucca* house on the land and for an order for the demolition of a *pucca* plinth said to have been already built:

Held, that the plaintiff was not entitled to either of the reliefs prayed for, and that the fact that the lease would constitute a protected interest at a sale of the holding for arrears of rent, was no reason why the defendant should be deprived of the right to build if he has that right under his lease.

Semble. The lease would be void and the defendant liable to be ejected under clause (*c*) of section 49, after due notice to quit, as an under-*raiyat* holding otherwise than under a written lease.

Appeal from the decree of the Sub-Judge of Faridpur, dated September 14, 1908, modifying that of the First Munsif of Chikandi, dated June 11, 1908.

Babu *Dwarka Nath Mitter*, for the Appellant.

Babu *Baikuntha Nath Das*, for the Respondents.

Judgment.—It is clear from the judgments of the Courts below that this suit must be dealt with on the footing that the plaintiff is a *ryot* and the defendant No. 1 an under-*ryot*. The defendant No. 1 is in occupation of *bastee* land, forming part of the plaintiff's holding, under a written lease granted by the plaintiff and purporting to be of a permanent character. The lease has been admitted to registration notwithstanding the provision contained in clause (2) of section 85 of the Bengal Tenancy Act.

In these circumstances, the plaintiff sues for a perpetual injunction restraining the defendant No. 1 from building a *pucca* house on the land and also for an order for the demolition of a *pucca* plinth said to have been already built. The trial Court gave the plaintiff a decree which the lower appellate Court has confirmed so far as the prayer for an injunction is concerned. As regards the prayer for the demolition of the plinth, the learned Subordinate Judge has dismissed the suit. From his decree the defendant No. 1 appeals so far as he is adversely affected thereby.

I fail to see why the plaintiff is entitled to either of the reliefs for which she seeks or why the defendant No. 1 should not build at his own risk a *pucca* dwelling house on the *bastee* land of which he is in occupation. The Subordinate Judge argues that if an under-*ryot* is permitted so to build, he will obtain a protected interest under clause (*c*) of section 160 of the Bengal Tenancy Act to the prejudice of the rights of the *ryot's* landlord. But this argument seems to me fallacious. The clause referred to cannot be so construed as to give the tenant a larger interest than his own lease gives him. It has been held in a series of cases that a lease registered in contravention of the express provision in clause (2) of section 85 is void and must be dealt with as non-existing : see *Srikanta Mondal* v. *Saroda* (1) ; *Fazel* v. *Keramuddi* (2); *Ramgati* v. *Shyamo* (3) ; *Mohendra* v. *Parbutty* (4) ; *Basaratulla* v. *Kasirunnessa* (5). But even if such a lease as we have here is not void for all purposes, the question whether it could be annulled by a purchaser of the holding at a sale in execution of a decree for arrears of rent in irrelevant in the present case. The power to annul is bestowed on the purchaser for the benefit of the landlord but neither the power nor its limitations affect the rights which the landlord possesses under other provisions of the law. No doubt, it is laid dows that the purchaser takes subject to 'protected interest'. But that means no more than this, that at a sale for arrears of rent, he would take subject to those interests so far as they are otherwise valid as against him, and the fact that he would so take, cannot prevent the *ryot's* landlord from asserting at the proper time and by appropriate proceedings such independent rights as he may possess in regard to such interests. In other words, the provisions relating to the annulment of encum-

(1) 26 C. 46. (2) 6 C. W. N. 916.
(3) 6 C. W. N. 991. (4) 8 C. W. N. 136.
(5) 11 C. W. N. 190.

brances give an advantage to the landlord and the purchaser in respect of incumbrances but neither enlarge the rights of the holder of a protected interest nor detract from the specific rights which other provisions of the law confer upon the landlord of *zemindar*. The fact, therefore, (if it be a fact), that the lease here would constitute a protected interest at a sale of the holding for arrears of rent, is no reason why the defendant No. 1 should on that account be deprived of the right to build if he has that right under his lease.

For the reasons indicated I think that the learned Subordinate Judge is mistaken. As I have said I cannot see why the defendant No. 1 should not build a *pucca* house if he so pleases. But I repeat that if he builds, he must build at his own risk, subject, that is, to the provisions of the statutory law as interpreted by the Courts.

The real issue between the parties is not whether the plaintiff is or is not entitled to an injunction but whether or not the defendant No. 1 is entitled as against the plaintiff to treat the lease according to its purport as a permanent lease.

The defendant No. 1 is not afraid of the rights of the plaintiff's landlord; he says that he has himself acquired those rights; what he really wants to know is whether as between himself and the plaintiff he can safely build.' But the suit was brought by the plaintiff and, strictly speaking, it is not properly framed for the determination of that question. The nature of the defendant No. 1's interest under the lease has, however, formed the subject of controversy and argument throughout the proceedings and I may say a few words in reference to this aspect of the case.

In the first place, I concur with the lower Courts that the facts as they are found to be and the plain terms of the lease afford no foundation for raising an estoppel against the plaintiff so as to preclude her from asserting that he is a *ryot*. The lease describes the plaintiff's holding as a *ryoti* holding and it has been found that the defendant No. 1 was, in no way, misled by the plaintiff or induced by her to believe that he was contracting not with a *ryot* but with a tenure-holder. The defendant No. 1, therefore, cannot take refuge in an estoppel and the plaintiff is at liberty to assert her legal rights under the Tenancy Act.

Those rights depend on the true construction of sections 49 and 85 of that Act. I have already referred to the cases which support the plaintiff's contention that the lease is void and that defendant No. 1 is liable to be ejected under clause (*b*) of section 49, after due notice to quit, as an under-*ryot* holding otherwise than under a written lease. Of the cases cited on behalf of the defendant No. 1 three [*Gopal* v. *Eshan* (6); *Madan* v. *Jaki* (7) and *Bipin* v. *Amrita* (8)] are not precisely in point because they deal with clause (3) of section 85 and not with clause (2). The lease here was not registered before the commencement of the Tenancy Act. As to the case of *Tamijuddi* v. *Asgur* (9), I gather that the lease in that case was a registered lease though this is not expressly stated in the report. The lease was one from year to year : it was not permanent or for a term exceeding nine years. It was held, therefore, as I understand, that there was no bar to the registration of the lease, and that so long as the lease was a subsisting lease, as between *ryot* and under-*ryot*, it was valid as against the *royt's* landlord during the continuance of the *ryot's* interest. The lease before me, however, is a permanent lease and it has been registered in contravention of the prohibition contained in clause (2) of section 85. If I had to decide whether the lease is void or not, I should be bound by the chain of authorities previously cited to hold that it is void.

As I think, however, that the plaintiff is not entitled to an injunction, the appeal succeeds. The suit, therefore, is dismissed with costs in all the Courts.

Appeal allowed.

(6) 29 C. 148. (7) 6 C. W. N. 377.
(8) 9 C. L. J. 76; 3 Ind. Cas. 685.
(9) 36 C. 256; 13 C. W. N. 183; 1 Ind. Cas. 942.

MADRAS HIGH COURT.

CIVIL APPEAL No. 66 OF 1905.

CIVIL APPEALS Nos. 64, 65, 129, 134 OF 1907.

CIVIL APPEALS Nos. 35, 36, 40, 41 OF 1905.

AND

SECOND CIVIL APPEAL No. 237 OF 1907.

September 9, 1910.

Present:—Mr. Justice Miller and Mr. Justice Munro.

IN APPEAL No. 66 OF 1905.

KANDUKURI MAHALAKSHMAMMA GARU, (DIED) AND OTHERS—APPELLANTS

versus

THE SECRETARY OF STATE FOF INDIA IN COUNCIL, REPRESENTED BY THE COLLECTOR OF GANJAM—RESPONDENT.

IN APPEALS NOS. 64 AND 65 OF 1907 AND 129 AND 134 OF 1907.

KANDUKURI MAHALAKSHMAMMA GARU (DIED) AND OTHERS—APPELLANTS

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL, REPRESENTED BY THE COLLECTOR OF GANJAM—RESPONDENTS.

IN APPEALS NOS. 35 AND 40 OF 1905.

KANNEPALLI SOORYANARAYANA AVADHANULU AND OTHERS—APPELLANTS

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—RESPONDENTS.

IN APPEALS NOS. 36 AND 41 OF 1905.

BOORLE SREERAMULU—APPELLANTS

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—RESPONDENT

IN SECOND APPEAL No. 237 OF 1907.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL, REPRESENTED BY THE COLLECTOR OF GANJAM—APPELLANTS

vrrsus

KANNEPALLI SOORYANARAYANA AVADHANULU AND OTHERS—RESPONDENTS.

Madras Act (VII of 1865), s. 1—Water-cess—Lands irrigated by Government water—Bed of river, ownership of—Property in river, whether vests in Government—'Natural stream', meaning of—Act III of 1905, s. 2, effect of—Grant of land by Government—Whether implies grant of free right of irrigation—Abstention by Government from levying water-cess—Presumption—Burden of proof—Artificial channel fed by a river or Government channel—Voluntary payment of water-cess—Demand of water cess—Compliance with demand, whether voluntary payment.

Under Madras Act VII of 1865, Government is entitled to charge water-cess if the water with which lands are irrigated is supplied from a river or channel belonging to, or a work constructed by, Government and if there is no engagement between the person using the water and Government by which the irrigation is to be free of separate charge.

A grant of land does not necessarily carry with it a right to free irrigation.

Section 2 of Act III of 1905 is declaratory of the right to property in rivers and all flowing waters.

The provisions of the said section amount to a declaration that, subject to easements and natural rights of other land-holders, all standing and flowing waters, which are not the property of any one else, are the property of Government.

A river is the property of Government within the meaning of Act VII of 1865, even though the property in bed may be vested in the owners of land along the banks, so as to give them the right to accretions or 'lankas' forming therein.

M'Nab v. *Robertson*, (1897) App. Cas., 129; 66 L. J. P. C. 27; 75 L. T. 666; 61 J. P. 468, referred to.

Artificial channels constructed by a *Zamindar*, which, however, are fed by a river, cannot be regarded as sources of supply to the lands which owe their immediate source of irrigation to such channels, and do not on that account create an exemption from water-cess.

The abstention of Government from charging the *Zemindar* with water-cess for a long time does not amount to evidence of an agreement with the *Zemindar* exempting him from such charge. When the origin of title is not known, as in the case of some *inams* granted before the Permanent Settlement, the fact that irrigation was permitted free of charge for a series of years may be evidence of a lost grant, but does not afford room for presuming another grant of irrigation rights.

In all cases the burden is on the person claiming exemption from the charge.

Maria Susai Mudaliar v. *The Secretary of State for India in Council*, 14 M. L. J. 354, referred to.

Payment of water-cess, found to have been illegally levied by Government, entitles the person who paid it to claim its refund. Such payment is not '*voluntary*' and, therefore, irrecoverable, though it was made without any actual attachment or distraint of property.

A demand by Government under the powers given to it by Madras Act II of 1864, amounts to a threat of distraint if the money demanded is not paid, and if payment is made to prevent the execution of that threat.

Muthaya Chetti v. *Secretary of State for India*, 22 M. 100, *Narayanasawmy Reddi* v. *Osuru Reddi*, 25 M. 548 and *Luchmee Doss* v. *Secretary of State*, 32 M. 456; 6 M. L. T. 242; 3 Ind. Cas. 456, referred to.

Clause (*a*) of section 1 of Act VII of 1865 applies when the water irrigating the land is taken from a river belonging to Government.

Second appeal against the decree of the District Court of Ganjam in Appeal Suit No. 161 of 1906, presented against the decree of the Court of the District Munsif of Chicacole in Original Suit No. 306 of 1905.

Judgment.

Miller, J.—The questions for decision in all these appeals except Appeal No. 41 of 1905, which is for costs only, relate to the right claimed by the Government to charge a water-cess under Act VII of 1865 (Madras) on lands in the Urlam *zemindari* and Lukulam *Agraharam* in the Chicacole Taluq of the Ganjam District, irrigated from four channels, the Jalmuru, Polaki, Lukulam and Mobagam channels, all of which take off from the left bank of the river Vamsadhara.

The cess objected to by the *zemindar* and *Agraharamdars* has been levied in some cases on irrigated second crop grown on land classed as irrigable or 'wet' land, and in others on irrigated crops grown on land classed as, 'dry' or unirrigated land. The *zemindar* and the *agraharamdars* claim the right to irrigate free of cess all the land 'dry' or, 'wet' which the channels will command, and as many crops as can be raised thereon.

The Government will be entitled under the Act of 1865 to charge water-cess if the water with which the lands are irrigated is supplied from a river or channel belonging to, or a work constructed by, the Government and if there is no engagement between the person using the water and the Government by which the irrigation is to be free of separate charge.

All the lands commanded by the four channels in question were included in the Haveli lands, which came into the hands of the East India Company in 1765. In 1803 they were divided into four lots and were all disposed of by permanent settlement with the bidder offering the highest "premium" at an auction. Of the four lots, three were soon afterwards in 1809 and 1810 sold up for arrears of revenue, and two of them, Jalmuru and Nagarakatakam, were bought by the Government: the third, Urlam, was purchased by a predecessor of the present *zemindar*. The fourth lot Polaki did not come into the hands of the Government until 1850. The District Judge finds that the Jalmuru, Polaki and Lukulam channels are channels belonging to the Government and, therefore, that water-cess may be charged upon land irrigated under them, but that the Mobagam channel does not belong to the Government and the Vamsadhara river which supplies it does not belong to Government and consequently that no charge can be made for water supplied from that channel.

Both sides have appealed against his decrees in so far as they injuriously affect the rights they claim.

The *zemindar* claims to be the owner of all the channels so far as they lie within the limits of the Urlam Estate, and though the answer to the question, who is the owner of the channel beds, may not materially affect the decision of these appeals, I have thought it best to deal with the question as it has been fully argued. The *zemindar* has at different times made inconsistent allegations concerning the origin of the channels, at one time alleging that they are natural branches of the Vamsadhara river and at another that they were dug by previous *zemindars*. It is clear that the latter allegation cannot be accurate for it is shown by Exhibit LIV that all four channels were in existence before 1792, that is to say, before the Haveli lands were settled as *zemindari* land. Nor is there any evidence to support the former suggestion. What evidence there is,—there is not much—points the other way. In 1854 Captain Rundall writes of the channels as old native works excavated with a great fall in their beds and gradually enlarged by the action of the unregulated volume of water passing along them (Ganjam District Manual, page 253). Exhibits G (1526), C (1854) and E (1889) show that some of the channels have always been regarded as artificial, and I think it must be taken in this state of the evidence that all are artificial channels. At the date of the auction in 1803, they watered Haveli lands and certain *inams* but when the Haveli lands were permanently settled the right to collect the dues payable by the *inamdars* was also alienated to the *zemindars*. Thus it may be said that the only lands watered by the channels after the permanent settlement were *zemindari* lands.

Now it is contended on behalf of the Government that when the Haveli lands were divided into lots and transferred to *zemindars*, the channels were reserved in the hands of the Government, and on behalf of the *zemindar* that they were alienated with the lands.

There is nothing in the *Sanad*, granted to the *zemindar* at the permanent settlement, which helps to elucidate the matter. No

mention is therein made of channels or water courses. In the instructions to Collectors issued in 1799, which form an appendix to the well-known "Fifth report from tbe Select Committee on the affairs of the East India Company", it is stated to have been the intention of the company to leave the construction and care of the water-courses entirely to the *zemindars* unless it should be thought that the works were such as for special reasons to be stated by the Collector ought to be retained under the care of the Government (Fifth Report, Volume II, page 331, paragraph 59). We have not been shown anything in the evidence to indicate that any channels or works in the Haveli lands were so reserved, nor does it seem probable that the Government would at that time have deemed it necessary to reserve a channel merely because it watered the lands of more than one *zemindar*. The *zemindars* could settle the distribution of the water according to custom or by arrangement. *Ambalavana Pandara Sannadhy* v. *Secretary of State for India* (1), a case, relied on by the Government, is distinguishable, for there the channel in question irrigated lands other than *inam* lands, and it was held unlikely that in that case the grant of the *inam* carried with it the grant of the channel.

And so far as appears from the evidence, the Govcrnment did not, until some of the property came back into its own hands, exercise any control over or in any way interfere with any of the channels. The Jalmuru and Nagarakatagam estates quickly returned to the ownership of the Government but Polaki remained a *zemindari* until 1850, and beyond the authorisation of the removal of the head of the Polaki channel to a point on the bank of the river within a Government village, there is nothing to shew that the Government interfered with this channel any more than with the others. After the re-purchase of the Polaki estate we find the Government controlling and directing the improvement, maintenance and repair of all the channels, but after the re-purchase of all the Polaki estate the Government had a substantial interest in all, as considerable areas of *ryotwari* land were irrigated by all. On the whole the evidence seems to me to support the contention that the beds of the channels were not reserved by the Government at the permanent settlement but passed with the lands to the respective purchasers in so far as they lay within the limits of the land purchased by each, to the same extent and in the same way as tank beds, village sites and other poramboke lands. That, however, as I have already said, does not decide the questions at issue in these suits. It does not follow because the *zemindar* provides the necessary channels to enable the irrigation of the *zemindari* lands, that although those channels carry water supplied from a river or channel belonging to the Government, the irrigation is nevertheless exempt from water-cess.

It is argued, however, if I understood Mr. Ramachandrayyar aright, that the non-reservation of the channel beds is evidence that the grant was intended to convey the right to use all the water flowing in the channels without interference or charge, that is to say, is evidence of an engagement with the *zemindar* freeing all the land commanded by the channels from separate charge for irrigation. But I do not think we can from the non-reservation of the beds presume anything more than that the Government fixed the revenue with reference to the extent of land under irrigation at the time: we have none of the permanent settlement accounts before us and no evidence that the *peshcush* of the *zemindari* was fixed with a view to any possible extension of irrigation. Statements such as those, to which we have been referred in the 5th report, expressing a hope that permanent settlement would have the effect of improving and extending the cultivation of the country are not evidence of an agreement in any particular case to permit free irrigation from Government sources of water supply.

The abstention of the Government from charging water-cess until 1901 is adduced as evidence of an agreement but does not help the *zemindar*. When the origin of title is not known as in the case of some *inams* granted before the permanent settlement, the fact that irrigation has been permitted free of charge for series of years may be evidence of a lost grant, but in the present case we know that before the settlement in

(1) 28 M. 539; 15 M. L. J. 251.

1803, the Government had the full rights of owner (apart from *ryot's* rights, if any) in all the land and water-courses, and we know what is contained in the *sanad* under which the *zemindar* holds. There is, therefore, no room for presuming another grant of irrigation rights.

It was suggested that an agreement between the different *zemindars* may be presumed, but that, if any could bind the Government as re-purchaser only so far as it relates to rights in the *zemindar* from whom the purchase was made: the right to make a separate charge for irrigation, if it then existed in Government, was not sold to the *zemindars*.

There is a quantity of evidence as to the construction and repair of works in the different channels, but I do not think it is of great significance in the present case. I will take it in favour of the *zemindar* that the works constructed and the repairs executed by the Government were to secure a supply of water for irrigation principally for the benefit of the *ryotwari* lands under the channels and the expenditure on such works and repairs can be roughly apportioned between the Government and the *zemindar* as proportional to the areas of *ryotwari* and *zemindari* land respectively commanded by the channels: but it does not seem to me that that helps the case of the *zemindar*. An arrangement of this kind for the upkeep of the channels by the parties interested might be equally just and fair whether the water which reaches the land is supplied free of charge or has to be paid for.

Then it is urged that we have the admission of officers of the Government that the irrigation is to be free of charge. It is not contended that these admissions bind the Government but only that they are evidence in support of the existence of the suggested engagement.

In 1856 the question of charging water rate was raised and the Collector expressed an opinion that the Lukulam and Mobagam channels should irrigate free of charge on the ground that they were maintained and repaired by the *zemindar* and *Agraharamdars*. In 1893 the *zemindarni* claimed the right to irrigate as much as she liked without separate charge and the Collector was of opinion that no charge should be made: he took the ground that documents shewed that the *zemindarni* had the right she claimed, and that in the absence of a regular survey of the *zemindari*, it could not be ascertained whether or not the area then under irrigation exceeded the area shewn in the 'Gudikat' accounts as irrigable (Exhibit FF).

The documents on which the Collector relied were, *first*, an agreement between the Polaki and Uralam *zemindars* in 1842; we do not know the purport of this agreement but so far as I can see it could not affect the right of the Government to levy water-cess though it might affect the right to regulate the flow of water in the Polaki Channel to the lands of the Urlam *zemindari*. *Secondly*, some correspondence in 1861 in the course of which the Government Engineer directed that water was to be allowed to the *zemindar* 'for present and future crops to the end of the year' as usual. We do not know the grounds on which the Board of Revenue accepted the Collector's recommendation. They are not detailed in Exhibit R 1, but so far as the right to irrigate second crop was in question, the Collector's view that the *zemindar's* right was proved must have been accepted: justification for the result, as far as the extension of irrigation to dry lands was in question, is found in the impossibility of ascertaining the area of the extension without a survey which apparently was considered not worth the expense involved.

There is in all this no evidence which indicates any engagement with the Government other than that which can be inferred from the Permanent Settlement, namely, that the *peshcush* being fixed with reference to the area of land, then under irrigation no further charge for the use of water should be made in respect of that area. (As to this see correspondence XXIV series).

In the absence of any more extensive engagement, then, it has to be decided whether the Urlam *zemindari* is supplied with water from a river, stream or channel belonging to the Government.

I have little doubt that it is so supplied.

Mr. Sundarayyar relied on Act III of 1905 as declaratory of the law and I did not understand Mr. Ramachandrayyar to dissent from his contention on that point. His argument was that the Act left the law as it was before except in the matter of encroachments on land.

But the provisions of section 2 are clear enough and we cannot ignore a declaration contained in that section simply because the other provisions of the Act deal principally with the question of encroachments on public land. So far as this case is concerned, the provisions of section 2 amount to a declaration that, subject to easement and natural rights of other land-holders, all standing and flowing waters which are not the property of any one else are the property of the Government. Now clearly the waters of the Vamsadhara river do not belong to any one else: the owners of land on the banks of the river do not own the water: their natural right as defined by the Easements Act is saved by Act III of 1905, but it is not contended that the water is their 'property.' It follows that it is the property of the Government.

And if the body of water forming the river is the property of the Government, the river, it seems to me, belongs to the Government within the meaning of Act VII of 1865, even though the bed may be vested in the owners of land along the banks, so as to give them the right to accretions or 'lankas' forming therein. The Vamsadhara river is undoubtedly a natural stream, and the definition of a natural stream given in the explanation to section 7 of the Easements Act indicates that in the eye of the law the stream is the flowing body of water—and a stream was defined by Lord Watson, in *M'Nab* v. *Robertson* (2), as "a body of water having as such body a continuous flow in one direction."

In this view it becomes unnecessary to discuss the question whether the bed of the Vamsadhara belongs to the Government as being the bed of a navigable river. It may be that for a portion of its course the land owners on either bank have proprietary rights in the bank and bed; that, in my opinion, will not prevent the river from being a river belonging to the Government within the meaning of Act VII of 1865.

The District Judge seems to be of opinion that it is not the river but the artificial channels which are to be regarded as the source of supply within the meaning of the Act VII of 1865: I did not understand that Mr. Ramachandrayyer supported that view: he rested his case in regard to the river on the contention that the river bed did not belong to the Government.

It remains to be seen to what extent the levy of water-cess is lawful in the present cases, and here it is desirable to deal separately with the different appeals.

APPEAL No. 66 OF 1905.

Appeal No. 66 of 1905 is an appeal by the *zemindar* from the decree of the District Judge in Original Suit No. 3 of 1904 dismissing a suit to recover money paid as water-cess on *zemindari jerayati* land irrigated for second crop from the Polaki, Jalmuru and Lukulam channels.

The irrigation accounts (see for example Exhibit XC) on which the charges are based shew that the second crops in question are not what are ordinarily known as 'wet' crops, *i. e.*, crops requiring constant irrigation: they are crops irrigated by one or two floodings of the ground, principally green gram and gingelly, and if it be found that crops of this kind were grown and irrigated at the time of the permanent settlement, we must imply an engagement to make no separate charge for irrigation in the future.

There is naturally not much evidence now in the absence of any accounts prior to the settlement, and the abstention of the Government from making any charge for so long a period after the enactment of Act VII of 1865 has placed the *zemindar* in a difficult position; but the burden is on the *zemindar* to prove the extent of his right [*Maria Susai Mudaliar* v. *The Secretary of State for India in Council*(3)], and, in my opinion, the evidence is insufficient to discharge it. At the most the evidence shows that it is probable that some land in the *zemindari* was before 1803 cropped with second crops such as are now grown therein.

Exhibit B (1823) shews that spring crops were watered in Kottapolavalasa and probably in Kabagam in that year. In Exhibit D (1855) the *inamdars* of Lukulam complain that much water is taken to grow spring crops in Polaki village which ought to come to their channels. In Exhibit O (1861) the Engineer directs a subordinate to make provision for the irrigation of 'present and future crops' to the end of the year. There is also evidence that at the *inam* settlement about the same year second crops of 'green

(2) (1897) A. C. 129; 66 L. J. P. C. 27; 75 L. T. 666; 61 J. P. 468.

(3) 14 M. L. J. 354.

gram, &c.' were very generally grown on the *inam* lands. The District Judge relies on a remark at page 232 of the District Manual as indicating that the raising of a second crop is exceptional but that remark, it seems to me, refers only to second crops of paddy and sugarcane, the staples referred to in the preceding paragraph. Some passages on page 238 are more relevant to the present case. Second crops of green gram, it is there stated, are sometimes raised on paddy land when there is water; and again wet lands are used for oilseeds in April and May. I have already remarked that the second crops on which the charge is levied are principally green gram and gingelly (an oil seed crop).

In Exhibit LXIV (1810), the Collector informed the Board of Revenue that Urlam *zemindari* was then reckoned one of the best, if not the best of the estates in the Chicacole Taluq, and from Exhibit XXIV, we find that it was the opinion of the officers of Government that the *peshcush* was fixed at high rate.

We get no aid from the practice of the Urlam *zemindar:* the rents paid by the *ryots* were in 1884 fixed, "at conventional rates not based on any ascertained principle" (Exhibit XXIX) and we have nothing before us to shew whether these rates prevail at the time of the Permanent Settlement or are calculated so as to give the *zemindar* a share of the profits of two crops.

I do not think there is any other evidence on this point to which we have been referred, and it is impossible to differ from the District Judge's conclusion that we have not enough to show that the charge of water-cess on second crop *jerayati* is not legal. Appeal No. 66 of 1905 must, therefore, be dismissed with costs.

APPEALS NOS. 64 AND 65 OF 1907.

Appeals Nos. 64 and 65 of 1907 and the memorandum of objections in Appeal No. 64 next fall to be considered. Appeal No. 64 of 1907 is presented by the *zemindar* from the decree of the District Judge in Original Suit No. 19 of 1905. In that suit three questions were raised as to the right of the Government to levy water cess (1) as in Original Suit No. 3 of 1904 on second crop on *jerayati* land (2) on first and second crops on *inam* lands and, (3) on first and second crops on *jerayati* land alleged by the Government to have been unirrigated or 'dry' at the time of the permanent settlement. The District Judge upheld the claim of the Government so far as it related to irrigation from the Jalmuru, Polaki and Lukulam channels, but holding that the Mobagam channel belonged to the *zemindar* declared that the Government is not entitled to levy water-cess on lands irrigated under that channel.

The *zemindar* appeals in Appeal Suit No. 64 of 1907, and the Government by a Memorandum of objections raises the question of its rights in respect of the Mobagam channel. Appeal No. 65 of 1907 is by the Government and is put on the same ground as the memorandum of objections.

As regards extension of irrigation in *jerayati* land, *i. e.*, the conversion of 'dry' land into 'wet,' I have already pointed out that the only engagement on which the *zemindarni* can rely is an engagement enabling her to irrigate free of separate charge the extent of land which was classed as 'wet' at the time of the permanent settlement. In arriving at a conclusion as to this extent, the District Judge has relied on accounts prepared in 1853 showing the area then irrigated. These accounts (called the *gudikat* accounts), though not based on an accurate survey and measurement of the land (Exhibit FF, para. 7), were found by the *Inam* Deputy Collector to have been carefully prepared (Exhibit LXXI, 1st paragraph) and were in some cases accepted as the basis of the *Inam* settlement. They form the most trustworthy evidence we have on which to base an estimate of the extent of irrigation at the date of their preparation, and as there is no evidence of any decrease of cultivation between 1803 and 1853, it is not likely that they are generally in favour of the Government. But a discrepancy was pointed out to us as an example of their inaccuracy: Exhibit LXIX, the *gudikat* account of the Urlam village, is inconsistent with Exhibit CVII the water rate account of the same village. The area of 'wet' land taken from the *gudikat* account is 706 acres, the area actually irrigated is found to be 1039 acres and the difference between the two is charged with water-cess. But 1039 acres is more than the whole cultivated area including *inams* as given in the *gudikat* account, and almost equal to the total area of the village including puramboke. Mr. Sundarayyar suggests that the difference

may be accounted for by the cultivation of purambokes but there is no evidence in support of the suggestion. In the absence of any such evidence, it is fair to infer that the difference is due to an underestimating of the area by the officer responsible for the preparation of the *gudikat* accounts. In Exhibit FF, the Collector suggested that the Government might allow 10 *per cent.* of the estimated area for possible inaccuracies in the estimate, but this does not appear to have been done. Possibly the Government Officers were of opinion that any underestimate which might operate to the prejudice of the *zemindar* would be compensated by probable extensions of irrigation between 1803 and 1853, which were left out of account and this may, in general, be a fair assumption although there is in fact no evidence of any great extension of irrigation, and Exhibit XXIV shows that under the Polaki channel the improvements made had rendered the supply sufficient for the lands already irrigable but had probably not resulted in any large extension of irrigation to the 'dry' lands.

But in the case of Urlam village, we have positive evidence that the area of wet land must have been more than 703 acres in 1853, while there is no evidence that it was not more than that extent in 1803. In these circumstances, it seems to me that an attempt should be made to estimate the probable extent of the underestimate.

The area of 'dry' land in the *gudikat* account (LXIX) is so small that the inaccuracy must be to a large extent in the estimate of the 'wet' land: and I would arrive at a conclusion by the following method. Assume in favour of the Government that all the dry cultivable land in the village has been converted into wet: then $745\frac{1}{2}$ *acres* (the total *Sarkar* cultivable area as per *gudikat* account) represents an actual area of 1039 *acres*: and 706 *acres* as per *gudikat* account represents 984 *acres* on the ground, and this is the area of the '*mamul* wet'.

We are not asked by either side to adopt this method of cultivation. For the *zemindar*, it is urged that the discrepancy is enough to discredit the whole *gudikat* accounts, and for the Government that we should assume that the difference is due to cultivation of purambоke lands. I am not prepared to do either. The *gudikat* accounts may be accepted where there is no evidence to discredit them, and corrected by the method I propose when there is clearly an underestimate.

There is a similar underestimate in regard to the village of Kobagam where the total *Sarkar* area is 395 *acres* while the actual area charged is 410 *acres*, the *mamul* wet being 360 *acres*. The difference in this case is small. By the same method of calculation 360 *acres* as per *gudikat* account will be found to represent 370 on the ground. The extent on which the Government is entitled to charge water-cess will, therefore, be in Urlam 1039—984=55 *acres* and in Kobagam 410—370=40 *acres*.

As to the *inams* we have the accounts prepared at the *inam* settlement and there is nothing to suggest that they are incorrect. We must accept them.

In the case of second crop on *jeruyati* lands, I have already shown that the *zemindar* has failed to make out a right to free irrigation.

Then as to second crop on *inam* lands, we have to go by the *inam* settlement. The difficulty arises because there are no statements of areas grown with second crop at the date of the settlement, but there are statements made by the *Inam* Deputy Collector which indicate that in estimating the income from the land the cultivation of second crops was taken into consideration.

In Exhibit LXXVI, we have an explanation of the method adopted to ascertain the profits of the land. The village under consideration was compared, with reference to its fertility and irrigation facilities, with some village in the neighbouring Polaki Estate which had shortly before come into the hands of the Government and an acreage rate of rent or land tax was fixed, based on an average of the rates obtaining in the Polaki Estate village taken for comparison.

In considering the fertility of the village, the question whether the lands are cultivated with second crop is always taken into account, and except in the village of Venkatapuram we find from the statements that the cultivation of second crops was general. I do not understand the District Judge to say that the acreage rates were fixed without reference to this factor; his view seems to be that the second crops to which reference is made in the statement were not irrigated crops.

In that view I have no doubt he is wrong; he relies on a remark in Exhibit LXXI to the effect that 'wet grain and paddy' are not grown as second crops in Lukulam but the crops on which the Government is now charging water-cess are not "wet grain or paddy," but green gram, gingelly, chillies &c. The statements show that this kind of crop was grown generally as second crop on wet lands and the District Judge's surmise that it was grown without irrigation is unlikely to be correct.

For in the *first* place, if those crops were generally irrigated in 1901, it is not unreasonable to suppose that they did not grow without irrigation in 1861—and *secondly*, in the statement for Venkatapuram village it is alleged that the lands are not cultivated a second time "*for want of water*": the obvious inference being that in the other villages where the lands are cultivated a second time that cultivation is with the aid of water—and *thirdly*, I may remark that in dealing with O. S. No. 30 of 1906 (Appeals Nos. 129 and 134 of 1907) the District Judge himself found that for such crops one flooding to prepare the land was essential. I conclude from all the evidence on this point that the assessment of the *inams* was fixed with reference to the capacity of the land to grow an irrigated second crop, and consequently, when second crops were grown, includes a payment for such crop: and the Government cannot demand a second payment on the same account.

Appeal No. 65 of 1907 is by the Government claiming the right to charge water-cess on lands irrigated from the Mobagam channel. The District Judge has disallowed this claim holding that the Mobagam channel belongs to the *zemindar*. I have shown that the water of all these channels is supplied or used from a river belonging to the Government and that the ownership of the bed of the channel is really beside the question. Appeal No. 65 of 1907 must be allowed.

A question is raised on behalf of the Government whether the *zemindar* is entitled to recover anything, whatever be the result of our decision on the other questions. It is urged that the payment of the water-cess must be regarded as voluntary and, therefore, irrecoverable payment, because it was made without any actual attachment or distraint of the *zemindar's* property. The case *Muthayya Chetti* v. *Secretary of State for India* (4), is relied on. The plea is one which I suppose the advisers of the Government feel bound to raise, though probably a refund would, as a matter of fact, follow on a declaration by the Courts of the *zemindar's* right to free irrigation of land on which water-cess had been collected.

But I do not think the plea can be sustained. A demand by the Government having at its back the powers given by Act II of 1864 must, unless in special circumstances which are not shewn here, amount to a threat of distraint if the money demanded is not paid, and if payment is made to prevent the execution of that threat. I am unable to see how the payment can be regarded as a voluntary payment. [See *Narayanasami Reddi* v. *Osuru Reddi* (5) and *Lutchmee Doss* v. *Secretary of State for India* (6)].

I would, therefore, modify the decree and refuse the declaration (*a*) prayed for in paragraph 30 of the plaint: grant a declaration that the plaintiff is entitled to irrigate free of water-cess second crops grown on the *inam* lands belonging to her except on those situated in the village of Venkatapuram to the extent of the wet area specified in the respective title deeds, by means of water flowing &c., as in prayers (*b*) of paragraph 30 of the plaint, and direct payment to the plaintiff of the amount collected for second crop on *inams* so far as the collection is unauthorised by this declaration—and also payment of the difference between the claim on *jerayati* first crop in Urlam village and the amount due taking the extent of *mamul* wet to be 984 instead of 706 *acres* the extent in Kobagam village being 370 instead of 360 *acres*. As to interest, the District Judge allowed interest and we do not intend to disallow it. Interest will be allowed on the sums decreed at the rates allowed by the District Judge up to the date of decree and at 6 per cent. on the aggregate after the date of decree till the date of payment.

Each party should pay his own costs in Appeals Nos. 64 and 65 of 1907. As the memorandum of objections in Appeal No. 64 of 1907 is unnecessary, it must be dismissed but as its grounds are identical with those in Appeal No. 65 of 1907, its presentation can-

(4) 22 M. 100.
(5) 25 M. 548.
(6) 32 M. 456; 6 M. L. T. 242; 3 Ind. Cas. 456.

not have increased the costs of the plaintiff and it will be dismissed without costs. Each party should bear his own costs in the lower Court.

APPEALS NOS 129 AND 134 OF 1907.

These are appeals from the Subordinate Judge's decree in Original Suit No. 30 of 1906.

The suit was for declaration similar to those prayed for in Original Suit No. 19 of 1905 and refund of water-cess collected for *Fasli* 1314, and our decree should follow that in Appeals Nos. 64 and 65 of 1907. There is one question raised which was not in Original Suit No. 19 of 1905 and which requires separate consideration. It is dealt with in the 11th and following grounds of appeal in Appeal No. 134 of 1907 and in the thirteenth and following paragraphs of the judgment of the District Judge. I agree with the District Judge on the evidence that the water was used to irrigate second crops on lands ordinarily irrigated from the Mobagam channel, and that the water so used was surplus water of the Polaki channel and was carried to the Mobagam channel through various branch channels.

I also agree with the District Judge that clause (*b*) of section 1 of Act VII of 1865 does not apply to the case because the land was not irrigated by water flowing from or through adjoining land within the meaning of that section nor was it stored in a reservoir and thereafter used. But it seems to me that clause (*a*) is applicable: the water is used from a river belonging to the Government, just as much as is any other water used from the Polaki channel. The question what would be the rights of the parties supposing the waters of the Mobagam channel were mixed with those of the Polaki channel does not arise; whether the irrigation from the Mobagam channel is or is not irrigation with water supplied from a river belonging to the Government: because no water from the Mobagam channel head was used in this case and for the purposes of this question the Mobagam channel bed formed only a branch channel from the Polaki channels. I would allow the Appeal No. 134 of 1907 on this point, and in other respects modify the decree in the manner indicated in disposing of the Appeals Nos. 64 and 65 of 1907. Each party should bear his own costs in Appeal No. 129; and Appeal No. 134 is allowed with costs. Each party should bear his own costs in the lower Court.

APPEALS NOS. 35 AND 36 OF 1905.

Appeals Nos. 35 and 36 of 1905 are appeals from the decree of the District Judge in Original Suits Nos. 37 and 38 of 1903 by the Lukulam *agraharamdars* in regard to water-cess on second crops grown on wet lands in their *agraharam*.

It seems to me clear from Exhibit H (which is Exhibit LXXI in Appeal No. 64 of 1907) that the rates fixed in order to arrive at the quit-rent stated in Exhibit J were struck in consideration of the circumstances that the lands were generally grown with second crops. It cannot be doubted, I think, that in arriving at his rate of Rs. 6 per acre the *Inam* Deputy Collector relied on the fact that even in unfavourable seasons the wet lands were twice cultivated. It follows that a payment for a second crop irrigated, at any rate for a second crop of the kind on which water-cess is now levied, was included in the amount on which the quit-rent was fixed, and a further charge on that account would be a violation of the engagement implied in the grant J.

Appeals Nos. 35 and 36 of 1905 must be allowed and the respective plaintiff in Original Suits Nos. 37 and 38 of 1903 given decrees declaring that of the lands in their *agraharam* classed as wet lands the extent specified in their title-deeds is entitled to irrigation free of water-cess for second crops of gingelly, green-gram, ragi, &c., raised thereon after the ordinary wet crop with the water of the Vamsadhara river through the Lukulam and Mobagam *geddas* (in Appeal No. 35 of 1905) and through the Lukulam *gedda* (in Appeal No. 36 of 1905) and a direction to refund the amount claimed with interest at 6 per cent. from date of levy to date of payment.

In the lower Court and in the appeals, the parties will pay their own costs as the *agraharamdars* fail in their claim for unlimited free irrigation.

APPEAL NO. 40 OF 1905.

In Appeal No. 40 of 1905 the Government succeeds so far as the declaration is concerned, but fails as regards the second crop charge claimed. Each party may, therefore, bear his own costs.

APPEAL NO. 41 OF 1905.

Appeal No. 41 of 1905 is an appeal from the decree of the District Judge in Original

Suit No. 38 of 1903 in so far as it refuses costs to the Government. As I hold that Original Suit No. 38 of 1903 ought not to have been dismissed and that each party thereto ought to pay his own costs, I think this appeal must be dismissed with costs.

S. A. No. 237 of 1907.

Second Appeal No. 237 of 1907 is an appeal by the Government from the decree of the District Judge in Appeal No. 161 of 1906 on his file. He there held that the Government was not entitled to collect water-cess on the second crop raised on their *inam* lands by means of water drawn from the Mobagam channel.

The plaintiffs did not set up any engagement with the Government or give evidence of any such engagement. They rested their case on an alleged right to irrigate from the Mobagam channel free of water-cess. I am of opinion that they have not that right for reasons already given: and in the absence of any engagement, the Government is entitled to levy a separate charge on second crops.

The appeal must, therefore, be allowed and the suit dismissed with costs throughout.

Munro, J.—I agree.

Appeal allowed.

CALCUTTA HIGH COURT.
CIVIL RULE No. 3089 OF 1910.
September 2, 1910.
Present:—Mr. Justice Mookerjee and
Mr. Justice Teunon.
INDRA NARAIN MANNA—
PETITIONER
versus
NUT BEHARY JANA—OPPOSITE PARTY.

Attachment of holding before judgment—Surrender of holding during attachment—Surrender invalid if holding transferable—Civil Procedure Code (Act V of 1908), s. 64.

In a suit for money, a holding of the defendant was attached before judgment. During the continuance of the attachment the defendant surrendered the holding and the landlord settled it with another person. The plaintiff obtained a decree and in execution purchased the holding:

Held, that, if the holding was transferable a surrender of it after attachment could not, in view of the provisions of section 64 of the Code of 1908, affect the position of the decree-holder purchaser or create in the landlord and his new tenant any preferential right.

Rule against the order of the Munsif of Uluberia, dated June 11, 1910.

Babu *Surendra Nath Guho*, for the Petitioner.

Baba *Nalini Ranjan Chatterjee*, for the Opposite Party.

Judgment.—We are invited in this Rule to set aside an order, which purports to have been made under Rule 101 of Order XXI of the Code of Civil Procedure, 1908. The petitioner before us brought a suit for money against two persons, Gopal Chandra Mondal and Krishna Chandra Mondal. He asserts that on the 3rd April 1908 he got an attachment on the disputed property before judgment in his suit. On the 29th August 1908, a consent decree was made to the effect that Rs. 1,005 would be paid by the defendant in four instalments and the property in dispute attached before judgment would continue under attachment, till the decretal debt had been realised. On the 27th November 1908, during the continuance of the alleged attachment, the judgment-debtors, who were defendants in a suit by their landlord, consented to a decree by which they surrendered the holding in his favour. On the 14th April 1909, the landlord settled the land with the present opposite party. Shortly after this on the 21st May 1909, the petitioner before us applied for execution of his decree as the judgment-debtors had defaulted to make payment. He purchased the property at the execution sale, and on the 26th October 1909, obtained delivery of possession through the Court. On the 15th November 1909, the opposite party, who had obtained settlement of the land from the landlord on the 14th April 1909, made an application under Rule 100 on the allegation that he had been dispossessed. The Court below has held that the objector is entitled to be restored to possession on the ground that at the time when the delivery of possession was effected to the purchaser, the objector was in possession. This order has been assailed on the ground that it is in contravention of Rule 102, and that the Court below has not appreciated the true legal effect of the attachment before judgment in the suit of the petitioner. On behalf of the opposite party it has been argued that Rule 102 has no application and that even if the attachment is proved to have been made, the petitioner would not be entitled to be placed in pos-

session unless it was proved that the holding in question was transferable. It has also been suggested that the case, as it has been presented to us, was not made in the Court below. It may be conceded that Rule 102 has no direct application, as it applies only to cases of delivery of possession to decree-holders and does not include cases of execution purchasers. But it is clear that on behalf of the petitioner, documents were produced in the lower Court to show that the attachment had been effected and evidence appears to have been adduced by both parties upon the question of the transferability of the holding. It is manifest, therefore, that the questions now in issue were raised in the Court below but they were not appreciated by the Court which upon imperfect findings has made an order under Rule 101 in favour of the opposite party. If the holding was transferable, a surrender of it after attachment could not, in view of the provisions of section 64 of the Code of 1908, affect the position of the petitioner as execution purchaser or create in the landlord and his new tenant any preferential right.

The result, therefore, is that this Rule must be made absolute and the order of the Court below discharged. The case will be remitted to that Court in order that it may find, *first*, whether an attachment of the disputed property was effected on the 3rd April 1908, as asserted by the petitioner, and *secondly*, whether the disputed holding was transferable. If both these points are found in favour of the petitioner, he will be entitled to succeed. If either point is decided against him, he must fail and the opposite party will be restored to possession under Rule 101. The costs of this Rule will abide the result. We assess the hearing fee at two gold *mohurs*.

The parties will be at liberty to adduce evidence in the lower Court upon both the points indicated above.

Rule made absolute.

CALCUTTA HIGH COURT.

CIVIL RULE No. 3903 OF 1910.

September 6, 1910.

Present:—Mr. Justice Mookerjee and Mr. Justice Teunon.

RASIK CHANDRA GHOSH—CLAIMANT—PETITIONER

versus

JITENDRA KUMAR GHOSH HAZRA—DECREE-HOLDER—OPPOSITE PARTY.

Claim—Movable property of perishable nature, sale of—Subsequent investigation of claim—Claim to standing crop—Successful claimant not to be charged with harvesting costs.

If movable property of a perishable nature is attached, and a claim is preferred the claim may be investigated even after the sale of the property by the Court. The Court will in such case adopt the rule of proportion in awarding damage to the claimant, assuming that the value of the article was represented with fair accuracy by the price realised at the sale.

Where standing crops belonging to a claimant are unlawfully attached, and extraordinary harvesting expenses are incurred due to the employment of Court peons to do the work, the burden of the harvesting costs cannot be charged to the account of the claimant.

Rule against the order of the Munsif of Howrah, dated April 16, 1910.

Babu *Monmatha Nath Roy*, for the Petitioner.

Babu *Surendra Chandra Sen*, for the Opposite Party.

Judgment.—We are invited in this Rule to consider the legality of an order in a claim case under Rule 58 of Order XXI of the Code of 1908. The opposite party in execution of a decree for arrears of rent against their tenant attached the standing crops on 10 *bighas* of land. The attachment was effected on the 2nd December 1909. Eight days later, it was reported that the crops were fit to be reaped. The decree-holder was thereupon directed to deposit the costs of reaping. This order of the Court was carried out and the Nazir was directed to take steps to cut the crops. On the 14th December, before the crops had been reaped, the petitioner before us preferred a claim to the crops standing upon a portion of the land about 5 *bighas*, 12½ *cottahs* in area. He alleged that these crops had been grown by himself and not by the judgment-debtors of the decree-holder, and, consequently, could not be seized in execution of the decree. He, therefore, prayed that till his claim was adjudged, the reaping might be

stayed. But his application was rejected. He subsequently prayed that after the crops were reaped, those claimed by him might be stored separately. This application also was refused. Subsequently, the crops were reaped and sold under the direction of the Court for Rs. 123. Meanwhile, nearly Rs. 100 had been paid by the decree-holder as the costs of reaping the crops and for incidental purposes. The claim was then investigated and was allowed. The Court directed that as the attached property had been sold and converted into money, the claimant could obtain a proportionate share of the net value of the crops, that is, of the difference between the price realized at the sale and the harvesting costs. The result was that the claimant was allowed Rs. 15 only.

The claimant now invites us to modify this order on the ground that as his crops were unlawfully attached at the instance of the decree-holder, the burden of the harvesting costs cannot be charged to his account. In answer to this contention, it has been argued on behalf of the decree-holders that the rule ought to be discharged on two grounds, *first*, because at the time when the claim was actually investigated, the attached property had ceased to exist and consequently the claim must be taken to have proved infructuous, and, *secondly*, because the claimant is at best entitled to the value of the standing crops, and there is no evidence to show what that value is or even what was the actual quantity of crops grown by the claimant. In our opinion, the objections, urged on behalf of the decree-holders, are unsubstantial, and the order made by the Court below for deduction of the harvesting charges from the amount realized at the sale and for payment of a share of the balance to the claimant cannot be supported.

In so far as the first objection taken on behalf of the decree-holders is concerned, it is clear that there is no substance in it. No doubt, Rules 58 and 60 of Order XXI of the Code of 1908 speak of claim to attached property and the release of property from attachment, but they do not justify the conclusion that if movable property of a perishable nature has been attached and a claim has been preferred thereto, the claim must prove nugatory if the decree-holder can only induce the Court to sell the property before the claim has been investigated. That the objection taken is entirely groundless becomes obvious from one illustration. If the claim had been preferred to the entire crops attached and before the determination of the claim the crops had been sold, it could not have been reasonably contended that the claimant was not entitled to the value of the crops even though his claim was ultimately established to be well-founded. There is no reason why the same principle should not apply when the claim is preferred and established to a portion only of the movable property attached.

In so far as the second objection urged on behalf of the decree-holder is concerned, there is apparently more substance in it. It need not be disputed that the claimant is entitled to the value of the crops as standing crops and there is no evidence of such value. It must not be overlooked, however, that the absence of such evidence is in a large measure due to the rejection of the application by the claimant to the Court below to keep separate the crops grown by him. Under these circumstances, the Court below justly adopted the rule of proportion and assumed that the value of the standing crops was represented with fair accuracy by the price realized at the sale. We must take it, therefore, that the value of the crops grown by the claimant upon 5 *bighas*, $12\frac{1}{2}$ *cottas* of land was Rs. 72.

The only question which requires consideration is whether any portion of the harvesting costs could be charged on the claimant. In our opinion the order of the Court below is not well-founded on principle and cannot be supported. The decree-holders, when they attached the crops of the claimant, must be taken to have done so entirely at their own risk. When they proceeded to sell the crops in spite of the claim which had been preferred, they took the risk of loss likely to follow from the course they deliberately pursued. It is clear that their claim cannot be sustained under either section 69 or section 70 of the Indian Contract Act, not the former, because it cannot be urged that the whole of the amount sought to be charged was legally payable by the claimant, and not the latter, because the action of the decree-holders was clearly unlawful. No doubt, in view of the decision of the Judicial Committee in *Dakhina Mohan* v. *Saroda Mohan* (1), the rule laid down in *Tiluck Chand* v.

(1) 21 C. 142; 20 I. A. 163.

Soudamini (2), that a person who is in wrongful possession is not entitled to recover sums paid on account of out-goings, although he may be able to use them for the purpose of reducing the mesne profits, cannot be treated as a proposition of law of universal application; [see also *Abdul Wahid* v. *Shaluka Bibi* (3), *Goma Mahad* v. *Gokal Das* (4)]; but even according to the exposition of the law on the subject by Lord Watson and Lord Macnaghten in *Peruvian Guano Co.*, v. *Dreyfus Brothers* (5), a wrong-doer would not be entitled to anything more than expenses properly incurred, that is, such expenses as the owner himself would have to make if the wrong-doer had not made them [*Doe* v. *Hare* (6), *Clarke* v. *Nicholson* (7)]. Now in the case before us, if the decree-holders had not unlawfully seized the crops, the claimant who had grown them could have reaped them himself and incurred little or no expense. The effect of the unauthorised interference of the decree-holders has been that the value of the crops has been almost entirely swallowed up by the heavy harvesting expenses due to the employment of Court peons to do the work. Under these circumstances. we cannot justly throw the burden of these extraordinary expenses upon the claimant.

The result is that this Rule is made absolute and the order of the lower Court is modified in so far as the claimant has been made liable for a proportionate share of the harvesting charges. The effect of our order will be that the decree of the Court below will be varied. The claimant will have a decree for Rs. 72 with costs both here and in the lower Court. We assess the hearing fee in this Court at one gold *mohur*.

Rule made absolute.

(2) 4 C. 566; 3 C. L. R. 456.
(3) 21 C. 496; 21 I. A. 26.
(4) 3 B. 74.
(5) (1892) A. C. 166 at pp. 173, 186; 61 L. J. Ch. 749; 66 L. T. 536; 7 Asp. M. C. 225.
(6) 2 C. and M. 145; 4 Tyr. 29; 3 L. J. Ex. 17.
(7) 1 C. M. & R. 724; 6 C. and P. 712; 5 Tyr. 233; 4 L. J. Ex. 66.

CALCUTTA HIGH COURT.

CIVIL RULE No. 3635 OF 1910.

September 8, 1910.

Present:—Mr. Justice Mookerjee and Mr. Justice Sharf-ud-Din.

MANI LAL GUZRATI—DEFENDANT-PETITIONER

versus

HARENDRA LAL ROY CHOWDHURY—PLAINTIFF—OPPOSITE PARTY.

Estoppel—Acceptance of order of Court and action under it on protest—Right of appeal from order, if barred—Civil Procedure Code (Act V of 1908), O. VI, R. 17—Plaint—Amendment—Prayer for injunction to restrain defendant from executing fraudulent decree—Subsequent amendment of plaint by alleging that plaintiff's claim is preferential to defendant's decree—Amendment, whether changes character of suit—Amendment, order of—Discretion of Court.

A party who has adopted an order of the Court and acted under it, cannot, after he has enjoyed a benefit under the order, contend that it is valid for one purpose and invalid for another. But where the party accepts the order under protest, he is not debarred from appealing against it.

The plaintiff claimed to have acquired title to the disputed property by purchase at an execution sale and alleged that the defendant was about to bring it to sale in execution of a fraudulent mortgage decree, and, therefore, he prayed that the defendant might be perpetually restrained from proceeding with execution of his decree. Subsequently the plaintiff asked leave to amend his plaint, and the object of the amendment was to show that, apart from the fraud, the mortgage decree of the defendant was not enforceable against the property because the transaction under which the plaintiff derived his title gave him in law a preferential title to that of the defendant:

Held, that the amendment was rightly allowed; that it merely enabled the plaintiff to urge an alternative ground in support of his claim for injunction; that the plaintiff would have been seriously prejudiced if the amendment had not been allowed, for he could not have asserted this ground in another litigation: and that the effect of the amendment was not to alter the fundamental character of the suit and to convert it into another of a different and inconsistent character.

Amendments must not be allowed to prejudice the substantial rights of the party in favour of whose opponent they are allowed; but observing due caution in that regard, the time and extent of each amendment are in the judicial discretion of the Court.

Rule against the order of the Sub-Judge of Hooghly, dated July 21, 1910.

Babus *Mahendra Nath Roy*, *Biraj Mohan Majumdar* and *Tarakeshwar Pal Chowdhury*, for the Petitioner.

Dr. *Rash Behary Ghosh* and Babu *Akshoy Kumar Banerji*, for the Opposite Party.

Judgment.—We are invited in this Rule to discharge an order made by the Court below under Rule 17 of Order VI of the

Code of 1908, by which a plaintiff has been allowed to amend his plaint. The suit was commenced on the 7th April 1909, the defendant filed their written statement on the 21st May, the issues were framed 4 days later. The trial was adjourned from time to time for various reasons not material for our present purpose. On the 24th February 1910, the plaintiff applied for leave to amend his plaint. This application was refused by the Sub-Judge on the ground that if the plaint was allowed to be amended, the defendants would find it necessary to file a fresh written statement, and a new issue would have to be raised. The trial commenced on the 19th July 1910, and witnesses on behalf of the plaintiff were examined on that date as also on the day following. On the 20th July, the plaintiff applied for the framing of an additional issue. On the 21st July, the Sub-Judge held that the additional issue could not be framed unless the plaint was amended. He, thereupon, proceeded to consider whether the plaint should be allowed to be amended at that stage, that is, practically to review his order of the 25th February 1910. He came to the conclusion that the plaintiff ought to be granted leave to amend the plaint upon payment of Rs. 150 as costs to the defendants. The costs were paid at once and were received by the defendants under protest. The plaintiff then amended the plaint by the insertion of a paragraph in which certain new facts were stated. The defendants, who unsuccessfully resisted the application for amendment in the Court below, have now assailed the order on the ground that the Sub-Judge ought not to have allowed the amendment, as the effect of it was essentially to change the character of the suit. This has been controverted on behalf of the plaintiff, and we have further been invited to discharge the rule on the ground that as the defendants acquiesced in the order of the Court in so far as they received the adjournment costs, they cannot now be permitted to question the propriety of the order. In support of this proposition, reliance has been placed upon the case of *Tinkler* v. *Hilder* (1).

In so far as the preliminary ground urged by the plaintiff is concerned, it has been explained on behalf of the defendants that they were compelled to accept payment of the costs under order of the Court, and they did so under protest. This allegation appears to be well-founded. Consequently the principle which underlies the cases of *Tinkler* v. *Hilder* (1), *King* v. *Simmonds* (2), *Kennard* v. *Harris* (3) and *Pearce* v. *Chaplin* (4), cannot be properly applied to the present case. That principle is that a party, who has adopted an order of the Court and acted under it, cannot, after he has enjoyed a benefit under the order, contend that it is valid for one purpose and invalid for another. Here the defendants had no choice in the matter. The order of the Court was so framed as to make it practically obligatory upon them to receive the money. If the learned Judge had directed the costs to be paid into Court to the credit of the defendants, and they had voluntarily withdrawn the sums deposited, they might have been debarred from questioning the validity of the order. We must, therefore, overrule the preliminary ground upon which we are invited to discharge the Rule.

In so far as the merits of the order are concerned, it is necessary to state that the subject-matter of the litigation is an one-half share of a property named Gunnuckpota and a smaller share of another property to both of which the plaintiff claims to have acquired title by purchase at a sale in execution. In the plaint as originally framed, the plaintiff alleged that the defendant in execution of a fraudulent decree in a mortgage suit dated the 19th December 1895, and made absolute on the 24th March 1908, was about to bring the disputed properties to sale. He, therefore, prayed that the defendant might be perpetually restrained from proceeding with execution of his decree. The object of the amendment is in substance to show that, apart from the alleged fraud, the mortgage decree of the defendant was not enforceable against the property in the hands of the plaintiff, because the transaction under which the plaintiff derived his title gave him in law a preferential title to that of the defendants. To put the matter in another way, whereas in the plaint as originally framed the plaintiff sought an injunction on the ground that the decree under execution was fraudulent, in the plaint as amended he

(1) (1849) 4 Ex Ch. 187; 7 D. & L. 61; 18 L. J. Ex. 429; 13 Jur. 684.

(2) 7 Q. B. 289; 14 L. J. Q. B. 248; 9 Jur. 761.
(3) 2 B. C. 801; 4 D. & R. 272.
(4) 9 Q. B. 802; 16 L. J. Q. B. 49.

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put forward an alternative ground in support of the injunction, namely, that as the result of previous litigation upon which the title of the plaintiff was founded, the decree was inoperative against him. The result of the amendment, therefore, has been that the plaintiff has been enabled to urge an alternative ground in support of his claim for injunction. It is further obvious that if this alternative ground is not put forward in this suit, it cannot be asserted in another litigation; in other words, the plaintiff will be debarred for ever and seriously prejudiced if the amendment is not allowed. The question, therefore, arises, whether the order for amendment has been properly made under Rule 17 of Order VI. That Rule authorizes the Court to allow at any stage of the proceedings an amendment of the pleadings in such manner, and on such terms as may be just, and renders it obligatory upon the Court to make all such amendments as may be necessary for the purpose of determining the real question in controversy between the parties. Now what is the real question in controversy between the parties here? Obviously, whether the disputed properties are liable to be sold in execution of the decree held by the defendant. To determine this question, the Court must investigate the true character of the antecedent transactions. As to one branch of these transactions, the plaintiff charges fraud, but he asserts in the alternative that apart from fraud, the defendants have no enforceable claim against him. It is impossible to say that the effect of the amendment is to convert the suit into another of a different and inconsistent character [*Raleigh* v. *Goschen* (5)]; nor can we say, to use the language of Mr. Justice Straight in *Hamilton* v. *Land Mortgage Bank* (6), that the plaintiff coming into Court with one case and hopelessly failing to prove it, seeks to succeed upon another, and that directly in antagonism with his primary allegation. It cannot be rightly maintained, as it was put in *Kasinath* v. *Sadasiv* (7), that by the amendment the fundamental character of the suit is altered. As was observed by this Court in *Chhayunnessa Bibi* v. *Kazi Basirar Rahman* (8), no comprehensive formula can be framed to define precisely the power of a Court to allow amendments to be made; but this much may be laid down as the cardinal rule that the allowance of amendments must, in every stage of the case, rest with the discretion of the Court. Amendments must not be allowed to prejudice the substantial rights of the party in favour of whose opponent the amendment is allowed, but observing due caution in that regard, the time and extent of each amendment are in the judicial discretion of the Court. As was observed by Bramwell, L. J. in *Tildesley* v. *Harper* (9), leave to amend ought to be granted unless the party applying is acting *mala fide* or by his blunder has done some injury to his opponent which cannot be compensated for by costs or otherwise. Whether the original omission arose from negligence, carelessness or accidental error, the defect may be allowed to be remedied, if no injustice is done to the other side because in the expressive phraseology of Bowen, L. J., "there is one panacea which heals every sore in litigation and that is costs." *Cropper* v. *Smith* (10).

Upon a review of all the circumstances of the present litigation, we are of opinion that the application for leave to amend was improperly refused by the Sub-Judge in the first instance and was rightly granted ultimately. The rule must, therefore, be discharged. As the Sub-Judge, however, altered his opinion, we are not prepared to say that the application to this Court was unreasonable, and consequently we make no order as to costs.

Rule discharged.

(5) (1898) 1 Ch. 73 at p. 81; 67 L. J. Ch. 59; 77 L. T. 429; 46 W. R. 90.
(6) 5. A. 456.
(7) 20 C. 805.
(8) 5 Ind. Cas. 532; 37 C. 399; 11 C. L. J. 285.
(9) (1878) 10 Ch. D. 393; 43 L. J. Ch. 495; 39 L. T. 552; 27 W. R. 249.
(10) (1884) 26 Ch. D. 710; 53 L. J. Ch. 891; 51 L. T. 733; 33 W. R. 60.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL No. 1474 OF 1908.
September 8, 1910.
Present:—Mr. Justice Mookerjee and
Mr. Justice Sharf-ud-Din.
HINGU MIYA *alias* ABDUL MAJID MIYA—DEFENDANT—APPELLANT
versus
HERAMBA CHANDRA CHAKRAVARTI—PLAINTIFF—RESPONDENT.

Evidence Act (*I of* 1872), *s.* 34—*Account books*—

HINGU MIYA *v.* HERAMBA CHANDRA.

Entries, how to be proved—Limitation Act (XV of 1877), ss. 19, 20—Acknowledgment—Admission should be of distinct liability in dispute, not any liability—Payment of interest where debtor liable in respect of several transactions—Appropriation of interest to several debts.

It is essential in every case, where reliance is placed upon books of account, to establish that they have been regularly kept in the course of business. They need not be written up from moment to moment, or from day to day.

Deputy Commissioner v. *Ram Parshad*, 27 C. 118 (P. C.); 26 I. A. 254; 4 C. W. N. 417, relied upon.

But it is obvious that if they have been written up casually once a week or a fortnight, though they may be admitted in evidence, they do not possess the same claim to confidence that attaches to books entered up from day to day or from hour to hour as transactions take place.

Munchershaw v. *New Dhurumsey*, 4 B. 576, referred to.

The proper procedure to follow is to call the clerk, who has kept the accounts or some person competent to speak to their genuineness, to prove that the books have been regularly kept and that they are generally accurate.

Dwarka Das v. *Jankee Das*, 6 M. I. A. 88 at p. 98, followed.

Where certain account books were produced in the original Court by the plaintiff, and all that was proved was that they were in the handwriting of his father, and the books were not even examined in detail in the original Court, and the particular entries upon which the plaintiff relied were not selected and exhibited:

Held, that the entries ought to have been pointed out and proved and evidence should also have been given in detail as to the character of the books themselves.

An acknowledgment under section 19 of the Limitation Act, 1877, need not be expressed and may be left to implication; but it must be a necessary implication from the words used that the person acknowledging was referring to and admitting the distinct liability in dispute and not any liability.

Gopal Rao v. *Hari Lal*, 9 Bom. L. R. 950, relied upon.

Therefore where A, who was indebted to B in respect of eleven different transactions, wrote a letter to the effect that the money of the addressee would be paid: *Held*, that the terms of the letter not being specific enough to indicate whether the acknowledgment related to one or more of these transactions, it was not sufficient to save the claim in respect of any of them from the bar of limitation.

Section 20 of the Limitation Act, 1877, did not expressly refer to the case of payment of a sum as interest when more than one debt was due from debtor to the creditor.

When there are two debts and payment of interest has been made by the debtor without specification, it may save either debt from limitation.

The amount due as interest from a debtor to a creditor in respect of eight different transactions was Rs. 307 when a payment of Rs. 200 was made towards interest. The sum paid was sufficient to discharge the whole of the interest due on the last seven debts amounting to Rs. 175 and there was a balance of Rs. 25 left which might be deemed as part payment of interest on the first sum due:

Held, that the inference was perfectly legitimate that the payment might reasonably be attributed to all the debts which were thus saved from limitation.

If the plaint shows the ground of exemption from limitation, the requirement of section 50 of the Civil Procedure Code of 1882 is satisfied; but this does not preclude the plaintiff from taking another and an inconsistent ground to get over the bar of limitation if he believes that the latter is the true ground, and he is entitled to urge that the suit is not barred by limitation for a reason different from the one assigned in the plaint.

Appeal from the decree of the Second Sub-Judge of Barisal, dated March 9, 1908, affirming that of the First Munsif of that place, dated April 29, 1907.

Babus *Jogesh Chandra Roy* and *Prokash Chandra Majumdar*, for the Appellant.

Babus *Dwarka Nath Chakravarti* and *Bidhu Bhushan Banerjee*, for the Respondents.

Judgment.—This is an appeal on behalf of the defendant in an action commenced against him by the plaintiff-respondent, for the recovery of Rs. 1,999. The case for the plaintiff is that the defendant, who was engaged in contract business under the District Board of Faridpur found it necessary to borrow from his father money from time to time upon agreement to pay interest thereon at the rate of 2 per cent. per annum. According to the plaintiff, the first of the sums lent was advanced on the 2nd April 1902 and the last on the 6th August 1904. The plaintiff further alleges that the defendant made payments on account of principal and interest on the 2nd April 1902 and a payment on account of interest only on the 21st September 1903. According to the statement of accounts appended to the plaint, a sum of Rs. 1,729-8 would be due from the defendant on account of the principal and Rs. 1,267-14-9 as interest thereon. The plaintiff, however, relinquished out of the sum due as interest Rs. 993-6-9 and he claimed to recover the balance Rs. 1,999 from the defendant. In support of that claim the plaintiff relied upon the private account book of his father, for the years 1899 to 1904 which, he alleged, contained entries of sums paid out to the defendants. He also produced a letter alleged to have been written by the defendants on the 26th October 1904 to the father of the plaintiff, which he asserted contained an acknowledgment of the debts, sufficient in law to save the claim from the bar of limitation. In the Court of 1st instance the defendant resisted the claim mainly on the ground that he had

not borrowed any money on the several dates alleged by the plaintiffs, but he conceded that he had taken loans on other occasions which he had duly repaid. He further pleaded that the claim, if true, was barred by limitation. The Courts below have concurrently decreed the claim in part. They have found that the story set up by the defendant was untrue, and that the sums alleged to have been advanced by the plaintiff had been duly paid to the defendant except two sums dated the 18th December 1903 and the 6th August 1904. The Courts below have also overruled the plea of limitation on the ground that the payment made on the 21st September 1903 was sufficient to save the claim from the bar of limitation.

The defendant has now appealed to this Court and on his behalf the decree of the Subordinate Judge has been assailed substantially on two grounds, namely, *first*, that the account books were not regularly kept in the course of business and were consequently not admissible in evidence, and that in any event the specific entries of the sum advanced had not been duly proved; and, *secondly*, that the claim was barred by limitation.

In support of the first of these contentions, the learned Vakil for the appellant has placed reliance upon section 34 of the Indian Evidence Act which provides that entries in books of account regularly kept in the course of business are relevant whenever they refer to a matter into which the Court has to enquire, but such statement shall not alone be sufficient evidence to charge any person with liability. It has been argued that before an entry in a book of account can be treated as relevant and consequently admissible in evidence, it must be proved that the book has been regularly kept in the course of business, and it has been asserted that in the case before us, there is no evidence to show that the books relied upon were so kept. It has also been suggested that there is, on the other hand, evidence to show that the books were not regularly written. In answer to this last argument, the learned Vakil for the respondent has contended that in order to bring an account book within the section, it is not necessary to show that it has been written from day to day, as ruled by the Judicial Committee in the case of *Deputy Commissioner* v. *Ram Parshad* (1). To determine, whether the objection of the appellant is well-founded, it is necessary to remember the principle on which the rule is based. The reasons for the rule are, *first*, that the habit and system of making any such book with regularity ensure their accuracy; *secondly*, that the influence of habit prevents casual inaccuracies and counteracts the casual temptation to mis-statements: *thirdly*, that as such books record a regular process of business transactions, an error is almost certain to be detected and rectified, *fourthly*, that in such books mis-statements cannot be made except by a systematic and comprehensive plan of falsification; and *fifthly*, in some cases the writer may make the record under a duty to his employer in which case there is the additional risk of censure from the master if a mistake is committed. (Wigmore on Evidence sections 15, 22). As Tindal, C. J., observes in *Poole* v. *Dicas* (2), it is easier to state what is true than what is false; the process of invention implies trouble; the clerk has no interest to make a false entry; if he has any interest it is rather to make a true entry; a false entry would be likely to bring him into disgrace with his employer. To put the matter in another way, in the words of Swayne, J., in *Fannerstim* v. *Champagne* (3), the rule rests upon the consideration that the entry was within the writer's business; the writer has full knowledge, no motive to falsehood and there is the strongest improbability of untruth; safer sanctions rarely surround the testimony of a witness examined under oath. From the point of view of these principles, it is essential, in every case where reliance is placed upon books of account, to establish that they have been regularly kept in the course of business. It is perfectly true that as laid down by their Lordships of the Judicial Committee in the case of *Deputy Commissioner* v. *Ram Parshad* (1), they need not be written up from moment to moment or from day to day. But it is obvious that if they have been written up casually once a week or a fortnight, though they may be admitted in evidence, they do not possess the same claim to confidence that attaches to books entered up from day to day or from

(1) 27 C. 118; 26 I. A. 254; 4 C. W. N. 417.

(2) (1835) 1 Bing. N. C. 649; 41 R. R. 646; 1 Scott, 600, 1 Hodges 162; 7 Car. & P. 79; 4 L. J. C. P. 196.

(3) 3 Wallace 149.

hour to hour as transactions take place. [*Muncher Shaw* v. *New Dhurumsy* (4).] The proper procedure to follow, therefore, is, as laid down by their Lordships of the Judicial Committee in *Dwarka Das* v. *Jankee Das* (5), to call the clerk who has kept the accounts or some person competent to speak to their genuineness, to prove that the books have been regularly kept and that they are generally accurate. But this is not all that is necessary; section 34 makes the entries relevant if they are entries in a book of account regularly kept in the course of business. It is, therefore, not sufficient merely to prove the correctness of the book, the entries themselves have to be proved unless indeed the necessity for such proof is removed by the admission of the opposite party. In the case before us, the account books were produced in the original Court and all that was proved on the side of the plaintiff was that the books were in the handwriting of his father, Kali Prosanno Chuckerbutty. The books were not even examined in detail in the original Court. The particular entries upon which the plaintiff relies were not even selected and exhibited. In this Court some of the entries have not been traced at all. Obviously the proceedings in the original Court were conducted with considerable laxity. The particular entries upon which the plaintiff relies ought to have been pointed out and proved; evidence should also have been given in detail as to the character of the books themselves. We have ourselves examined the books closely and we are of opinion that they require much fuller scrutiny than has been applied by the Courts below, before the plaintiff can be permitted to use any entries therein in support of his claim. It must be remembered further that the books purport to be the private account books of the father of the plaintiff and they ought, consequently, to be carefully tested before they are used against the defendant. In fact when they are used in favour of the plaintiff, it must not be overlooked that the plaintiff is allowed to use in his own favour evidence which he or his predecessor-in-interest has created; the Court must, therefore, feel assured that the books are thoroughly reliable. The first ground taken on behalf of the appellant must, consequently, prevail.

(4) 4 B. 576. (5) 6 M. I. A. 88 at p. 98.

In so far as the second ground urged on behalf of the appellant is concerned, it raises a question of considerable nicety, the true bearing of which does not appear to have been appreciated by either of the Courts below. The plaintiff relies upon a letter alleged to have been written by the defendant on the 26th October 1904 as also upon a payment of interest alleged to have been made by him on the 21st September 1903, to save the case from the bar of limitation. In so far as the letter is concerned, the Subordinate Judge has not determined the question of its genuineness. In our opinion, even if the letter be assumed to be genuine, its terms are not sufficiently precise to constitute an acknowledgment of liability in respect of the right in controversy within the meaning of section 19 of the Limitation Act. The letter, which is addressed by the defendant to the father of the plaintiffs, states that the writer had informed Ananda Charan Chakravarti that since the overseer had passed the bills, the money of the addressee would be paid. It will be observed that the defendant, if the story of the plaintiff is true, was indebted to his father in respect at least of eleven different transactions; the terms of the letter are obviously not specific enough to indicate whether the acknowledgment related to one or more of these transactions. No doubt, as observed in the case of *Gopal Rao* v. *Hari Lal* (6), though an acknowledgment need not be expressed and may be left to implication, it must be a necessary implication from the words used, that the person acknowledging was referring to and admitting the distinct liability in dispute and not any liability. Tested in the light of this principle, the letter is obviously insufficient to save the claim from the bar of limitation.

In so far as the alleged payment of interest is concerned, the question which arises for consideration is, whether the payment is sufficient to bring the case within section 20 of the Limitation Act. That section provides that where interest on a debt is before expiration of the prescribed period paid as such by a person liable to pay the debt or by his agent duly authorized in this behalf, a fresh period of limitation shall be computed from the time when the payment was made. This section, it will be observed, does not expressly refer to the case of payment of a sum as in-

(6) 9 Bom. L. R. 950.

terest when more than one debt is due from the debtor to the creditor, which is the case now before us. As we have already stated, the defendant borrowed various sums from the father of the plaintiff on different occasions. The sums advanced were never consolidated so as to constitute one debt. Consequently, when payment was made of Rs. 200 on account of interest on the 21st September 1903, without further specification, the question necessarily arises whether the payment is sufficient to save the claim from the bar of limitation in respect of any or all of the different debts due. The learned Vakil for the appellant has contended that there is no presumption that the payment was made on account of one of the different debts than of the others; and that, consequently, the inference is not permissible that any portion of the claim is saved from the bar of limitation. In support of this proposition, reliance has been placed upon the cases of *Tippetts* v. *Heane* (7): *Burn* v. *Boulton* (8); *Mills* v. *Fowkes* (9). Reference has been made particularly to the second of these cases in which it was ruled by Tindal, C. J., that if it has been left in doubt on which of the accounts the payments were made, they would have been applied to neither. Now it may be conceded that the payment whether of principal or interest must be attributable to the debt sued on. *Tippets* v. *Heane* (7); *Simms* v. *Bruttom* (10); *In re Fountaine* (11). So that when there is only one debt between the parties, a payment of interest may without further evidence be referred to that debt. *Evans* v. *Davies* (12); but where there is more than one debt, the plaintiff must make out distinctly that the payment, on which he relies, is applicable to the debt sued for. *Burkett* v. *Blanshard* (13): *Holme* v. *Green* (14). Now, if the debtor does not appropriate at the time of payment, what is to happen? He has, no doubt, the first right to appropriate provided he does so at the time of the payment; because *quicquid solvitur, solvitur secundum modun solventis.* But if he does not appropriate, the creditor has the right to appropriate, because *quicquid recipitur, recipitur secundum modun recipientis.* The right to appropriate thus devolves upon the creditor and can be exercised by him at any time before the proceedings questioning the debt. *The Mecca* (15); *Smith* v. *Betty* (16). Consequently, the rule which the learned Vakil for the appellant invited us to adopt, *viz.*, that if there are two debts and payment has been made by the debtor without specification, it cannot save either debt from the bar of limitation, cannot be accepted as an inflexible rule of law. In fact, there is weighty authority in support of the contrary view. Thus in *Walker* v. *Butler* (17), the creditor had the money due from his debtor on seven separate advances which aggregated to more than £ 300. The debtor made a payment of £ 60 but without specification as to the particular debt for which the payment was intended. The different accounts had never been balanced or ascertained between the creditor and the debtor, much less had there been any consolidation. It was ruled that there was evidence to go to the jury as to whether the payment on account of the debts was sufficient to take the whole out of the statute of limitation. Garb, J., declined to assent to the doctrine that where there are two debts existing and a payment is made, not specifically appropriating to either, there is no sufficient evidence of a payment on account of either of those debts to take it out of the statute of limitation. Crompton, J., observed that even where the debts are not separate, if a payment is shown, it will be a question for the jury whether it is not applicable to all the debts. The case of *Nash* v. *Hodgson* (18) is clearly distinguishable. In that case A was indebted to B on three promissory-notes. Upon application by B, A paid £ 5 on account of interest. At the time of this payment, two of the notes were barred and one was not barred. It was ruled that the payment must be attributed as made exclusively in respect of the note not barred,

(7) 1 C. M. R. 252; 40 R. R. 549; 4 Tyr. 772; 3 L. J. Ex. 281.

(8) 2 C. B. 476; 69 R. R. 508; 15 L. J. C. P. 97.

(9) 5 Bing. & C. 455; 50 R. R. 750; 7 Scott 444; 2 Arn. 62; 8 L. J. C. P. 276; 3 Jur. 406.

(10) (1850) 5 Exch. 802; 20 L. J. Ex. 41.

(11) (1909) 2 Ch. 382; 25 T. L. R. 689; 78 L. J. Ch. 648; 101 L. T. 83; 25 T. L. R. 689.

(12) (1838) 4 A. & E. 840; 2 H. & W. 15; 6 L. J. K. B. 268.

(13) (1848) 3 Exch. 89; 18 L. J. Ex. 34.

(14) (1816) 1 Starkies 488.

(15) (1897) A. C. 286; 66 L. J. P. 85; 76 L. T. 579; 45 W. R. 667.

(16) (1903) 2 K. B. 317; 72 L. J. K. B. 853; 89 L. T. 258; 52 W. R. 187.

(17) (1856) 6 E. and B. 506; 106 R. R. 691; 25 L. J. Q. B. 377; 2 Jur. (N. S.) 687.

(18) (1855) 6 De. G. M. G. 474; 106 R. R. 157; 25 L. J. Ch. 186; 1 Jur. (N. S.) 946.

because, as Lord Cranworth observed, where there are several debts, the inference is that the payment should be attributed to those not barred. See also *In re Boswell* (19) and *Friend* v. *Young* (20). The question, therefore, arises, whether there are any special circumstances in the case before us which may help us to determine whether the payment of interest was made on account of all or any of the debts then due. For this purpose we need not examine the accounts before the 2nd April 1902. There had been before that four advances of the aggregate sum of Rs. 1,125 and interest thereon was due to the extent of Rs. 54-9-6. On the 2nd April 1902, Rs. 800 was paid by the defendant. The result of this was that the whole of the claim for interest was satisfied and the defendant continued indebted to the plaintiff for the principal sum of Rs. 379-6-6. We state below in a tabular form the sums subsequently advanced on the different dates and the interest approximately due on each sum from the date of its advance to the date when Rs. 200 was paid on account of interest.

Date of advance.	Sum advanced.	Interest due up to 21st September 1907.
	Rs. a. p.	Rs. a. p.
2nd April 1902	379 6 6	132 0 0
3rd June 1902	200 0 0	62 0 0
9th October 1902	100 0 0	22 0 0
27th November 1902	100 0 0	19 0 0
17th December 1902	100 0 0	18 0 0
24th December 1902	100 0 0	18 0 0
11th January 1903	200 0 0	34 0 0
12 August 1903	100 0 0	2 0 0

It will be observed that the amount due as interest when the payment of Rs. 200 was made on the 21st September 1907, was Rs. 307; the sum paid was sufficient to discharge the whole of the interest due on the last seven debts amounting to Rs. 175 and there was a balance of Rs. 25 left which might be deemed as part payment of interest on the first sum due. Under these circumstances, the inference is perfectly legitimate that the payment may reasonably be attributed to all the debts. In this view, no portion of the claim would be barred by limitation. The learned Vakil for the appellant, however, has strenuously contended that as under section 50 of the Civil Procedure Code of 1882, the plaintiff had stated in his plaint how he proposed to save his claim from the bar of limitation, he could not be now allowed to rely upon an altogether different circumstance as sufficient for his purpose. In support of this proposition, he has placed reliance upon the case of *Jogeshwar Roy* v. *Raj Narain Mitter* (21). That decision, however, as explained in the cases of *Raghu Nath* v. *Syed Samad Shah* (22), *Yakub Ibrahim* v. *Bai Rahimat Bai* (23) and *Nistarini* v. *Chandi Dasi* (24), does not lay down any inflexible rule of law. If the plaint shows the ground of exemption, the requirement of the Code is satisfied, but this does not preclude the plaintiff from taking another and an inconsistent ground to get over the bar of limitation if he believes that the latter is the true ground. Consequently, in the case before us the plaintiff-respondent is entitled to urge that the suit is not barred by limitation for a reason different from the one assigned in the plaint. The second ground upon which the decree of the Subordinate Judge is assailed, cannot consequently, be supported.

The result, therefore, is that this appeal must be allowed, the decree of the Subordinate Judge reversed and the case remitted to him in order that he may re-examine the question, whether the plaintiff has proved the advances alleged by him. The Subordinate Judge will direct the Court of first instance to take such evidenceas may be adduced by the plaintiff in support of the account books to prove their character and the specific entries upon which he relies. The defendant will be allowed opportunity to adduce rebutting evidence. When the additional evidence is received by the Subordinate Judge, he will consider the case on the merits. It is to be noted, however, that the matter is not to be re-opened in so far as the two sums alleged to have been advanced on the 18th December 1903, and 6th August 1904, are concerned.

(19) (1906) 2 Ch. 359; 75 L. J. Ch. 234; 94 L. T. 243; 54 W. R. 306; 22 T. L. R. 247.

(20) (1897) 2 Ch. 421; 66 L. J. Ch. 737; 77 L. T. 50; 46 W. R. 139.

(21) 31 C. 195; 8 C. W. N. 168.

(22) 12 C. W. N. 617; 7 C. L. J. 560.

(23) 10 Bom. L. R. 346.

(24) S. A. No. 466 of 1908.

This part of the case has been concurrently dismissed by the Courts below and as plaintiff has not filed any cross-appeal, the truth or otherwise of these alleged payments cannot be re-investigated. The costs of this appeal will abide the result.

Appeal allowed.

CALCUTTA HIGH COURT.

CIVIL RULE No. 3094 OF 1910.

August 4, 1910.

Present:—Mr. Justice Mookerjee and Mr. Justice Sharf-ud-Din.

CHARU CHANDRA DUTT—PLAINTIFF—PETITIONER

versus

SARAT CHANDRA SINGH—DEFENDANT—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. I, R. 10, Sub-R. (1)—Parties, addition of—Suit instituted through bona fide *mistake in law—Endowment held invalid by first Court—Suit for account by heir against executor—Endowment held valid by appellate Court—Petition by* shebaits *for being added as parties to account suit—*Shebaits *to be added as plaintiffs—Interlocutory order—Revision.*

Order I, Rule 10, sub-rule (1) of the Civil Procedure Code contemplates cases in which a suit is brought by a plaintiff who subsequently discovers that he cannot get the full relief he seeks without the joinder of some other persons as co-plaintiffs, or where it is found that some other person and not the original plaintiff is entitled to the relief claimed. In the former contingency a new party has to be added, and in the latter, a new party has to be substituted.

Bona fide mistake within the meaning of the sub-rule may be one of fact or in law. Where the Court of first instance takes one view of the law and the Court of Appeal takes a contrary view, that in itself is sufficient evidence of *bona fide* mistake.

Hughes v. *The Pump House Hotel Co. Ld.*, (1902) 2 K. B. 485; 87 L. T. 359; 50 W. R. 677, relied upon.

One Suresh Chandra dedicated by his Will a portion of his properties to an idol to be established by his executor Satish, who took out probate and continued in charge of the estate till his death. Shortly after, one of the five grandsons of the testator (who would have been entitled to succeed in the event of an intestacy) brought a suit for construction of the Will, making the other grandsons of the testator as also the heir of the executor and one Charu, who had been appointed by the Will as a *shebait* of the proposed idol as defendants. The first Court held that the endowment was invalid. Charu appealed against the decision. Meanwhile three of the grandsons of the testator brought a suit for accounts against the heirs of the executor and for three-fifth share of the estate. The other two grandsons were made defendants. After that, Charu's appeal succeeded, the endowment was held good, and the suit for construction of the Will was withdrawn. Then Charu and one of the three grandsons took out Letters of Administration and applied in the suit for accounts praying that they might be substituted or added as parties to the suit and that leave might be granted to them to amend the plaint and that two of the three original plaintiffs might either be removed from the suit or transferred to the category of defendants:

Held, that the suit for account, when it was commenced, was properly instituted, that subsequently it having been found that the endowment was good, the two *shebaits* who took out Letters of Administration ought to have been made parties to the account suit, and the other two original plaintiffs made defendants.

It is within the powers of the High Court to interfere with interlocutory orders if the Court is satisfied that such interference is needed in the interests of justice.

Gobinda Mohan Das v. *Kunja Behary Das*, 10 C. L. J. 407; 4 Ind. Cas. 364, *Amjad Ali* v. *Ali Hussen*, 6 Ind. Cas. 574 and *Ramrup Das* v. *Mohunt Shirjram*, 7 Ind. Cas. 92; 12 C. L. J. 211; 14 C. W. N. 932, relied upon.

Rule against the order of the Sub-Judge of 24-Pergannahs, dated June 27, 1910.

Babu *Khetra Mohan Sen*, for the Petitioner.

Babus *Jogesh Chandra Roy*, *Shoroshi Charan Mitra* and *Nares Chandra Sinha*, for the Opposite Party.

Judgment.—We are invited in this rule to set aside an order by which the Court below has refused to allow the petitioners to intervene in a suit for accounts against the representatives of the executor to the estate of one Suresh Chandra Gangoli. Suresh Chandra Gangoli died on the 29th January 1907. Before his death, he had made a testamentary disposition of his properties, the effect of which was to dedicate a considerable portion of his estate for the benefit of an idol to be established after his death. He appointed Kumar Satish Chandra Singh an executor of this Will. At the time of his death he left five grandsons by daughters, who would have been entitled to succeed in the event of an intestacy. It appears that the executor obtained probate of the Will and continued in charge of the estate till his death which took place on the 30th January 1908. Shortly after, one of the grandsons of the testator, by name Keshab Chandra Mukerjee, instituted a suit for construction of his Will, for declaration that the endowment created thereby was invalid and inoperative in law and for incidental reliefs. Amongst the parties to this suit, were the other grandsons of the testator as also the heir of the executor, and one Charu Chander Dutt, who had been appointed by the Will a *shebait* of the proposed endowment. On the 5th September 1908, the Subordinate Judge

decreed the suit and held that the endowment was inoperative, inasmuch as the image of the idol was not in existence at the time of the death of the testator. Charu Chandra Dutt alone appealed to this Court on the ground that the Subordinate Judge had taken an erroneous view of the legality of the provisions of the Will. Shortly after this, it was held by a Full Bench of this Court in the case of *Bhupati Nath Smrititirtho* v. *Ram Lal* (1), that a valid endowment could be created in favour of an idol, even though the image was not in existence at the death of the testator. Consequently, when the appeal of Charu Chandra came to be heard on the 25th February 1910, the plaintiff-respondent asked for leave to withdraw the suit. No other course was possible for him, because the ground, upon which the suit had been instituted, had been completely negatived by the subsequent decision of the Full Bench. Leave was granted and the suit was withdrawn. Meanwhile, on the 4th October 1909, that is, after the decision of the original Court in the suit for construction of the Will and declaration of the invalidity of the endowment and during the pendency of the appeal against that decision, three of the grandsons of Suresh Chandra, namely, Khetra Pada, Mritunjoy and Gopal Lal instituted, in the Court of the Subordinate, Judge, a suit for accounts against the representatives-in-interest of the executor, Kumar Satish Chandra Singh. This action had been commenced by the plaintiff on the assumption that the decision of the Subordinate Judge was correct, that the dedication was inoperative, and that they were entitled to three-fifth share of the estate of Suresh Chandra, as upon an intestacy. The other grandsons were made defendants in the suit. Consequently, the suit when it was commenced was properly instituted by three of the five persons entitled to the estate of Suresh Chandra. After the suit was withdrawn on the 25th February 1910, one of the grandsons, Khetar Pada, and Charu Chandra Dutt, one of the *shebaits* under the Will, made an application to the District Judge for Letters of Administration to the estate of Suresh Chandra, on the ground that the estate had not been completely administered by the executor Kumar Satish Chandra Singh. This application was granted on the 3rd May 1910. We may observe here that the order of the District Judge is not quite intelligible. Khetra Pada was an infant and the application for Letters of Administration, in so far as he was concerned, appears to have been made by his father, Radhuka Nath Mukerjee. The learned Judge overlooked the provisions of section 13 of the Probate and Administration Act which lays down that Letters of Administration cannot be granted to any person who is a minor or is of unsound mind. The order of the Judge, however, is possibly capable of the interpretation that he granted the Letters of Administration to Charu Chandra Dutt and the father of Khetra Pada Mukerjee, the grant in favour of the latter to continue only during the minority of his son Khetra Pada. But we are not concerned now with the precise effect of the order of the District Judge; let us assume that the District Judge granted Letters of Administration to Charu Chandra Dutt and Khetra Pada Mukerjee. On the 12th May 1910, two applications were presented in the account suit, one by Charu Chandra Dutt and the other by Khetra Pada. The petitioners prayed that they might be substituted or added as parties to the suit, that leave might be granted to them to amend the plaint and that two of the three original plaintiffs Mritunjoy and Gopal might either be removed from the suit or transferred to the category of defendants. The Subordinate Judge rejected these applications on the 27th June 1910, and we are now invited to consider the propriety of his order. We may state at once that the learned Judge appears to have taken a very narrow and restricted view of his powers and duties in this matter. He held that as there had been no devolution or assignment of interest during the pendency of the suit, no question of substitution or addition of names could possibly arise. He also held that if the applications were granted, the nature of the suit would be altered, and concluded that on this ground alone they must be refused. In our opinion, the view taken by the Subordinate Judge is erroneous and cannot possibly be supported.

In so far as one of the petitioners, Khetra Pada, was concerned, it may be observed that he was one of the original plaintiffs in the suit; in so far, however, as the other petitioner Charu Chander Dutt was concerned in case his application was granted, the result would be the addition of a new party as

(1) 3 Ind. Cas. 642; 37 C. 128; 10 C. L. J. 355; 14 C. W. N. 18.

plaintiff in the suit. But both these cases are completely covered by Order I, Rule 10 sub-rule (1) of the Code of Civil Procedure of 1908. That rule provides that where a suit has been instituted in the name of a wrong person as plaintiff or it is doubtful whether it has been instituted in the name of the right plaintiff, the Court may, at any stage of the suit, if satisfied that the suit has been instituted through *bona fide* mistake and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as the Court thinks just. This rule corresponds to Rule 2 of Order XVI of the rules of the Supreme Court in England, and it has been uniformly held there that this rule contemplates cases in which a suit is brought by a plaintiff who subsequently discovers that he cannot get the full relief he seeks without the joinder of some other persons as co-plaintiffs, or where it is found that some other person and not the original plaintiff is entitled to the relief claimed. In the former contingency a new party has to be added, and in the latter a new party has to be substituted. No doubt, the rule is applicable only to cases where it is established that the suit has been improperly instituted through a *bona fide* mistake; but such mistake may obviously be one of fact or in law. If any authority is needed for this proposition, reference may be made to the cases of *Duckett* v. *Gover* (2) and *Hughes* v. *The Pump House Hotel Co., Ld.*, (3). In the latter case, it was pointed out that where the Court of first instance takes one view of the law and the Court of appeal takes a contrary view, that in itself is sufficient evidence of *bona fide* mistake. In the case before us, the Subordinate Judge in the suit for construction of the Will of Suresh Chandra Gangoli held that the dedication was inoperative in law and that consequently his grandsons were entitled to his whole estate. That view was subsequently negatived by a Full Bench of this Court which overruled a series of decisions in which a contrary view had been taken. It is obvious that when the plaintiffs instituted the suit for accounts on the 4th August 1909, they based their claim on the decision of the Subordinate Judge which was supported by a series of decisions of this Court. Subsequently, they found that this position was no longer tenable, that the dedication was valid in law and that one of the original plaintiffs was entitled to maintain the suit, not in his character as a person interested in the estate of Suresh Chandra Gangoli, but as a person who had obtained Letters of Administration as a joint *shebait* of the idol to be established under the direction in the Will of the testator. The other applicant, Charu Chandra Dutt, who had defended the suit for construction of the Will and had secured its withdrawal in this Court, had also obtained Letters of Administration as one of the *shebaits*. What possible objection can there be to the addition of these two persons as parties to the suit? Even assuming that a question of limitation could arise upon addition or substitution of a plaintiff under such circumstances, *Ravji* v. *Mahadev* (4), it is conceded that no question of limitation can arise here, because the executor, against whose representatives accounts are sought, died on the 30th June 1908, and the applications for addition or substitution of the petitioners as parties to the suit were made on the 12th May 1910. The learned Vakil for the defendant opposite party has, however, confessed with cynical frankness that if the applications of the petitioners are refused, he proposes to have the suit dismissed on the ground that in the events which have happened, the original plaintiffs are not entitled to proceed with the suit, and to leave it open to the petitioners to institute a fresh suit for accounts against the representatives of the executor. A Court of justice, however, will not encourage such wasteful litigation. In our opinion, there can be no doubt that the order for substitution ought to have been made by the Subordinate Judge. The view we take is supported by the cases of *Gopal Dass Agarwal* v. *Budree Dass Sureka* (5) and *Seshamma* v. *Chennappa* (6). But the learned Vakil for the opposite party has contended that an application of this character ought not to be granted if it is established that the original plaintiffs had no cause of action at the time when the suit was instituted. He has not referred us to any authority in support of this view, although his contention is, perhaps, to some extent,

(2) 6 Ch. D. 82; 46 L. J. Ch. 407; 25 W. R. 554.
(3) (1902) 2 K. B. 485; 87 L. T. 359; 50 W. R. 677.
(4) 22 B. 672.
(5) 33 C. 657; 10 C. W. N. 662. (6) 20 M. 467.

supported by the decision of the Bombay High Court in the cases of *Bhanu Tukaram Shet* v. *Kashi Nath Pand Shet* (7) and *Sayad Abdul Hak* v. *Gulam Jilani* (8). The contrary view, in our opinion, is obviously well-founded on principle and is amply supported, not only by the cases to which reference has been made but also by the decision in *Chunder Coomer Roy* v. *Gocool Chunder Bhuttacharjee* (9), as also by the recent decision of the Madras High Court in the case of *Krishna Bai* v. *The Cokala and Government Agent, Tanjore* (10). The learned Vakil for the defendant has also argued that the case of an administrator stands on a different footing from that of an executor, that the title of an administrator does not relate back to any period antecedent to the grant of administration, that in this view the petitioners had no right of suit when the action was commenced, and that consequently they cannot be appropriately added or substituted as parties plaintiffs in the pending suit. There is some apparent force in this contention [see *Wankford* v. *Wankford* (11)], where it was ruled that an administrator is not entitled to institute an action before he has obtained Letters of Administration. See also *Phillips* v. *Hartley* (12); *Tallersal* v. *Ashworth* (13). See, however, Daniell on Chancery Practice 352. But it must be remembered, as pointed out by Baron Parke in *Morgan* v. *Thomas* (14), that this principle has its limitations; although an act done by a party, who afterwards becomes administrator, to the prejudice of the estate, is not made good by subsequent administration, yet if the act is for the benefit of the estate; the order relates back, so that by virtue of the appointment the administrator is able to recover against such persons as have interfered with the estate and thereby to prevent it from being prejudiced and despoiled. [*Tharpe* v. *Stallwood* (15); *Foster* v. *Bates* (16); *Searson* v. *Robinson* (17); Williams on Executor 10th Edition, Vol. I page 469]. In the case before us, it is not open to the representatives of the original executor to contend that the petitioners are not entitled to claim an account from them merely because they were not appointed administrators till the 3rd May 1910. Upon their appointment as administrators on that date, they became clothed with the right to take the accounts of the executor who was apparently in charge of the estate till his death on the 30th January 1908. [*Baroda Prosad* v. *Rajendra Nath* (18)]. We, therefore, feel no doubt as to the propriety of the order we are about to make in this case.

The learned Vakil for the opposite party has finally urged that it is not competent to this Court to interfere with the order of the Court below, in the exercise of either its revisional jurisdiction or its powers of superintendence under the Charter Act. He has contended that the order now assailed is an interlocutory order and that, consequently, the Court is powerless to set matters right, though fully satisfied that the order is wholly unjust and erroneous. We do not feel pressed by this argument which is invariably the last resort of a litigant when convinced that the order he has obtained from the Court below is contrary to law and cannot be defended on the merits.

The decisions in *Judooputtee Chatterjee* v. *Chunder Kant Bhuttacharjee* (19); *Khettramoni* v. *Shyama Churn* (20); *Dwarka Nath Sen* v. *Kisori Lal Gossami* (21); *Promotha Nath* v. *Rakhal Das* (22); *Basli Bibi* v. *Hanif-ud-din* (23) and *Golab Jan* v. *Bhola Nath Manik* (24) show that this Court may interfere in cases of this description, if otherwise grave and irreparable injury will be done to one of the litigants. These six cases deal with the question of addition of parties to pending suits; in five cases, the Subordinate Court had erroneously refused to add the petitioner as a party; in another case, the Court below had erroneously made an order of the contrary description and thus brought on the record a person who was not entitled to be made a party to the suit; in every

(7) 20 B. 537.
(8) 20 B. 677.
(9) 6 C. 370.
(10) 30 M. 419; 2 M. L. T. 447.
(11) (1700) 1 Salkeld 301.
(12) (1827) 3 C. & P. 121.
(13) (1903) 1 Annual Practice 110 at pp. 139, 177.
(14) (1883) 8 Ex. Ch. 307; 22 L. J. Ex. 152; 17 Jur. 283.
(15) 5 M. & G. 760; 63 R. R. 474; 1 D. & L. 24; 6 Scott (N. R.) 715; 12 L. J. P. C. 241; 7 Jur. 492.
(16) (1843) 12 M. & W. 233; 67 R. R. 311.
(17) (1861) 2 F. & F. 351.
(18) 1 Ind. Cas. 289; 9 C. L. J. 383 at p. 404.
(19) 9 W. R. 309.
(20) 21 C. 539.
(21) 11 C. L. J. 426; 6 Ind. Cas. 549.
(22) 11 C. L. J. 420; 6 Ind. Cas. 546.
(23) 6 Ind. Cas. 570; 12 C. L. J. 267.
(24) 7 Ind. Cas. 481.

instance, the order of the Court below was discharged. A reference again to the cases of *Gobinda Mohan Das* v. *Kunja Behary Das* (25); *Amjad Ali* v. *Ali Husain* (26) and *Ram Rup Das* v. *Mohunt Shirj Ram* (27) will show that it is within the powers of this Court to interfere with interlocutory orders if the Court is satisfied that such interference is needed in the interests of justice. In the case before us, as we have already pointed out, the petitioners, as administrators appointed by a Court of competent jurisdiction to the estate of Suresh Chandra Gangoli, are entitled to take accounts from the representatives of the original executor. Indeed the decision of this Court in the case of *Baroda Prosad Banerjee* v. *Gajendra Nath Banerjee* (18) shows conclusively that it is their duty to do so and that in the event of their failure to take such accounts from the representatives of the original executor, they are themselves liable to render accounts. There can be no question, therefore, that they ought to be added as parties to the suit.

The result is that this rule is made absolute, the order of the Court below is discharged, and the two petitioners are added as plaintiffs in the account suit. The other plaintiffs, Mritunjoy and Gopal, will be removed from the category of plaintiffs and made defendants in the suit, which will, therefore, procecd, as re-constituted, at the instance of the present petitioners. The petitioners will have liberty to amend the plaint and the defendants will also be allowed opportunity to file fresh written statements.

The costs of this rule will be costs in the suit. We assess the hearing fee at three gold *mohurs*.

Rule made absolute.

(25) 10 C. L. J. 407; 4 Ind. Cas. 364.
(26) 6 Ind. Cas. 574.
(27) 7 Ind. Cas. 92; 12 C. L. J. 211; 14 C. W. N. 932.

CALCUTTA HIGH COURT.

REGULAR CIVIL APPEALS Nos. 276 AND 293 OF 1909.

September 5, 1910.

Present:—Mr. Justice Mookerjee and Mr. Justice Teunon.

DIGAMBAR DAS—PLAINTIFF IN No. 276 AND DEFENDANT IN No. 293—APPELLANT

versus

NISHIBALA DEBI—DEFENDANT IN No. 276 AND PLAINTIFF IN No. 293—RESPONDENT.

Vendor and purchaser—Mortgage for balance of consideration—Inability of vendor to put purchaser in possession of entire property—Reduction of consideration for mortgage pro tanto *—Claim to portion of property sold, by third party—Power of purchaser to compromise with claimant—Whether vendor bound by compromise—Clause in conveyance that if damage was sustained for any other cause, vendor would not be responsible, whether sufficient to relieve vendor's liability under s.* 55 *sub-s.* (2), *Transfer of Property Act—Transfer of Property Act* (*IV of* 1882), *s.* 55 *sub-s.* (2)—*Purchaser's claim for expenses of litigation with successful claimant.*

Where a purchaser takes a conveyance and being unable to pay the whole of the consideration in cash, executes a mortgage security for the unpaid balance, and it subsequently transpires that the purchaser is entitled to a deduction from the price settled because the vendor is unable to transfer what he had agreed to sell, the consideration for the mortgage will also be reduced *pro tanto*.

A purchaser may well compromise or refer to arbitration any adverse claim made upon him, which would be covered by the vendor's covenant of title, without giving notice to the vendor of the claim on the proceedings, and he will be entitled to recover under the covenants the amount paid or awarded to be paid by him as compensation and costs to the claimant.

Great Western Ry. Co. v. *Fisher*, (1906) 1 Ch. 316; 74 L. J. Ch. 241; 92 L. T. 104; 53 W. R. 297, referred to.

The only qualification to the rule is that if the vendor has no notice of the claim and of the intention to compromise it, he would be at liberty to prove in defence that the claim was unfounded either wholly or partially or that he could have made better terms than the purchaser, or that the purchaser made an improvident bargain, and in these respects he would have to bear the burden of proof. His position is worse if with notice of the claim he declines or fails to remove or contest it himself. He cannot then even allege any such ground of defence.

Smith v. *Compton*, 3 B. and Ad. 407, referred to.

Therefore, where the vendor was a party to the suit and quietly acquiesced in the adverse decision by the original Court, he cannot successfully turn round and contend that the compromise, which took place between the claimant and the purchaser in his presence in the appellate Court and without any protest on his part, was improvident.

In a conveyance, the vendor declared that he had not made any gift etc. of the property and that if on account of any such encumbrance any damage was

sustained by the purchaser, the vendor would indemnify him. This was followed by a clause that if damage was sustained from any other cause the vendor would not be responsible therefor:

Held, that this clause was not comprehensive enough to negative the liability of the vendor, which he may incur, by reason of the breach of the covenant implied, under section 55 sub-section (2) of the Transfer of Property Act, to the effect that the seller must be deemed to have contracted with the buyer that the interest he professed to transfer subsisted and that he had power to transfer the same.

When reliance is placed upon an express contract to exclude the operation of the statute, the contract to be binding must be expressed in plain and unambiguous language; if the vendor uses expressions reasonably capable of misconstruction or if he uses ambiguous words, the purchaser may generally construe them in the manner most advantageous to himself.

Sexton v. *Mapp*, 2 Collyer, 556, at p. 562, relied upon.

Where an action is brought against the purchaser by a person with superior title, and the former compromises by paying money, he is entitled in an action upon the covenant for title to recover the whole sum so paid and his costs, from the vendor.

But this principle is inapplicable to the case where the litigation expenses he incurred were caused in a large measure by the exaggerated claim of the person with superior title, for which his vendor was in no way responsible, and he voluntarily gave up costs which in the event of ultimate success he might have been awarded, and he had realized a substantial amount as profits from the portion of the property which he obtained from his vendor though he finally lost it. In such a case, there will be no failure of justice if the Court refuses to allow him any damages in the shape of litigation expenses against the vendor.

Appeals from the decrees of the third Sub-Judge of 24 Pergannahs, dated February 27, 1909.

Babus *Prorash Chunder Mitter* and *Susil Madhab Mallik*, for the Appellant.

Babu *Brojo Lal Chakravarti*, for the Respondent.

Judgment.—These appeals arise out of two cross suits in one of which the appellant Digambar Das is the plaintiff and in the other the defendant. The events antecedent to these two litigations, in so far as they are material for our present purposes, lie in a narrow compass and may be briefly narrated. One Ohindra Bhusan Chatterjee, father of the respondent, Nishi Bala Debi, was the owner of a reclaimed property in the Sunderbuns called Shamnuggar or Lakhipur or Lakhimonee in these proceedings. He had a *Zemindary* right in a 1/5th share and a *putni* right in the remaining 4/5th share under certain persons called the Dutts. On the 13th March 1898, Ohindra Bhusan entered into an agreement with Digambar to transfer his interest in the property to the latter for a consideration of Rs. 18,500 out of which Rs. 5,000 was paid down as earnest money. On the 7th April 1898, Ohindra executed the conveyance and it is the common case of both parties that another instalment of Rs. 3,132 was paid at this time. For the balance of the consideration, the purchaser executed a mortgage in favour of the vendor and as the total amount of the consideration had been fixed at Rs. 18,500, the mortgage was created for the balance calculated to be due namely Rs. 10,368. Payments were made on account of this mortgage from time to time till only Rs. 2,000 remained due on the 5th April 1900. Meanwhile on the 2nd April 1898, one Ram Narain Patra had instituted a suit against Ohindra for recovery of possession of 500 *bighas* of land which he alleged were included within a neighbouring *chuk* held by him but had been unlawfully seized by Ohindra. On the 3rd June, Ohindra filed his written statement in which he stated *inter alia* that the property had been transferred by him to Digambar Das. This written statement of Ohindra proves beyond all controversy that the land then in dispute was claimed by Ohindra as included within his property which he had transferred to Digambar; in fact this written statement completely negatives the suggestion made in this Court by the representative of Ohindra that the disputed land had not been transferred by him to Digambar but had been unlawfully seized by the latter at his own risk and upon his own responsibility. The effect of the written statement of Ohindra was that Digambar was added as a party to the suit on the 6th June 1898. During the pendency of that litigation, Ohindra died and on the 14th September 1899 his widow, Jibantara, was brought on the record as his legal representative. On the 12th December 1900, the suit of Pattra was dismissed on the ground that he had no interest in the property and his grandfather was the person beneficially interested. Ram Narain Pattra thereupon took a deed of gift from his grandfather and on the 19th March 1901 commenced a fresh suit against Jibantara and Digambar. He prayed for recovery of possession of 500 *bighas* of land and for mesne profits from

the 12th April 1897 to the date of delivery of possession. A Commissioner was appointed to demarcate the boundaries between the two properties claimed respectively by the plaintiff and the defendant. His report was to the effect that out of 500 *bighas* in dispute about 133 *bighas* belonged to the then plaintiff Ram Narain. The Subordinate Judge, however, decreed the claim in full and made the defendants liable for costs to the extent of Rs. 1,472 and mesne profits to be assessed in execution of the decree. Digambar alone appealed to this Court and he joined as parties respondent to the appeal the plaintiff Ram Narain and the co-defendant Jibantara. The latter died on the 4th May 1905 during the pendency of the appeal and thereupon Nishibala, the daughter of Ohindra, was brought on the record as his representative-in-interest. On the 25th June 1906, by consent of parties this Court varied the decree of the original Court. The plaintiff was allowed a decree for possession of 133 *bighas* only and he abandoned all claim for mesne profits and costs. By consent of parties, it was further directed that the name of Nishibala be struck out of the record of the suit. There has been some discussion at the bar as to the precise meaning and effect of this part of the order. But we feel no doubt that what was intended was to dismiss the suit as against Nishibala. This, in fact, would be obviously appropriate because after the sale by Ohindra to Digambar the contest would be restricted to Ram Narain Patra and Digambar Das. On the 13th September 1907, Nishibala commenced one of the suits now before us for recovery of the money still due on the mortgage. Digambar Das defended the suit on the ground that as the mortgage had been executed for the balance of the consideration for the sale and as the consideration had partially failed, nothing was due on the mortgage. On the other hand, Digambar complained that he had a legitimate grievance because by reason of the omission of his vendor to inform him that the title to the property was disputed, he had been needlessly involved in a costly litigation and he consequently in his turn commenced a suit on the 2nd September 1908 against Nishibala for recovery of damages. The two suits were by consent of parties tried together in the Court below. The Subordinate Judge has held that as Digambar had purchased the property after enquiry, he was not entitled to claim any damages for partial failure of consideration and that the consent decree between Ram Narain and Digambar Das was collusive. In this view, the Subordinate Judge has decreed the mortgage suit of Nishibala and dismissed the damage suit of Digambar.

Digambar has now appealed to this Court against both these decrees and the position taken up on his behalf has substantially been that Ohindra fraudulently omitted to inform him that the title was disputed, that as a result he has not only been dispossessed of 133 *bighas* of land but has had also to incur heavy costs in an expensive litigation and that consequently the obvious justice of the case requires that he should be indemnified by the representative-in-interest of Ohindra. This position has been strenuously controverted on behalf of the respondent and it has been argued that there was no fraud on the part of Ohindra, that Digambar purchased the property entirely at his own risk, that the claim of Ram Narain was wholly unfounded, that the consent decree was improvident if not collusive and that in any event, under the terms of conveyance, the vendor was not liable to indemnify the purchaser in the events which had happened. It has also been contended on behalf of the respondent that the claim for damages is barred by limitation.

In so far as the suit to enforce the mortgage security is concerned, it is, in our opinion, fairly clear that the plaintiff cannot succeed if the defendant establishes that there has been a failure of consideration to the extent of Rs. 2,000 left due on the 5th April 1900. The conveyance and the mortgage-deed were parts of the same transaction. No doubt in the mortgage instrument, it was stated that the sum secured was Rs. 10,368. But the recitals stated expressly that this was due as the unpaid consideration for the conveyance executed on the same day. The substance of the transaction was that the purchaser took the conveyance and as he was unable to pay the whole of the consideration in cash, he executed a mortgage security for the unpaid balance. If, therefore, it subsequently trans-

pired that the purchaser was entitled to a deduction from the price settled, because the vendor had failed to transfer what he had agreed to sell the consideration for the mortgage would also be reduced *pro tanto*. The intention of the parties obviously was that the properties purchased by Digambar should continue as a security for the unpaid balance of the purchase-money, which at the time was assumed to be Rs. 10,368 on the hypothesis that the vendor had a good title to all that he professed to convey. We must, therefore, proceed to consider whether the appellant as defendant in the mortgage suit has established that there has been a failure of consideration and, if so, to what extent.

Now it is perfectly clear that apart from all questions of fraud, the purchaser is entitled to the benefit of section 55 sub-section (2) of the Transfer of Property Act. It may be conceded that a vendor is not bound to mention to the purchaser mere claims put forward by third persons, unless the vendor is asked whether he knows of any claims [*Brownlie* v. *Campbell* (1)]. In the case before us, there is nothing to show whether any such enquiry was made by the purchaser, but we are unable to adopt the suggestion of the respondent that there was at the time of the sale no serious dispute about the title to the property. There had been transactions in 1891 to 1893 between the owners of the adjoining property and Ohindra or his predecessors which indicates that there was a substantial controversy and as a matter of fact the suit by Ram Narain was instituted against Ohindra shortly before the sale by the latter to Digambar. Under such circumstances, it may be a matter of some nicety to determine whether there was mere silence on the part of the vendor or a passive acquiescence in the purchaser's self-deception as it is put by Cockburn, C. J. in *Smith* v. *Hughes* (2). But we are not prepared to say that there was any industrious concealment as it is put in *Shirley* v. *Stratton* (3), on the part of the vendor, much less any aggressive deceit as is put in *Keates* v. *Cadogan* (4). It is not necessary, however, to consider the conduct of the vendor because, in our opinion, under sub-section (2) of section 55 of the Transfer of Property Act, the seller must be deemed to have contracted with the buyer that the interest which he professed to transfer subsisted and that he had, however, to transfer the same. That there has been breach of this covenant admits of no reasonable doubt. It has been suggested on behalf of the respondent that as the suit of Ram Narain was dismissed against Nishibala and a consent decree made between the other parties, she is not bound by the ultimate result of that litigation. It may be conceded that the position is unassailable that she is not concluded by it. But it cannot be disputed that the proceedings furnish weighty evidence against the defendant. She or her predecessor was a party to the suit in the original Court. The report of the Commissioner shows that the claim was well-founded in respect of at least 133 *bighas*. The original Court made a decree for the entire disputed land. The defendant did not prefer any appeal against this decision. She at any rate accepted it as unassailable. It was Digambar alone who challenged it by way of appeal and ultimately entered into the compromise previously related. The suggestion that the compromise was collusive is wholly unfounded. No attempt has been made on behalf of Nishibala to show that her father had a good title to the disputed 133 *bighas*. In our opinion, the position cannot be seriously contended for a moment that there has been a failure of consideration to the extent of this 133 *bighas* and that without any fault on the part of the purchaser. It is firmly settled that a purchaser may well compromise or refer to arbitration any adverse claim made upon him which would be covered by the vendor's covenant of title, without giving notice to the vendor of the claim on the proceedings, and he will be entitled to recover under the covenants the amount paid or awarded to be paid by him as compensation and costs to the claimant. *Great Western Railway Company* v. *Fisher* (5). The only qualification to the rule is that if the vendor has no notice of the claim and of the intention to compromise it, he would be at liberty

(1) (1880) 5 A. C. 925 at p. 944.

(2) (1871) L. R. 6 Q. B. 597; 40 L. J. Q. B. 221; 25 L. T. 329; 19 W. R. 1059.

(3) (1885) 1 Bro. C. C. 440.

(4) (1851) 10 C. B. 591; 20 L. J. C. P. 76; 15 Jur. 428.

(5) (1906) 1 Ch. 316; 74 L. J. Ch. 241; 92 L. T. 104; 53 W. R. 279.

to prove in defence that the claim was unfounded either wholly or partially or that he could have made better terms than the purchaser or that the purchaser made an improvident bargain, and in these respects he would have to bear the burden of proof. His position is worse if with notice of the claim, he declines or fails to remove or contest it himself. He cannot then even allege any such ground of defence [*Smith* v. *Compton* (6), Williams on Vendors, 1050, Dent on Vendors 802]. The case before us is really much stronger than any to be found in the books. Here the vendor was a party to the suit and quietly acquiesced in the adverse decision by the original Court. She cannot now successfully turn round and contend that the compromise, which took place in her presence in the appellate Court and without any protest on her part, was improvident. We must, therefore, take it as settled beyond the possibility of dispute that Digambar has been deprived of 133 *bighas* of land which he had purchased on the faith of the covenant for title impliedly given by his vendor. It has been argued, however, on behalf of Nishibala, on the authority of the decision in *Subramania* v. *Saminatha* (7), as the representative of the vendor that the purchaser is not entitled to be indemnified because there is an express covenant to the contrary in the conveyance. Reliance has been placed upon a clause in the conveyance in which the vendor declares that he had not made any gift, sale or mortgage of the property, nor created any kind of encumbrance thereon and then covenants that if any loss or damage is sustained by the purchaser on account of any such encumbrance, he and his representative would indemnify him. This is followed by a clause that if damage was sustained from any other cause, the vendor would not be responsible therefor. We are unable to uphold the contention that this clause is comprehensive enough to negative the liability of the vendor in the events which have happened. The vendor undertakes to indemnify the purchaser if it should turn out that the property was in any respect *dayasang jukta*, which is comprehensive enough to mean subject to claim or liability of any kind. It must further be remembered that when reliance is placed upon an express contract to exclude the operation of the statute, the contract to be binding must be expressed in plain and unambiguous language. As Vice-Chancellor, Knight Bruce, put it in *Seaton* v. *Mapp* (8), when a vendor sells property under stipulations which are against common right and place the purchaser in a position less advantageous than that in which he would otherwise be, it is incumbent on the vendor to express himself with reasonable clearness ; if he uses expressions reasonably capable of misconstruction or if he uses ambiguous words, the purchaser may generally construe them in the manner most advantageous to himself. The special covenant, upon which the representative of the vendor relies, is, in our opinion, wholly insufficient to relieve her from the liability she has incurred by reason of the breach of the covenant implied under section 55 sub-section (2) of the Transfer of Property Act.

The question, therefore, arises what is the value of the 133 *bighas* of land of which the purchaser has been deprived. As we have already stated the total area was assumed to be 4,800 *bighas* and the vendor had proprietary interest in one-fifth of this and a *patni* interest in the remainder. The rent payable is stated to be Rs. 2,000. The result of the loss of 133 *bighas* has, therefore, been that the purchaser has got so much quantity of land less out of the assets of which to pay the superior *Zemindar*. The annual loss of the defendant works out at Rs. 57 a year and capitalized at 20 years purchase this represents Rs. 1,140 and the value of 133 *bighas* at about Rs. 10 a *bigha*, which was the value put by Ram Narain Patra in his suit, comes to Rs. 1,320. The total loss, therefore, would, even upon the most moderate estimate, fully cover the Rs. 2,000 claimed in the mortgage. It is obvious, therefore, that there has been a failure of consideration to the extent of not less than Rs. 2,000 and the mortgage-debt ought to be reduced by that sum. In this view nothing is due to the mortgagee and her suit ought to fail.

We have finally to consider the suit of Digambar in which he claims damages for the costs of the litigation in which he

(6) 3 B. and Ad. 407; 1 L. J. K. B. 146.
(7) 21 M. 69.
(8) (1846) 2 Coll. C. C. 556 at p. 562; 70 R. R. 324.

was involved after his purchase. The claim is laid at Rs. 8,825 from which Rs. 2,660 is deducted as the value of the land lost. The balance left is Rs. 6,165 but the suit is laid at Rs. 5,000 only. It has been argued on behalf of Digambar that he is entitled to the costs of the litigation and reference has been made to a passage from Mayne on Damages in which the principle applicable to cases of this description is thus stated (8th Edition, p. 253): "Where an action is brought against the occupier by a person with superior title and the former compromises by paying money, he is entitled in an action upon the covenant for title to recover the whole sum so paid and his costs as between attorney and client." This principle is, in our opinion, inapplicable to the case before us. In the first place, the costs incurred by the purchaser are attributable mainly to his necessary defence against a very exaggerated claim. Ram Narain Pattra, as we have seen, claimed to recover not 133 but 500 *bighas*. Even if Ram Narain had limited his claim to 367 *bighas*, Digambar would have incurred expenses in resisting the claim not appreciably less than what he incurred in resisting the claim for 500 *bighas*. In the second place, to the extent that he succeeded in the litigation he might, but for the compromise, have obtained proportionate costs from Ram Narain. These he voluntarily gave up and he cannot now reasonably throw the burden upon the representative of the vendor. In the third place, as the result of the compromise, he was relieved from all liability for mesne profits in respect of 133 *bighas* from the 7th April 1898 to the 25th June 1906. In other words, if he has incurred costs in the litigation he has recouped himself out of the profits of the land for a period of over 8 years. If we calculate the value of these mesne profits on the basis of the rate stated by Ram Narain Patra in his plaint in the suit of 1898, they would amount to at least Rs. 350 a year for the 133 *bighas*. Digambar, therefore, must be taken to have realised in more than 8 years Rs. 3,000 approximately from the area which he ultimately lost. When, therefore, we take into account all these circumstances, namely, that the litigation expenses he incurred were caused in a large measure by the unfounded claim of Ram Narain Patra for which his vendor was in no way responsible, that he voluntarily gave up costs which in the event of ultimate success he might have been awarded, and that he has realized a substantial amount as profits from the 133 *bighas* which he obtained from his vendor though he finally lost it, it appears to us to be reasonably plain that there will be no failure of justice if we refuse to allow him any damages in the shape of litigation expenses against the representative of his vendor. In our opinion, the claim of the purchaser for damages is as unsustainable as the claim of the vendor mortgagee for the unpaid balance of the purchase money.

The result, therefore, is that in reversal of the decree in the mortgage suit and in modification of the decree in the damage suit we dismiss both the suits and direct the parties to bear their costs in both the litigations.

Decree modified.

CALCUTTA HIGH COURT.

CIVIL RULE No. 2220 OF 1910.

August 8, 1910.

Present:—Mr. Justice Mookerjee and Mr. Justice Sharf-ud-Din.

PANCHU CHAKAR BEHARA—

DEFENDANT—PETITIONER

versus

NAGENDRA NATH PAL CHOWDHURY

PLAINTIFF—OPPOSITE PARTY.

Rent—Service to be rendered by tenant—Bengal Tenancy Act (VIII of 1885), s. 3, Sub-s. (5), s. 181—Service tenure—Service in nature of rent—Suit for damage for non-performance of service—Small Cause Court—Jurisdiction—Provincial Small Cause Courts Act (IX of 1887), Sch. II, art. 3.

If a tenant undertake to render service as the consideration for his tenancy, the service is to be treated as in the nature of rent; and a suit for damages for non-performance of the service is one for rent of land, and a Small Cause Court has no jurisdiction to entertain it.

Rule against an order of the Small Cause Court of Ranaghat, dated March 11, 1910.

Babus *Mohendra Nath Roy* and *Biraj Mohan Majumdar*, for the Petitioner.

Babus *Umakali Mukherjee* and *Joy Gopal Ghosha*, for the Respondent.

Judgment.—We are invited in this rule to set aside a decree made by the Court below in a suit for damages for non-perform-

ance of service. The case for the plaintiffs was that the defendant held certain lands under them and that in consideration thereof, he agreed to render service as a servant during four months in the year and also to procure two other persons to render similar service for the same period. The plaintiffs alleged that the defendant had broken the contract, that they had been obliged to employ other persons as servants and that, therefore, they were entitled to recover damages. The defendant denied all the material allegations in the plaint; he contended, *first*, that he was not bound to render any service to the plaintiffs because he held the land under a third party, *secondly*, that the suit was not maintainable in a Court of Small Causes, and, *thirdly*, that in any event, the suit ought not to be tried in a Court of Small Causes as substantial questions of title were involved in the litigation. The learned Judge in the Court below has overruled all these objections. He has held, *first*, that the suit is maintainable in a Court of Small Causes because it is essentially a suit for damages and not for rent, *secondly*, that as the question of title is raised only incidentally, there is no reason why the plaint should be returned under section 23 of the Provincial Small Cause Courts Act, and, *thirdly*, that upon the merits the plaintiffs have made out their case.

On behalf of the defendant, it has been contended in this Court that the Small Cause Court Judge had no jurisdiction to entertain the suit and, that, if he had jurisdiction, he ought not to have exercised it but should have returned the plaint, so that the question of title raised might be decided finally by a Court of competent jurisdiction. In our opinion, there is no room for controversy that the suit is in its essence one for rent of land and that the Small Cause Court Judge was not entitled to take cognizance of it.

The foundation of the claim is that the defendant holds the disputed land under the plaintiffs, consequently the interest of the defendant in the disputed land, if he holds it under the plaintiffs, is subordinate to their interest. It is further asserted that the services which the defendant is alleged to have agreed to perform were in consideration for the lands held by him. From these premises, the inference is irresistible that the services which the defendant undertook o perform were in the nature of rent. The learned Vakil for the plaintiff opposite party, however, invited our attention to the terms of section 3, sub-section (5) of the Bengal Tenancy Act, in which rent is defined to mean whatever is lawfully payable or deliverable in money or in kind to his landlord on account of the use or occupation of the land held by the tenant. It was argued with reference to this definition that the services which the defendant undertook to render could not be treated as anything payable or deliverable in money or kind by him to the plaintiffs and that consequently it was not in the nature of rent. In our opinion, the conclusion does not follow from the premises. No doubt, it is possible to maintain the view that service is not rent as defined in the Bengal Tenancy Act and we may, in this connection, refer to section 181 of the Bengal Tenancy Act which provides that nothing in the Act shall affect the incidents of service tenures. It may be assumed, therefore, that the intention of the legislature was that service tenures should not be governed by the provisions of the Bengal Tenancy Act, and that may be the reason why the definition of rent was so framed as to exclude service tenures. But this does not prove that the service performed by a tenant is not in the nature of rent; section 105 of the Transfer of Property Act conclusively shows that the contrary view is well-founded. Reference may also be made to the cases of *Doe* v. *Morse*(1); *Vyvyan* v. *Arthur* (2); *Doe* v. *Benham* (3); *Ansar Ali Jamdar* v. *Grey* (4) to show that the service rendered by a tenant to his landlord may be treated as in the nature of rent. If a tenant who had undertaken to render service as the consideration for his tenancy, refuses to perform his part of the agreement, the landlord may either sue him for rent or may bring an action in ejectment. In the case before us, the landlords have chosen to take the former course, but they have erroneously brought this suit in the Court of Small Causes which, under article 8 of the Schedule to the Provincial Small Cause Courts Act, has no jurisdiction to entertain any suit for recovery of rent other than house-rent. The result, therefore, is that this rule is made absolute, the judgment and decree of the Small

(1) 1 B. and Ad. 365.

(2) 1 B. and C. 410; 2 D. and R. 670; 1 L. J. (o. s.) K. B. 138; 25 R. R. 437.

(3) 7 Q. B. 976; 14 L. J. Q. B. 342; 9 Jur. 662.

(4) 2 C. L. J. 403.

Cause Court Judge are discharged and the plaint is directed to be returned to the plaintiffs for presenting it to the proper Court. Let the records be sent down so that the Small Cause Court Judge may return the plaint to the plaintiffs. The petitioner is entitled to his costs of this rule. We assess the hearing fee at one gold *mohur*.

Rule made absolute.

BOMBAY HIGH COURT.

CIVIL SUIT NO. 828 OF 1908.

February 10, 1910.

Present:—Mr. Justice Russell.

THE PUNJAB NATIONAL BANK LTD. —PLAINTIFFS

versus

THE MERCANTILE BANK OF INDIA, LTD. —DEFENDANTS.

Banker and customer—Honouring a draft genuine to all appearance—Suit by customer for recovery of money—Burden of proof—Forged draft—Plaint, amendment of—Inconsistent pleadings—Handwriting—Expert, value of evidence—Principal and agent—Default of principal misleading agent into doing something—Negligence—Signing a blank form—Fraudulent conversion of the form into a cheque—Liability of Banker for honouring such a cheque.

Where a banker pays money on a draft, signed by his customer, and the draft and the signatures thereon are to all appearance in order, the burden of proving, in a suit by the customer to recover the money from the Banker, that the draft was a forgery, lies on the customer.

The plaintiffs sued the defendants for the recovery of certain money paid by the defendants on a draft, the signatures on which, plaintiffs alleged, were forged. After the plaintiffs' case was nearly concluded, the plaintiffs asked for leave to amend the plaint and to raise a plea to the effect that, even if the signatures on the draft were genuine, the draft was not issued by the plaintiffs and was thus not a proper draft:

Held, that the amendment could not be allowed, as it would have the effect of putting forward an entirely new case for the plaintiffs inconsistent with the plaint as originally framed.

The opinion of an expert in handwriting should be received with great caution and should not be relied upon unless corroborated.

A principal, who has misled his agent into doing something on his own behalf, which the agent has honestly done, would not be entitled to claim against the agent in respect of the act so done. The question to be determined in such cases is whether the agent was misled into doing the act by the default of the principal.

Bank of England v. *Vagliano*, (1891) A. C. p. 114; 60 L. J. Q. B. 145; 64 L. T. 353; 39 W. R. 657; 55 J. P. 676; *Ireland* v. *Livingstone*, L.R. 5 H. L. 395; 41 L. J. Q. B. 201; 27 L. T. 79; 15 W. R. 152, relied upon.

If A employs B on his behalf to deal with articles of a certain description in a particular way and then A, through inadvertence or otherwise, introduces among the articles with which B is to deal a dangerous counterfeit, not distinguishable in appearance from its companions, A is bound to indemnify B against any loss resulting from his dealing with the counterfeit as if it were a genuine article within the scope of his employment.

As between a customer and a banker, who is his mandatory, the duty on the part of the customer arises directly out of contractual relations subsisting between them to take care that any cheque which he should buy him is not in such a form as to offer facilities for being filled up in a way which would mislead the banker if reasonably vigilant.

It is negligence to sign a document which somebody else may convert into a negotiable instrument for the honouring of which the banker is to be held liable.

The defendants were authorized by plaintiffs to accept and honour cheques signed by M. M left in his office blank forms of drafts signed by him. Another person duly filled up a blank signed form and had the cheque cashed at defendants'. Plaintiffs sued defendants for the recovery of the money paid on the cheque:

Held, that the defendants were not liable.

Scholfield v. *Lord Londesborough*, (1896) A. C. 514; 75 L. T. 253; 45 W. R. 124; 65 L. J. Q. B. 593; *Colonial Bank of Australasia, Ld.* v. *Marshall*, (1906) A. C. 559; 75 L. J. P. C. 76; 22 T. L. R. 746; *Adelphi Bank* v. *Edwards*, 26 S. J. 360, distinguished.

Young v. *Grote*, 4 Bing. 253; 12 Moore 484; 54 L. J. (o. s.) C. P. 165; 29 R. R. 552, relied upon.

Mr. *Raikes*, for the Plaintiffs.

Mr. *Lowndes*, for the Defendants.

Judgment.—The plaintiffs are a Banking Company carrying on business with their head office in Lahore and branches at Amritsar and Multan and other places. The defendants are a bank with their head office in England with branches in Bombay and other places.

About November 1904 a current account was opened in the defendants' books at Bombay with the plaintiffs and it was agreed *inter alia* that the plaintiffs and their branches should draw upon the accounut, which had been transferred to the defendants' bank from the Chartered Bank in Bombay. The usual Pass Book was issued to the plaintiffs on the opening of the said account by the defendants. The correspondence relating to the opening of the said account is to be found at the commencement of Ext. E herein, wherefrom it appears that on the 30th November 1904 the defendants' manager asked the plaintiffs at Lahore to send a list of the officers authorized to sign for his bank at the various branches together with their specimens, and on the 5th December 1904 in reply, Lahore wrote that the plaintiffs' Amritsar branch balance

should also be transferred so as to keep only one account and says that all the branches had been told to send their specimen signatures as desired, a list of which being enclosed. Amongst these the only one material to this case is that of Madho Ram the Manager at Amritsar, and notice of his appointment was given by Lahore to Bombay on the 5th December 1904 and a specimen sent of his signature. On the 13th July 1905 Amritsar writes to defendants that their permanent Accountant is Mr. Uttam Chand K., a specimen of whose signature is there given. It appears that on the 29th September 1905, two documents were drawn up (1) an advice Note Ext. A (2); a draft Ext. B for Rs. 10,000. These two documents purport to bear the signatures respectively of Madho Ram Manager and Uttam Chand K., Accountant. They were sent to Bombay and the evidence of the defendants' Bank clerk shows how they were dealt with there. Mr. Hedland, the Assistant Accountant at that time in defendants' bank, is unfortunately in England. So he was not called, and Mr. Lowndes did not deem it necessary to apply for a commission for his evidence.

There is no doubt that on the 2nd October 1905, the defendants in Bombay honoured the draft, which had been made payable to bearer, by paying that amount to the person who presented it who purported to acknowledge the receipt thereof on the back of the draft *viz.*, one Lala Nihalchand.

On the 17th October 1905, the defendants sent to the plaintiffs their Pass Book wherein a sum of Rs. 10,000 was debited to the plaintiffs on the 2nd October 1905, and on the 25th October 1905, Lahore writes to defendants pointing out that under date the 2nd October 1905 the defendants have debited to plaintiffs Rs. 10,000, the amount of Amritsar No. 16 of 1905, while their Amritsar Manager says they had not drawn any such draft on you. Copy of Madho Ram's letter was enclosed in that letter:—"To Manager, Head office, Your Number 784-B of the 21st instant. We do not appear to have drawn on Bombay Rs. 10,000 as on 2nd October. We have also consulted our Drawing Book and there appears no draft No. 16/05 as for Rs. 10,000 and on the 2nd October 1905."

On the 30th October 1905, defendants informed Lahore that the draft was drawn by their Amritsar branch as will be seen from the memo. of advice, a copy of which is enclosed. After this Lahore wires to Bombay:—"Amritsar denies issuing draft No. 16, and asks for the original draft advice and pass book". The request for original draft was countermanded, however, by wire on the 3rd November 1905 and on the 4th November 1905, the defendants wire Lahore that their draft appears in order payable bearer payee Lala Nihalchand; paid Nihalchand Pithimal posting advice for your perusal. On the 4th November, Lahore wires to Bombay.—"Demand draft No. 16 for Rs. 10,000 issued by Amritsar Branch Manager deputed;" and on the same day Lahore writes to Bambay that "enquiry shows that draft No. 16 for Rs. 10,000 favouring Nihalchand was not issued by our Amritsar Branch. Under the orders of the Board of Directors of this Bank, Lala Madho Ram is directed to leave this for Bombay to-day and personally inspect the original draft and the advice said to have been issued by the Branch." On the 4th November 1905, Lahore wrote again: "It appears some fraud has been committed somewhere, because our Amritsar branch issued no draft No. 16 for Rs. 10,000 by Nihalchand etc.," On the same day Lahore telegraphs to the defendants not to honour any draft etc., purporting to be issued by Madho Ram, until further instructions. A letter was written to the same effect. On the 5th November 1905 Amritsar wires to the defendants:—"Draft fraudulent, take necessary action" and on the 7th advises stopping the issuing of telegraphic advices. On the 8th November, Lahore wires to defendants that Amritsar Manager is detained; send advice and draft by registered post which defendants reply to by wire that it was necessary to interview Manager, full particulars required before any steps can be taken; cannot send draft and advice. Meantime on the 12th November Lahore wires:—Amritsar Manager's presence necessary in another fraud, and ask again original advice and draft and on the 13th, the defendants wire that they are sending the draft and advice; payee is unknown and cannot be traced. On the same day, defendants write to Lahore.—"We see no reason to doubt that this fraud has been committed with the connivance of some one, who thoroughly knows the routine of your

office and nothing can be done here until we get full particulars." On the 27th November, Lahore acknowledges receipt of the original draft and advice, the payment of which was taken fraudulently by some Nihalchand. On the 2nd December 1905, Lahore writes to the defendants:—"The draft and advice, received with your letter of 13th ultimo and herewith returned under an insured cover, have been shown to L. Madho Ram, Manager, Amiritsar Branch, who does not admit that they bear his signature. We may inform you that another fraud case has been committed at Multan, the circumstances of which appear to be similar to the one committed at your office. During the inquiry in that case, it has transpired that L. Madho Ram, having himself gone on leave, left some blank advices and drafts duly signed with the Accountant, Uttamchand, who it appears made them over to the *daftri*. The Manager on his return was told that the blank advices had been destroyed." The letter then goes on to refer to the other draft. On the 6th December 1905, Mr. Murdoch, defendants' Manager in Bombay, wrote to the Commissioner of Police, Bombay that the Punjab Bank advised them that a draft for Rs. 10,000 drawn on and cashed by them was fraudulent: they will be obliged if an official is sent to investigate the matter and on the same day Mr. Murdoch repudiates the suggestion made by Lahore that the person who cashed the draft had an accomplice in the defendants' office and says there was no need to any one of being a party to the fraud, the cheque being in order and a bearer one which was naturally paid in the course of business.

On the 9th February 1906, Lahore acknowledges receipt of defendants' letter advising them of the making up of their current account to 31st December etc., and the following passage appears at the foot of it but struck out: "Subject to our claim as to the draft of Rs. 10,000 cashed fraudulently on 2nd October 1905, which is now under Police investigation." On the 23rd March 1906, Lahore wrote to the defendants appending a copy of a resolution passed by the Board of Directors in connection with the forged documents of Rs. 10,000 for your information, resolved that the Mercantile Bank of Bombay be informed in connection with the fraud case of Rs. 10,000 that even the Government Expert is of opinion that the draft and the advice paid by them are forged documents" This it will be noticed is the first mention of the word forged.

On the 7th August 1908, Payne and Company wrote Exhibit F to the defendants in which they say *inter alia* that on 2nd October 1905, a forged draft of Rs. 10,000 bearing a forged signature of the Manager of the Amritsar Branch of the Punjab National Bank and purporting to be drawn in favour of Nihalchand a fictitious person was paid by the defendants; to which the defendants replied on the 8th August 1908 denying their liability.

The reason for my going at this length into the above correspondence will appear hereafter. As very considerable argument was addressed to me as to the form of the plaint and the plaintiffs' cause of action and the question of onus, I deal with these points next. The plaint was not filed until the 29th of September 1908 the very last day, on which it could be filed and I think Mr. Raikes was right in saying that the real gist of the action is one for money had and received. At page 473, Volume VII of the Laws of England, it is said: "Where one person has received the money of another under such circumstances that he is regarded in law as having received for the use of that other, the law implies the promise on his part to make the payment to the person entitled thereto and in default the rightful owner may maintain the action for money had and received to his use".

But I am not sure that the draftsman of the plaint intended to confine it to such a simple matter. The concise statement describes the plaintiffs' claim as for Rs. 10,000, the moneys paid by the defendants on the 2nd October 1905 on a forged draft as mentioned in the plaint etc. Assuming that I am right that the plaint is for money had and received then, how does the matter stand on the question of onus.

The plaintiffs say: You the defendants had certain monies of ours which included a sum of Rs. 10,000 which you have not paid away in accordance with our mandate and have charged us with it. The defendants say:—"We paid that money rightfully away on your order, *viz.*, the draft signed by your Manager which we produce; surely on this state of things, if no evidence was given, the defendants would be entitled to succeed. That being so, having regard to section 102 of the

Evidence Act, the onus is on the plaintiffs to prove that the draft was a forgery and in fact they accepted that onus, as, in my opinion, they were bound to do. In this view it is not necessary to consider section 106 of the Evidence Act, which was referred to by counsel.

It will be observed that the plaint, as originally drawn, relies solely upon the fact of Madho Ram's signature to the draft B being a forgery. I allowed an amendment raising *inter alia* the question as to whether Uttamchand's signature to the draft B was not also a forgery, as, in my opinion, it was clear that any such question must be raised by amendment. During the course of the hearing, Mr. Raikes, after the plaintiffs' case was nearly concluded, asked leave to raise issues to the effect that even if Madhoram's signature was genuine, the draft B had not been issued by the plaintiffs. I read the two proposed issues at length. I declined, however, to raise those two issues because it appeared to me that that would, in effect, be putting forward an entirely new case for the plaintiffs, and one so inconsistent with their case as originally framed that the only course open to them would be to withdraw the present suit with leave to file a fresh one. Further during the course of the hearing, Mr. Raikes, on behalf of the plaintiffs, tried to induce me to go into the question whether the Multan draft for Rs. 7,000, purporting to bear the date 25th October 1905, and the advice note connected therewith were not also forgeries. But I declined to be led into such an enquiry. In the course of my judgment hereafter it may be necessary for me incidentally to refer to the Multan draft and letter of advice, but I desire here to state distinctly that, in my opinion, in this case, as it comes before me, the sole question for me to decide is whether the plaintiffs have, to my mind, discharged the onus which lay upon them of proving that the signature of Madho Ram on Exhibit B is a forgery, for here, as regards the alleged initials of Madho Ram on B it is not strictly necessary to come to any decision. It is merely incidental in my view. I am very strongly of opinion that if I go into other matters, I shall be taking a wrong course of action. The question, therefore, I repeat, which alone I proceed to discuss, is:—Have the plaintiffs satisfied me that this signature of Madho Ram on Exhibit B is a forgery ?

A few remarks must now be made as to the appearance of Exhibit B. It is quite clear, looking at the water marks on the paper, the size of the paper, the printing of the paper, the fact that it was torn off from a counter-foil that that document was one of the drafts of the plaintiffs' Bank. No attempt has been made on the part of the plaintiffs to trace what became of the counter-foil of B or from what books these two documents were extracted.

B bears the stamp "Amritsar" above the word "Lahore" struck out which I find to have been one of the stamps in use by the plaintiffs' Bank. On the back of it, there is an one-anna receipt stamp with the words stamped across it "for the Punjab National Bank Ld." and I find that stamp also to have been one of the stamps in use by the plaintiffs' Bank. The initials of Madho Ram appear in three places "(1) below the word Lahore, (2) below the figure 5 in 1905, (3) below the word bearer". The number of B is 16 of 1905, and we know from C to C15, a series of drafts, drawn by Madho Ram and counter-signed by Accountants Khushalchand, Ruplall, Thakordas, Shriram and Uttamchand, respectively, that from the 31st January 1905, down to the 13th September 1905, different forms of drafts on superior paper and better printed were in use during that period. The serial Nos. 1-15 are applicable to draft drawn on the defendants' Bank as also is the serial No. 16 Amritsar draft on them as to which no question arises. Also that a different form of stamp *viz.* an oval form was used on the receipt stamps. But we know from the books in prior use during 1903, 1904 and beginning of 1905, in which Exhibits A 9 Nos. 13 and 15 are to be found, that the drafts in use during those periods were of the same size as Exhibit B.

One thing, I think, is clear and that is that the signature of Madho Ram on B was written at a period earlier than the body of the document because the ink is certainly fainter. I cannot agree with Madho Ram's statement that his signature to B was written in country or diluted ink for it appears to be ink of certainly not inferior description.

Now Madho Ram has been in the service of the Bank at intervals for 8 years and was Manager at Amritsar since 24th October 1904. He continued as Manager down to

the 27th November 1905, when he was suspended but he was re-instated on the 16th March 1906.

After Exhibit C 15, the next draft drawn on the defendant Bank is No. 16 of 1905, in Exhibit G for Rs. 5,000. This shows, I think, that the serial No. 16 of 1905, on Exhibit B, must have been put on by some person who knew what the then right serial number should be.

The direct evidence as to the signature of B not being that of Madho Ram is that of himself and Uttamchand. As regards Madho Ram, I may say at once that, in my opinion, he was an extremely unsatisfactory witness and I have the greatest possible difficulty in accepting any important statement that he made in the case.

The first point to notice in this connection arisesincor respondence, Exhibit E, which I have set out at length above. In my opinion, Mr. Lowndes was perfectly justified in pointing out that no mention of forgery of Madho Ram's signature was made therein until March 1903. Now it does seem to me a most remarkable fact that Madho Ram should not have at once said that his signature to any such draft was and must be a forgery. Describing the document as a fraudulent one, as is done over and over again, was entirely consistent with the signature of Madho Ram being genuine but the contents of the document a fraud on the plaintiffs' Bank. Judging of this circumstance by the conduct of Madho Ram in signing blank drafts, this omission to mention forgery at once is very significant.

The next thing that strikes one is that he absolutely denies his initials to drafts O2 to O4, which are admitted to be his genuine initials. Again, in examination-in-chief, he denied that he took any leave from the 4th April 1904 to 4th October 1905. That is absolutely untrue for Mr. Lowndes, in his cross-examination of Madho Ram, elicited his absence from the Bank on the following occasions:—27th February 1905 to 1st March 1905; 10th to 13th June; the 17th and 18th July, Monday and Tuesday; the 28th and 29th August, Monday and Tuesday; and the 14th September. This date is noticeable because the entry in cash book shows that it was first signed by somebody else whom he says he does not know. He struck out that signature and signed his name as appears now. On the evening of the 3rd October, we know, he went on leave to Hardwar and he was absent on the 9th to 11th October, Monday to Wednesday. Then again it is to be noticed that his statement to the Directors of the plaintiffs Bank, Exhibit No. 4, is signed by him under the words "read and admitted correct." Before me he denied that this statement which he had signed was true and I will refer in passing to the fact that he there said he could not state whether the signature of Madho Ram on the Multan advice was in his handwriting or not, although on the 6th November he saw the original and he admitted the signature on it was in his handwriting. I am not going to say that, in my opinion, Madho Ram's pecuniary position was such that it would be to his benefit to conspire to defraud the plaintiffs' Bank. He was thoroughly cross-examined upon the point and that is the conclusion I come to on this point. On the other hand, he is interested considerably in the result of this case because the plaintiffs' Bank have got Rs. 5,000 his security in their hands, upon which they probably may claim, in the event of their failing in this suit. His manner of giving evidence struck me as shifty and not in any way dependable.

The next witness on this point is Uttamchand. But his evidence, to my mind, as to the signature not being that of Madho Ram, does not carry any weight and need not be considered.

One fact, however, was pointed out by Mr. Lowndes and has weighed considerably with me, that is, that although there must be several persons connected with the Bank who presumably are in respectable positions, not one of them has been called to swear that this signature is not Madho Ram's.

As regards the signature itself, it certainly bears a most extraordinary resemblance to the genuine signatures of Madho Ram. Madho Ram himself said he would have paid on it (page 552, my note book). It is like that any one would have done so. The large R in the centre of his name is of very peculiar character, there only being two other similar Rs, one on Multan draft and the other being the exhibit itself. As Mr. Lowndes pointed out, it seems a strange thing that the forger should have selected the letter of such peculiarity because it obviously is the stroking figure in the signature. Then

again, the whole run of the signature bears an extraordinary resemblance to that of Madho Ram's genuine ones. This is strikingly borne out when you compare with the enlargement of the signature in B, that of the "specimen" of his signature. Again, the similarity of the initials on B is strikingly alike Madho Ram's genuine initials. Whether his initials to the word "bearer" on B are a forgery or not seems to me immaterial to the question which I am dealing with. Mr. Raikes rightly said that I am in the position of a jury and it was within my province to express my personal opinion on this matter. I can only say that having given many days' study to this case, having looked carefully, I think I may say, at every signature in it, in my opinion, the signature of Madho Ram's to B is the genuine signature and his initials certainly to "Amritsar" and to the date "1905," are his initials. But as I have said before, whether the initials are forgery or not is not material or at all events the plaintiffs have failed to prove that his signature is a forgery.

The next thing I have to do is to consider the evidence of Mr. Hardless on one side and of Mr. Marshall and Mr. Johnson on the other. Now I say at once that I see no reason to believe that Mr. Hardless in any way intended to give false evidence. I do not propose to deal with his evidence in anything like the very great detail with which it was given but to deal with the salient features of it. In the first place, I do not agree that B and M. D. (Mooltan drafts) bear signs of having been traced from the same original. The tracings put in by Mr. Lowndes seem to me to disprove this theory. Then again with regard to this tracing question, Mr. Hardless admits that it never occurred to him when he gave evidence in the Police Court and, therefore, we must consider it to be an after-thought. It is, of course, possible that M. D. was traced from B but if so, that would not make B a forgery. As I said before, I absolutely decline to decide whether M. D. was a forgery, but the most cursory glance at that document shows that it is, if I may say so, a much more clumsy one than B. Mr. Hardless says (page 593 of my notes), "Apart from the similarity of the measurements, I say Madho Ram's signature on B is a tracing because Madho Ram, in his usual signature, writes it in similar operations of one or two pen-lifts, whereas in B the signature has several pen-lifts". All I can say is that in A3 (*b*) which is the enlargement of B, as far as I can judge, no such pen-lifts appear to me. I, therefore, disagree with Mr. Hardless when he describes the various pen operations. So also with regard to his evidence as to pen presentation, *i.e.*, the angle at which the pen is presented to the paper. Mr. Hardless says that B was written with a greater presentation at a greater angle than Madho Ram usually wrote. All I can say is that I fail to see it. He further says that there is a heavier pen-pressure in B and A3 (*b*) than in the usual signatures of Madho Ram. That is shown by the shading of the writing which you can judge by the eye. No such difference is apparent to me, so also with regard to his evidence as to furrows. Again he says that the measurements of the signature on A agree with that on No. 9, that is, the advice and the Multan draft. All I can say is that it is not apparent to me and the signatures to me look as if they had been written by the same person, namely, Madho Ram. I may say here at once, of course, it is possible that the Ex. A is a forgery, the whole of it and yet the signature of Madhoram to B is genuine. Mr. Hardless says, (page 12 of my notes) that "signatures of Madhoram to A and B are good imitations; that he has seen better. They are not exceptionally good. They puzzled me to make out they are genuine or not. At first I was very doubtful as to whether they were forgeries. I cannot swear that I did not report to the authorities that they were genuine. I made a report to the Police. I may have reported that both A and B might have been genuine. I cannot remember whether I did I have looked at my evidence in the Criminal Court before giving evidence here". Then the passages were put in No. 18. As I have said, I do not suggest Mr. Hardless is in any way untruthful. I think his zeal in this case may possibly have eaten him up.

As against him, we had the evidence of Mr. Marshall and Mr. Johnson whom I held to be experts within the meaning of the Evidence Act. It must be remembered that professional experts are very difficult to get in India and, in my opinion, those two gentlemen are as well qualified to judge of signatures as any professional experts can be,

seeing that enormous sums of money depend on their acumen and judgment. Both of those gentlemen say that, after examination, they formed a confident opinion that Madho Ram's signature on B, which is all I am dealing with, was genuine. Both of them said that if Madhoram had been a customer of their respective Banks, they would have passed B in the course of their duty. This, to my mind, is very important evidence because there can be no suggestion made with regard to the position of either of these two gentlemen, who are not even getting any fee for attending in this Court and have been promised nothing. And I feel a considerable confidence in my own judgment supported as it is by that of two gentlemen of this position.

On the evidence, therefore, as far as I have got, I am not satisfied that the signature of Madho Ram to B is a forgery.

This brings me to the astonishing feature in this case, a point on which it wholly turns, that is this. It is proved that certainly on one occasion Madho Ram signed blank drafts *i.e.*, before he left on 4th of October, but owing to the importance of it, I read his statement (Extibit 4) before the Directors, which is dated the 8th November 1905:—"I admit that when I have to go out of the station temporarily or when I have to leave the Bank premises for attending Court or for some other purpose, I sign blank drafts and advices and leave them with the Accountant to be filled up in my absence, if a customer turns up while I am away. On my return, I always enquire from the Accountant whether the blank form which I left with him was or was not used up in my absence. If he says it was, then I check it with the entries in the other books. If he says it was not, then I tear the signed advice but not the drafts as the latter bears on the back of it a one anna receipt stamp and tearing it means a loss of one anna to the Bank". His answers, in cross-examination on this passage, were most unsatisfactory, and I do not believe that it was only on one occasion that he did this, for look at what he said before me (page 556) " I had once or twice signed the Banks drafts in blank at Lahore when I acted as Manager and had to go to Court."

And from another part of the evidence, it appears that it was the practice of the Bank to sign blank drafts. From his evidence I infer that he was in the habit of signing blank drafts and he actually said in cross-examination as to his depositions in the Criminal Court "that it was the custom of the Bank to do so" *i.e.*, "the custom at all the Bank's Branches and Head Office."

The conclusion I have come to is that Exhibit B had been signed in blank by Madho Ram and used by the forgers for the purpose for which it was used. No doubt, two men, Devanchand and Ishwardas, have been convicted and sentenced for forgery of Multan draft as well as B. But it is obvious that the signature and the initials (other than the initials to the word "bearer") to B may be the genuine ones of Madhoram and the rest of the document a forgery.

Supposing my conclusion to be well-founded, how does the matter stand in law? Looking at the duty imposed on a banker to obey the mandate of his customer on a document, such as the one in question, there is, if I may so express it, a correlative duty whereby a customer may be told *sic utere tuo ut alienum non lædas* and when Madho Ram signed papers of the Bank which, though not perhaps filled in any particular, were really Bank drafts, he was acting in such a way as to injure the banker who honoured the draft when filled in. Mr. Raikes very ingeniously argued that the draft, though signed by Madhoram, had no drawee or payee mentioned in it and, therefore, could not be described as a cheque but, in my opinion, that, as I show hereafter, seems to be against his clients. Putting Madhoram's name to it enabled any person, into whose hands it fell, to fill in the payee and drawee and made it a perilous thing for him to do. This seems to me to distinguish the present case from *Scholfield* v. *Lord Londesborough* (1) and *Colonial Bank of Australasia Ld.* v. *Marshall* (2), for in those cases the instruments, when drawn originally, were complete and the subsequent additions unauthorised ; whereas here the document was one which could be and was completed to the damnification of the defendants Bank. The principles applicable to the present case are those stated by Lord Halsbury in the *Bank of England* v. *Vagliano* (3): "Now, apart from the particular machinery by

(1) (1896) A. C. 514; 65 L. J. Q. B. 593; 75 L. T. 254; 45 W. R. 124.

(2) (1906) A. C. 559; 75 L.J.P.C. 76; 22 T.L.R. 746.

(3) (1891) A. C. 114; 60 L. J. Q. B. 145; 64 L. T. 353; 39 W. R. 657; 55 J. P. 676.

which this transaction was effected, it will not be denied that a principal who has misled his agent into doing something on his behalf, which the agent has honestly done, would not be entitled to claim against the agent in respect of the act so done; and upon this branch of the case, the question is whether the agent was misled into doing the act by the default of the principal." *See Ireland* v. *Livingstone* (4). That principle seems to me to be directly applicable to the present case, for here the agent was misled into paying the draft by the default of the principal in drawing it in blank. I refer to another passage, page 115, from "My Lords" down to "the case." But here I hold that the plaintiffs' agent, by voluntary act of his own in signing blank document, gave credit and the certification of its genuineness when filled up. Here the very thing which the defendants did was induced by the default of the plaintiffs' agent and it will be noticed that Lord Halsbury says that he designedly avoided calling these documents bills of exchange because they were nothing of the sort but if they had got into the hands of an innocent owner of value without notice, Vagliano would have undoubtedly been responsible upon them, for he had given them a genuineness as against himself by accepting them. So here Madhoram gave B genuineness as against the plaintiffs by his signature thereto. Again Lord Macnaghten, page 159, says: "If A employs B on his behalf to deal with articles of a certain description in a particular way and then A, through inadvertence or otherwise, introduces among the articles with which B is to deal a dangerous counterfeit, not distinguishable in appearance from its companions, I cannot doubt that A is bound to indemnify B against any loss resulting from his dealing with the counterfeit as if it were a genuine article within the scope of his employment. And it cannot, I think, make any difference that B is bound by the terms of his employment to bear every risk incident to his dealing with the genuine article." In the present case, Madhoram introduced amongst the drafts, with which the defendants had to deal, a document dangerous to the defendants because the body of it could be filled above his genuine signature to their detriment.

After having referred to all the cases, which were mentioned to me, I am of opinion that the statement in Hart on Banking, second edition, page 293, is correct where he says: "As between a customer and his banker who is his mandatory, the duty on the part of the customer arises directly out of contractual relations subsisting between them to take care that any cheque which he should buy him is not in such a form as to offer facilities for an alteration which would mislead the banker if reasonably vigilant." Substitute for the words "for an alternation" the words "for being filled up" and you have the present case.

Mr. Raikes argued that *Young* v. *Grote* (5) had been overruled by reason of the decisions in *Scholfield* v. *Londersborough* (1), and *Colonial Bank* v. *Marshall* (2), and referred to a passage in the Laws of England to that effect. But in Hart on Banking, a second edition, *Young* v. *Grote* (5), is certainly not treated as overruled and, however, much may it have been criticised, I do not feel justified in saying that it has been overruled, and, moreover, it appears to me that there must be a distinction between drawing an instrument in blank and putting your signature to a document which is capable of being converted into an instrument. Madhoram, when he signed Ext. B on the plaintiffs' paper, must have known that he was authorising any person, into whose hands that paper came, to fill it up so as to make it an instrument. In *Young* v. *Grote* (5), *Scholfield* v. *Londesborough* (1) and *Colonial Bank* v. *Marshall* (2) the documents were instruments when they left the hands of the drawer or acceptor and he need not, it may be, have been obliged to take precautions against any alteration of the instrument he had prepared. Of course, in *Young* v. *Grote* (5) the husband was held liable because he entrusted blank cheques to his wife and this is what I think the remarks of Lindley, L. J., in *Adelphi Bank* v. *Edwards* (6) quoted in *Scholfield's case* (1) must be limited to when he says: "We cannot say there was negligence here, unless we go the whole length of saying that it is negligence to sign a negoti-

(4) L. R. 5 H. L. 395; 41 L. J. Q. B. 201; 27 L. T. 79; 15 W. R. 152.

(5) 4 Bing. 253; 12 Moore 484; 5 L. J. (o. s.) C. P. 165; 29 R. R. 552.

(6) 26 S. J. 360.

able instrument so that somebody else can tamper with it; I cannot go that length. I think it would be wrong". That it seems to me is a very different thing from saying that it is negligence to sign a document which somebody else may convert into a negotiable instrument for the honouring of which the banker is to be held liable. So again when Bowen, L. J., said in *Le Leevue* v. *Gould*(7):— "The Law of England does not consider that what a man writes on paper is like a gun or other dangerous instrument; unless he intended to deceive, the law does not, in the absence of contract, hold him responsible for drawing his certificate carelessly." He is there alluding to the drawing of an instrument not to the drawing of a document which somebody else is, by the form of it and in consequence of the signature, capable of converting into an instrument. Madhoram, by signing his name to a blank Bank form, enabled any person into whose hands it fell to make it a gun with which to shoot the defendants' bank. Again in the *Colonial Bank's case*(2), the Privy Council, at page 567, in discussing *Scholfield's case*, (1) say: "It was recognised that there is or may be a duty on the part of the drawer of a cheque towards his banker which does not exist on the part of the acceptor of a bill towards the holder. It was recognised that if the customer by any act of his has induced the banker to act upon the document by his act or neglect of some act usual in the course of dealing between them, it is quite intelligible that he should not be permitted to set up his own act or neglect to the prejudice of the banker, whom he has thus misled or by neglect permitted to be misled."

To my mind, the act usual in the course of dealing between the plaintiffs and the defendant, which Madhoram neglected, was to fill up drafts in the usual way. The act of commission on the part of Madhoram was to sign his name upon the bank's paper which any person could fill up for any amount. I can imagine that bankers in the City of London would get a shock if they were told that they were to be held liable on drafts signed wholly in blank by country managers and filled up fraudulently.

I, therefore, come to the conclusion that the plaintiffs have failed to discharge the onus which lay upon them of proving that the signature of Madhoram to B. is a forgery.

I find on the issues as follows:—

(1) Whether the draft of Rs. 10,000 bore the genuine signature of Madhoram.

The plaintiffs have failed to prove that it did not.

(2) Whether, having regard to the signatures and wording appearing on the said draft, the defendants were not justified in paying the said draft to the bearer.

In the affirmative.

(3) Whether the plaintiffs without delay gave information to the defendants that the draft was a forgery.

No finding necessary.

(4) Whether the defendants in making the said payment acted without proper care and caution or were guilty of negligence.

In the negative.

(5) Whether if the signature of Madhoram on the said draft was a forgery, was it not owing to the negligence of the plaintiffs that such forgery came to be committed.

No finding necessary, but if necessary, in negative.

(6) Whether the plaintiffs are entitled to recover the sum of Rs. 10,000 or any and what part thereof from the defendants.

The plaintiffs are not entitled to recover Rs. 10,000 or any part thereof from the defendants.

I dismiss the suit with costs.

I cannot help regretting that owing to the state of my health, I had to put the parties and counsel to so much trouble in coming up to the bungalow where I heard this case for several days, a trouble which was cheerfully borne by all of them.

Suit dismissed.

(7) (1893) 12 B. 491 at p. 502.

CALCUTTA HIGH COURT.

CIVIL RULES NOS. 3034, 3035, 3518 AND 3519 OF 1910.

September 5, 1910.

Present:—Mr. Justice Mookerjee and Mr. Justice Sharf-ud-Din.

BRITISH INDIA STEAM NAVIGATION CO.,—CLAIMANTS

versus

SECRETARY OF STATE FOR INDIA IN COUNCIL

AND

GARDEN REACH SPINNING AND MANUFACTURING CO.,—CLAIMANTS

versus

SECRETARY OF STATE FOR INDIA IN COUNCIL AND CROSS RULES BY THE SECRETARY OF STATE AGAINST THE ABOVE TWO COMPANIES.

Land Acquisition Act (*I of* 1894), *ss.* 11, 18, 53—*Land Acquisition Collector, not a Court—High Court has no power to interfere with award—Civil Procedure Code*(*Act V of* 1908), *s.* 115, *O. XI, R.* 12—*Charter Act, s.* 15—*Power of Land Acquisition Judge to interfere with award—Secretary of State or person for whose benefit land is acquired, not entitled to demand reference—Discovery, order for, may be made in Land Acquisition case—High Court—Power of interference—Interlocutory order.*

A Land Acquisition Collector, when he holds an enquiry and makes an award under section 11 of Act I of 1894, is not a Court within the meaning of section 115 of the Civil Procedure Code of 1908, much less is he a Court subject to the appellate jurisdiction of the High Court within the meaning of section 15 of the Charter Act. Consequently the High Court has no power to review an award of the Collector, in the exercise of its revisional jurisdiction or of the powers of superintendence vested in it under the Charter Act.

Durga Das v. *Queen-Empress*, 27 C. 820; *Ezra* v. *Secretary of State*, 30 C. 36; 7 C. W. N. 249 and *Ezra* v. *Secretary of State*, 32 C. 605; 1 C. L. J. 227; 9 C. W. N. 454; 2 A. L. J. 771; 32 I. A. 93 (P. C.), relied upon.

Administrator-General v. *Land Acquisition Collector*, 12 C. W. N. 241; *Abdool Ali* v. *Verner*, 23 W. R. 73 and *Lachmeswar Singh* v. *Chairman of Darbhanga Municipality*, 17 I. A. 90; 18 C. 99, distinguished.

The Court of the Land Acquisition Judge is a Court of special jurisdiction, the powers and duties of which are defined by the statute; therefore, it cannot exercise inherent powers so as to assume jurisdiction over matters not intended by the Legislature to be comprehended within the scope of the enquiry before it.

Consequently it has no jurisdiction to review the award of the Collector, to set it aside as illegal and made in contravention of the provisions of the law and to direct him to recast, modify and reduce it.

Shyam Chandra v. *Secretary of State*, 7 C. L. J. 445; 35 C. 525; 12 C. W. N. 569; and *Gajendra Sahu* v. *Secretary of State*, 8 C. L. J. 39, distinguished.

The expression "any person interested" in section 18 of the Land Acquisition Act, does not include the Secretary of State or the person for whose benefit land is acquired, and they are not entitled to demand a reference under that section.

Municipal Corporation v. *Jogendra Narain*, 13 C. W. N. 116; 4 Ind. Cas. 332, referred to.

The Court of the Land Acquisition Judge is restricted to an examination of the question which has been referred by the Collector for decision under section 18, and the scope of the enquiry cannot be enlarged at the instance of parties who have not obtained, or who cannot obtain any order of reference.

Promotha Nath v. *Rakhal Das*, 11 C. L. J. 420 at p. 423; 6 Ind. Cas. 546, relied upon.

Therefore, the Judge has no jurisdiction either to reduce the total sum awarded by the Collector, or to consider items not disputed by the claimant, with a view to reduce them by an amount which the claimant may prove ought to be added to other items.

An order for discovery may be made in a case under the Land Acquisition Act, under Order XI, Rule 12, of the Civil Procedure Code, 1908.

The High Court may interfere when an interlocutory order has been made by the lower Court without jurisdiction or under such circumstances as are likely to cause irreparable injury to one of the litigants.

Gobinda Mohan v. *Kunja Behari*, 10 C. L. J. 407; 4 Ind. Cas. 364 14 C. W. N. 147 and *Amjad Ali* v. *Ali Hussein*, 6 Ind. Cas. 574, relied upon.

Rules against the order of the Land Acquisition Judge of 24-Pergannahs, dated June 30, 1910.

Dr. *Rash Behary Ghosh*, Babus *Surendra Nath Roy* and *Satyendra Nath Roy*, for the Claimants.

Messrs. *Stephen*, *Knight* and *Bagram* and Babus *Ram Charan Mitra* and *Joy Gopal Ghosha*, for the Secretary of State.

Judgment.—These four rules are directed against two orders of the same description made by the Land Acquisition Judge of the 24-Pergannahs, in two references made to him under section 18 of the Land Acquisition Act, at the instance of two claimants, the British India Steam Navigation Co., and the Garden Reach Spinning and Manufacturing Co. The properties in respect of which the references were made have been acquired by the Government for the Commissioners of the Port of Calcutta. The orders of the Land Acquisition Judge have been assailed before us on behalf of both the Secretary of State and the claimants. To appreciate the true bearing of the questions raised which are of considerable importance and not wholly free from difficulty, it is essential that we should state in brief outline the circumstances under which

the orders in controversy were made by the Court below.

After the references under section 18 had been made by the Collector, two applications in each of the cases were presented on behalf of the Secretary of State to the Land Acquisition Judge on the 22nd and 23rd June 1910. In the first application, objections were taken to the validity of the award of the Land Acquisition Collector on the ground that under that award various sums had been awarded to the claimants in contravention of the law; it was accordingly prayed that the award might be remitted with directions that the Collector do proceed according to law or that the award be set aside, recast, modified or reduced. In the second application, it was prayed that under Order XI, Rule 12, of the Civil Procedure Code of 1908, an order might be made upon the claimants to make discovery on oath of all documents in their possession relating to the matters in controversy. In respect of the first of these applications, the learned Judge in the Court below has held, *first*, that he had no power to remit the award to the Land Acquisition Collector for reconsideration, and, *secondly*, that he could not reduce the total amount which may have been properly awarded by the Collector; but the learned Judge has also expressed the opinion that he had power to review the items which made up the total award, so as to reduce any item by an amount equal to that by which another item might have to be increased; in other words, that if the Judge was satisfied that the Collector had exceeded his statutory authority and paid away sums which he was not competent to award under the provisions of the Act, the Judge had authority to review that portion of the award of the Collector and set it aside on the ground that it was illegal and void. In respect of the second application, the learned Judge has expressed the opinion that before an order for discovery was made, it would be to the interest of the litigants to have the questions in controversy between them definitely ascertained, but he has nevertheless directed the claimants to make a full and sufficient affidavit of all documents in their possession or power relating to the matters in question, and also to produce for the inspection of the legal advisers of the Secretary of State all documents mentioned in such affidavit except such as they are legally entitled to refuse to produce. In the Rules obtained by the claimants, the order of the learned Judge has been assailed substantially on two grounds, namely, *first*, that the order for discovery ought not to have been made and, *secondly*, that he had no jurisdiction to review the award of the Collector at the instance of the Secretary of State, to set aside any portion of it as illegal and void and generally, to readjust the various items some of which were not impeached by the claimants. In the Rules obtained by the Secretary of State, the order of the learned Judge has been assailed on the ground that he has for erroneous reasons held that he had no jurisdiction to remit the award to the Collector and that upon the facts alleged by the Secretary of State and not controverted by the claimants though ample opportunity was repeatedly offered to them to do so, he ought to have exercised such jurisdiction. It has been further argued, in the alternative, in these Rules, that if the learned Judge had no jurisdiction to remit the award to the Collector, this Court possesses such jurisdiction, and that, we should, in the exercise of such jurisdiction, remit the award to the Collector for re-consideration, as otherwise grave and irreparable injury would be done to the Commissioner of the Port of Calcutta for whose benefit the properties have been acquired by the Government. The principal questions, therefore, which emerge for consideration from the arguments which have been addressed to us on both sides may be formulated as follows:—*first*, has this Court jurisdiction to review the award of the Collector, to cancel or modify it, or to remit the proceedings to him for reconsideration; *secondly*, has the Land Acquisition Judge jurisdiction to take action of the same description; *thirdly*, has the Land Acquisition Judge jurisdiction to review, at the instance of the Secretary of State, the award of the Collector in so far as it is not challenged by the claimants, to re-examine items not controverted by them, and to set aside the award partially on the ground that it is illegal and void, and, *fourthly*, has the Land Acquisition Judge jurisdiction to make an order for discovery; if so, whether that jurisdiction has been appropriately exercised in these cases. These questions have been argued with great earnestness and elaboration, justified not merely by the value of the

claim but also by the novelty of some of the questions in controversy. Since the close of the hearing of these Rules, we have minutely scrutinized all the materials which have been placed before us and have anxiously considered every argument addressed to us on both sides. We now proceed to state the conclusions at which we have arrived.

In so far as the first of the four questions, which arise for consideration, is concerned, it has been argued on behalf of the Secretary of State that it is competent to this Court to review an order made by the Collector under section 11 of the Land Acquisition Act, either under section 115 of the Civil Procedure Code of 1908 or under section 15 of the High Courts Act, 1861; and in support of this proposition, reliance has been placed upon the case of *Administrator-General* v. *Land Acquisition Collector* (1). In our opinion, this contention is entirely unsustainable, because the Collector, when he holds an enquiry and makes an award under section 11 of Act I of 1894, is not a Court, and is, undoubtedly, not a Court subject to the appellate jurisdiction of the High Court. In support of this proposition, reference may be made to the observations of this Court in *Durga Das* v. *Queen-Empress* (2); *Ezra* v. *Secretary of State* (3) and of their Lordships of the Judicial Committee in *Ezra* v. *Secretary of State* (4). In *Ezra* v. *Secretary of State* (3), this Court observed that throughout the proceedings, the Collector acts as the agent of the Government for the purpose of the acquisition, clothed with certain powers to require the attendance of persons to make statements relevant to the matter which he has to investigate; but he is in no sense of the term a Judicial Officer, nor is the proceeding before him a judicial proceeding. Again in *Ezra* v. *Secretary of State* (4), their Lordships of the Judicial Committee observed that when the sections relating to the Collector's award are read together, it is found that the proceedings resulting in an award are administrative and not judicial; that the award in which the enquiry results is merely a decision binding upon the Collector as to what sum shall be tendered to the owner of the lands, and that if a judicial ascertainment of the value is desired by the owner, he can obtain it by requiring the matters to be referred by the Collector to the Court. On this principle, it was ruled that, in the absence of fraud or corruption, the fact that the Collector obtained information without the knowledge of the claimant and did not disclose it on the enquiry, would not vitiate his proceedings. It is, in our opinion, reasonably clear from an examination of the provisions relating to the enquiry and award by the Collector that he is not a Court within the meaning of section 115 of the Code of 1908, much less is he a Court subject to the appellate jurisdiction of the High Court within the meaning of section 15 of the High Courts Act of 1861. The case of *Administrator General* v. *Land Acquisition Collector* (1) is obviously distinguishable. The learned Judges merely held that when a Collector refuses to make a reference to the Civil Court upon an application made under section 18, he acts judicially and his order is subject to revision by the High Court. Whether this view is or is not well-founded, it is needless to examine for our present purposes, because the learned Judges in that very case conceded that up to and including the time of making his award, the Collector is in no sense a Judicial Officer, that the proceedings before him are not judicial proceedings and, however irregular his proceedings may be, the High Court cannot interfere with his award made under section 11 of the Act. It has been suggested, however, on behalf of the Secretary of State, upon the authority of the decision of this Court in *Lekhraj Ram* v. *Debi Pershad* (5), that there is no form of judicial injustice which the High Court, if need be, cannot re-act under the Charter Act. With reference to this decision it must be observed that the injustice which was there sought to be rectified was due to the action of a Court subject to the appellate jurisdiction of the High Court, namely, the Court of the Chief Presidency Magistrate at Calcutta, and we are entirely in accord with the view indicated in this decision that the exercise of the powers of superintendence of this Court cannot be fettered by any artifical rules or crystallized into inelastic formulas. To attract the operation, however, of section 15 of the High Courts Act, 1861, it must be established in the first place that the order assailed has been made by a Court sub-

(1) 12 C. W. N. 241.
(2) 27 C. 820.
(3) 30 C. 36; 7 C. W. N. 249.
(4) 32 C. 605; 1 C. L. J. 227; 9 C. W. N. 454; 2 A. L. J. 771; 32 I. A. 93 (P. C.).
(5) 12 C. W. N. 678; 7 Cr. L. J. 499.

ject to the appellate jurisdiction of the High Court. The section does not entitle the High Court to rectify what may be called executive or administrative injustice in contradistinction to judicial injustice; nor can forms of procedure be legitimately ignored altogether to bring a case within section 15 of the High Courts Act, for instance, it would be idle to contend that if a litigant has his remedy by a regular suit, he may nevertheless claim, as a matter of right, the interference of this Court under the Charter Act. Reference has also been made to the cases of *Abdool Ali* v. *Verner* (6) and *Maharaja Luchmesswar Singh* v. *The Chairman of the Darbhanga Municipality* (7), to show that this Court has authority to review an award by a Collector. These cases, however, are of no real assistance and do not support the contention put forward on behalf of the Secretary of State. In the first case, the decision which was assailed was an award by the Judge. In the second case, the question of the legality of the award of the Collector was raised in a regular suit. Indeed the cases of *Luchmessar Singh* v. *The Chairman of Darbhanga Municipality* (7); *Saunby* v. *L. W. Commissioners* (8) and *Gaekwar of Baroda* v. *Gandhi* (9), reviewed by this Court in *Rameswar Singh* v. *Secretary of State* (10), indicate that the Civil Courts are not powerless to afford relief to a person aggrieved by proceedings taken in nominal compliance with statutory provisions, though there is apparently room for serious controversy, how far, if at all, and in what precise mode, such relief can be claimed by the Secretary of State or the Corporation for whose benefit proceedings have been taken [*In re Merwanji Cama* (11); *Daryudinomal* v. *Secretary of State* (12), where reference is made to *Attorney-General* v. *Great Western Railway Company* (13)]. It is sufficient for us to hold that the Secretary of State cannot invite this Court to review the award of the Collector in the exercise of our revisional jurisdiction or of the powers of superintendence vested in us under the Charter Act. The first question must consequently be answered against the Secretary of State.

In so far as the second question is concerned, we have been invited by the learned counsel for the Secretary of State to hold that the Land Acquisition Judge had jurisdiction to review the award of the Collector, to set it aside as illegal and made in contravention of the provisions of the law, and to direct him to recast, modify and reduce it. In support of this proposition, reliance has been placed upon the cases of *Shyam Chandra* v. *Secretary of State* (14) and *Gajendra Sahu* v. *Secretary of State* (15). This proposition has been strenuously controverted by the claimants. It has been argued on their behalf that the Court of the Land Acquisition Judge is a Court of strictly limited jurisdiction and that the scope of the enquiry before it is accurately defined by the statutory provisions on the subject and cannot possibly be enlarged so as to embrace an enquiry into the legality of the proceedings before the Collector antecedent to his award. In support of this position, reliance has been placed upon the cases of *Imdad Ali* v. *Collector of Farakhabad* (16); *Crown Brevery* v. *Collector of Dehra Dun* (17); *Babujan* v. *Secretary of State* (18); *Bhandi Singh* v. *Ramadhin Rai* (19); *Rayhu Nath Das* v. *Collector of Dacca* (20); *Nilmoni Singh* v. *Rambandhu* (21) and reference has been made to the observations of Lord Truro in *London and North-Western Railway Company* v. *Bradley* (22), which, it is said, are not affected by the decision of the House of Lords in *Hammersmith* v. *Brand* (23). In our opinion, there is no room for controversy that the Court of the Land Acquisition Judge is a Court of special jurisdiction, the powers and duties of which are defined by the statute, and that there is no foundation for the contention put forward on behalf of the Secretary of State that a Court of this description

(6) 23 W. R. 73.
(7) 17 I. A. 90; 18 C. 99.
(8) (1906) A. C. 110; 75 L. J. P. C. 25; 93 L. T. 648; 22 T. L. R. 37.
(9) 30 I. A. 60; 27 B. 346.
(10) 34 C. 470; 11 C. W. N. 356; 5 C. L. J. 669.
(11) 9 Bom. L. R. 1232 at p. 1238.
(12) 2 S. L. R. 68.
(13) (1877) 4 Ch. D. 735; 46 L. J. Ch. 192; 35 L. T. 921; 25 W. R. 330.
(14) 7 C. L. J. 445; 35 C. 525; 12 C. W. N. 569.
(15) 8 C. L. J. 39.
(16) 7 A. 817.
(17) 19 A. 339.
(18) 4 C. L. J. 256.
(19) 2 C. L. J. 359.
(20) 6 Ind. Cas. 457; 11 C. L. J. 612.
(21) 7 C. 388.
(22) (1851) 3 Mac. & Good 336 at p. 340; 6 Railw. Cas. 551; 15 Jur. 639.
(23) (1870) L. R. 4 H. L. 171; 21 L. T. 238; 18 W R. 12; 38 L. J. Q. B. 449.

can be legitimately invited to exercise inherent powers so as to assume jurisdiction over matters not intended by the Legislature to be comprehended within the scope of the enquiry before it. The cases of *Shyam Chandra* v. *Secretary of State* (14) and *Gajendra Sahu* v. *Secretary of State* (15), are clearly distinguishable. In the first of these cases, the property acquired, namely, fishery rights, was not 'land' within the meaning of the Act, and could not by any possibility form the subject-matter of statutory acquisition. In the second case, the property actually acquired was different from that mentioned in the declaration. Under such circumstances, it was ruled by this Court that the Land Acquisition Judge might refuse to take cognizance of a reference made by the Collector under section 18 of the Land Acquisition Act. It must further be observed that in these two cases, it was the claimant who ultimately took up the position that the reference was without jurisdiction, and it was at his instance that the objection was allowed to prevail. The substance of the matter, therefore, was that the claimant, although he had obtained a reference made under section 18, subsequently resiled from that position, and invited an order for what really amounted to a discharge of the reference. This position is perfectly intelligible, because such a course would still leave it open to the claimant to sue the Secretary of State for damages, for unauthorized interference with his property in merely nominal compliance with the provisions of the Statute. *Saunby* v. *L. W. Commissioner* (8); *Gaekwar of Baroda* v. *Gandhi* (9), *Rameswar Singh* v. *Secretary of State* (10). The position, however, which we are here invited to affirm is of an entirely different description. The claimant has here obtained a reference under section 15 of the Land Acquisition Act, because he is dissatisfied with the award. It is the Secretary of State who has challenged the reference. The contention on his behalf in substance has been that, not only has the claimant no grievance, but that he has been awarded large sums of money by the Collector in a wholly unauthorized manner on account of a jetty, an over-bridge, an electric plant stone ballast, a way bridge and loss of time due to possible removal of business to other premises, for all of which the claimant, it is suggested, has not the remotest vestige of a logical claim. It has further been urged that the statutory allowance on these items has been improperly awarded in contravention of the plain provisions of the statute and further that the sums awarded for land, houses and trees have been largely in excess of their market-value. It was upon these allegations and others of a like character, that the counsel for the Secretary of State invited the learned Judge in the Court below to review the award of the Collector, to cancel it, and to remit it to him to be recast, modified or reduced. In our opinion, the course which the learned Judge was invited to pursue was never contemplated by the framers of the statute, and is not authorized by any provision thereof. It is not necessary for us to review minutely the provisions of the Act which were recently examined by this Court in detail in the case of *Raghu Nath Das* v. *Collector of Dacca* (20). The scope of the reference made at the instance of a claimant under section 18 of the Land Acquisition Act is manifestly of a strictly limited character. If the contention of the learned counsel for the Secretary of State were well-founded, we would have to hold in substance that a reference under section 18 may be made at the instance not merely of the claimant but also of the Secretary of State. It follows indisputably, however, from an examination of the earlier sections of the Land Acquisition Act and specially of sections 9, 10 and 11 that the expression "any person interested" in section 18 does not include the Secretary of State. Section 50, on the other hand, makes it clear beyond the possibility of any dispute that a local authority or company for whose benefit land may be acquired by the Government is not entitled to demand a reference under section 18 [*Municipal Corporation, Pabna* v. *Jogendra Narain* (24)]. If, therefore, the Secretary of State is not entitled to claim a reference under section 18 of the Land Acquisition Act, as we hold he is not, we find it difficult to appreciate how at his instance the Land Acquisition Judge can be invited to review the award of the Collector, to cancel it or to remit it for modification or reduction. Obviously, the Secretary of State

(24) 13 C. W. N. 116; 4 Ind. Cas. 332.

cannot be permitted to achieve by the suggested indirect method what, it is undisputable, he cannot obtain directly. Section 18 and other sections which follow it, make it reasonably plain that the question of the legality of the acquisition or the impropriety of the award of the Collector were not intended by the legislature to form the subject of enquiry by the Land Acquisition Judge at the instance of the Secretary of State. The reference is obtained by the claimant, the objections he can urge against the award of the Collector are specified in sub-section (1) of section 18; under section 20, the Court has to determine the objection, and under section 21 the scope of the enquiry is restricted to a consideration of the interest of the persons affected by the objection. The questions, therefore, which were sought to be raised before the learned Judge in the Court below at the instance of the Secretary of State were manifestly questions which as a Court of special jurisdiction he was not competent to try, and we feel no doubt that he acted properly when he refused to remit the award to the Collector for re-consideration, modification or reduction. The second question must consequently be answered against the Secretary of State.

In so far as the third question which arises for consideration is concerned, the learned Judge in the Court below has held that although he has no jurisdiction to reduce the total sum awarded by the Collector, he is entitled, upon a reference under section 18 made at the instance of the claimant, to consider items not disputed by the claimant, with a view to reduce them by an amount which the claimant may prove ought to be added to other items. In support of this position, the learned Judge has placed reliance upon the case of *Hooghly Mills Company* v. *Secretary of State* (25). An examination of the judgment, however, taken along with the points in controversy in that case, makes it clear that the question now raised did not arise for consideration at all; and the isolated passage upon which reliance is placed cannot be deemed to embody a judicial determination of this point. The answer to the question raised, therefore, must depend upon the provisions of the Land Acquisition Act to which reference has already been made in the course of our examination of the second question. Section 18 contemplates a reference at the instance of the claimant, and indicates the objections that may be taken by him to the award: he is also required to state the grounds upon which such objection is taken. Under section 20, the Court proceeds to determine the objection, that is, the objection taken by the claimant under section 18. Section 20 does not contemplate that any cross-objection, if such an expression is permissible in this connection, may be taken by the Secretary of State. To take a concrete illustration, suppose the property acquired is land and a building thereon. The Collector in his award values the land at Rs. 500 a *cottah* and allows Rs. 10,000 for the house. The claimant obtains a reference on the ground that the land has been under-valued; is it open to the Secretary of State, who cannot obtain a reference under section 18, to urge that the building has been over-valued to such an extent that the objection of the claimant as to the under-valuation of the land, however well-founded it may be, must fail? We are not prepared to hold that such a procedure was contemplated by the legislature. We are not unmindful that section 18, when it specifies the four heads under which objection may be taken by the claimant, speaks of the amount of compensation. This expression by itself may be comprehensive enough to afford some basis for an argument that the whole question of amount of compensation is referred. But this view, we think, is sufficiently negatived by section 20, which directs the Court to determine the objection, that is, the objection of the claimant. Because the claimant objects to a particular item and obtains a reference, the Court cannot review another, a totally distinct and unconnected item. The view, we take, is to some extent supported by the principle which underlies the decisions of this Court in *Abu Bakar* v. *Peary Mohan Mukerjee* (26); *Gobinda Kumar* v. *Debendra Kumar* (27); *Mahommed Sofi* v. *Haran Chandra* (28) and *Probal Chundra* v. *Peary Mohan* (29). That principle is, as it

(25) Regular Appeal No. 96 of 1901.

(26) 34 C. 451.
(27) 12 C. W. N. 98.
(28) 12 C. W. N. 985.
(29) 12 C. W. N. 987.

is put in the case of *Promotha Nath* v. *Rakhal Das* (30), that the Court of the Land Acquisition Judge is restricted to an examination of the question which has been referred by the Collector for decision under section 18, and the scope of the enquiry cannot be enlarged at the instance of parties who have not obtained, or, who, as in the case before us, cannot obtain any order of reference. In our opinion the learned Judge was in error when he held that he had authority to review the award of the Collector in regard to matters not challenged by the complainant and to set it aside on the ground of illegality. The matter, of which the learned Judge was properly seized, was the objection of the claimant and he should now proceed to determine its validity. The third question must consequently be answered against the Secretary of State.

In so far as the fourth question raised before us is concerned, it is really comprised in a very narrow compass. As we have already stated, an application was made in the Court below on behalf of the Secretary of State for discovery under Order XI, Rule 12, of the Code of 1908. The learned Judge was inclined to the opinion that the question in controversy should be specified before the order for discovery was made. Yet he ultimately directed the claimants to make an affidavit of documents and to produce them in Court for inspection within a specified period. In this Court, it has been urged on behalf of the claimants, that an order for discovery cannot be made in a case under the Land Acquisition Act and that, in any event, an order ought not to be made at the present stage of the proceedings. This position has been controverted on behalf of the Secretary of State, and it has been urged that an order for discovery can be claimed almost as a matter of right. We think, there is no substance in the contention of the claimants that an order for discovery cannot be made in a case under the Land Acquisition Act. Section 53 makes the provisions of the Civil Procedure Code, save in so far as they may be inconsistent with anything contained in the Act, applicable to all proceedings before the Court of the Land Acquisition Judge. As the learned Judges of the Allahabad High Court observed in the case of *Kishen Chand* v. *Jagannath Pershad* (31), the comprehensive language of this section is not to be restrained, and a similar view has been indicated in *Bhandi Singh* v. *Ramadhin Rai* (19) and *Zimindar of Dhar* v. *Rana* (32). In our opinion, there is no intelligible reason why the operation of Rule 12, Order XI, of the Code of 1908, should be excluded from cases under the Land Acquisition Act. The mere circumstance that an order of this description cannot be shown to have been made or found necessary in any previous case, is by no means conclusive. On the other hand, as is well illustrated by the case of *Lyell* v. *Kennedy* (33), it may not be always safe to affirm that an order of this description has been never made before. The order of the Court below is, however, open to objection on the ground that it is premature, and is of the vaguest description. The points in controversy between the parties have not yet been specified and the learned counsel for the Secretary of State has plainly stated that in his view some of the objections taken by the claimant to the award of the Collector, are, on the face of them, absolutely unsustainable in law. Manifestly if there are any objections which must fail on the ground that they cannot be entertained at all upon any conceivable principle of law, no discovery need be directed as regards them. It is well settled that in cases where the right of discovery in any form depends upon the determination of any issue or question in dispute in the cause or matter, or it is desirable that some issue or question of law or fact or mixed question of law and fact in dispute should be determined first, the question of discovery may be reserved till after the issue a question has been determined. To take an illustration, if a mortgagor wishes to redeem an estate, and it is denied that he has the right to redeem at all, discovery relating to questions of account will be postponed till it is known whether there is such a right or not; so also in an action by a principal against an agent when agency is denied [*Whyte* v. *Ahrens* (34), *Benno Jaffe* v. *Richardson* (35), *Tasmanian Ry Co.* v. *Clark* (36), *Great Western Colliery Co.* v.

(30) 11 C. L. J. 420 at p. 423; 6 Ind. Cas. 546.

(31) 25 A. 133; A. W. N. (1902) 215.

(32) 53 P. R. 1906; 103 P. L. R. 1906.

(33) 8 App. Cas. 217.

(34) 26 Ch. D. 717 at p. 723; 51 L. J. Ch. 145; 50 L. T. 344; 32 W. R. 649.

(35) (1893) 62 L. J. Ch. 710; 3 R. 515; 68 L. T. 404; 41 W. R. 534.

(36) (1879) 27 W. R. 677.

MARUTHAN CHETTY *v.* KALIMUTHAN.

Tucker(37)]. In the case before us, the proper course to follow is to have the matters in controversy between the claimant and the Secretary of State specified and to have a determination upon the preliminary question, which, if any, of these objections are manifestly not maintainable in law. After this has been decided and the learned Judge has got before him the question to be investigated, he will deal with the application of the Secretary of State for discovery and pass such orders thereon as he may deem essential in the interests of justice, for determination of matters relevant to the points in controversy [*Downing* v. *Falmouth Board* (38), *In re Will's Trade Mark* (39), *White* v. *Credit Reform* (40), *South African Republic* v. *La Compagnie Franco-Belge* (41), *Marriott* v. *Chamberlain* (42), *Kent Coal Concessions* v. *Duguid* (43)]. If discovery is needed to enable the Secretary of State to test the legality of any of the objections of the claimant, the order may also be made for that purpose. The fourth question raised before us must consequently be answered partially against the Secretary of State.

At one stage of the argument, the contention was put forward that it was not competent to this Court to consider the legality of the order of the Court below; this objection, however, lost all force when both parties found it essential, in their own respective interests, to assail the order. We may add, however, that this Court is not powerless to set matters right when an interlocutory order has been made without jurisdiction or under such circumstances as are likely to cause irreparable injury to one of the litigants. [*Gobind Mohan* v. *Kunja Behari* (44), *Amjad Ali* v. *Ali Husain* (45)].

The result, therefore, is that the Rules obtained by the Secretary of State must be discharged with costs. We assess the hearing fee in each of these Rules at 10 gold *mohurs*. The Rules obtained by the claimants will be made absolute and the order of the learned Judge made on the 30th June 1910, discharged. The costs in these Rules will be costs in the proceedings in the Court below. We assess the hearing fee in these cases at 10 gold *mohurs* each. The matters will be remitted to the learned Judge so that he may take up the objections of the claimants and first determine which of them are sustainable in law. He will then make an order for discovery and give specific directions in that behalf as may be found necessary.

Rules discharged.

(37) 9 Ch. App. 376; 43 L. J. Ch. 518; 30 L. T. 731.
(38) 37 Ch. D. 234; 57 L. J. Ch. 234; 58 L. T. 296; 36 W.R. 437.
(39) (1892) 3 Ch. 207; 67 L. T. 453.
(40) (1905) 1 K. B. 653; 92 L. T. 817; 53 W.R. 369.
(41) (1898) 14 T. L. R. 403; 1 Ch. 190; 67 L. J. Ch. 92; 77 L. T. 655; 46 W. R. 151.
(42) 17 Q. B. D. 154; 55 L. J. Q. B. 448; 54 L. T. 714; 34 W.R. 783.
(43) (1910) 1 K. B. 904; 79 L. J. K. B. 872.
(44) 10 C. L. J. 497; 1 Ind.Cas. 361; 14 C W.N. 147.
(45) 6 Ind. Cas. 574.

MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 109 OF 1906.

August 31, 1910.

Present:—Sir Arnold White, KT., Chief Justice, and Mr. Justice Aiyling.

MARUTHAN CHETTY AND OTHERS—APPELLANTS

versus

KALIMUTHAN *alias* VELLAYAN AND OTHERS—RESPONDENTS.

Adverse possession—Prescription—Village tank—Common property—Trustees.

The plaintiffs claimed to be hereditary trustees in respect of a village pond or tank (common property of the villagers) and prayed for a declaration that as such trustees they were entitled to look after the conservancy of the tank and for an injunction restraining defendants from molesting them in their enjoyment of it. The following acts were relied on by plaintiffs in support of their claim, *viz.*, that they and their ancestors had been maintaining and conserving the tank at their cost, that they built at their cost a flight of steps, sluices and had been cleaning it, repairing and strengthening the *bunds*, enjoying the fruits of the trees on the banks, and that the occupants of the houses on the *bunds* constructed them with the leave of plaintiffs' ancestors:

Held, that, whatever might be the nature of the evidence required to establish a proprietary right, the above acts were not sufficient to sustain the plaintiffs' right as trustees, and the presumption of a lost grant could not be made in favour of the plaintiffs.

Muthaya v. *Sivaraman*, 6 M. 229 and *Swaraman Chetty* v. *Muttaya Chetty*, 12 M. 241 at p. 248; 16 I. A. 48, explained and applied.

Venkatrama Aiyar v. *Secretary of State*, 20 M. L. J. 74; 7 M. L. T. 139; 5 Ind. Cas. 118, distinguished.

Appeal against the decree of the Subordinate Judge's Court of Madura (East) in O. S. No. 16 of 1905.

Judgment.

White, C. J.—In this case the plaintiffs are inhabitants of a village called Nemathanpatty and the defendants are also inhabitants of the same village. The matter in dispute is a pond or tank which may be described as the

village pond of the village in question. It is said that the pond, as a matter of fact, is itself outside the boundaries of Nemathampatty village. But I think I am accurate in describing the pond as the village pond of the village of which the plaintiffs and the defendants are the inhabitants or some of the inhabitants.

Now the case set up by the plaintiffs is that they had certain rights as hereditary trustees of this tank, the parties for whom the beneficiary rights are supposed to exist being the defendants and other villagers of the same village. It may be it is not strictly accurate to describe the defendants as the *cestui que trustent* of the alleged trust, but there can be no doubt that the trust which the plaintiffs set up is supposed to exist for the benefit of the defendants as villagers.

The case for the plaintiffs, as made in para 5 of the plaint, is(I give the material portion only) that their ancestors and afterwards the plaintiffs have from time immemorial been undisputedly enjoying the pond in question for over 50 years as trustees. That is the case made in the plaint and that is the case made before us. They ask for a declaration that the properties with certain exceptions hereditarily belong to the ancestors of the plaintiffs and that the properties should be delivered to them and that the defendants have no right other than the rights of taking water like other people and they ask for a permanent injunction restraining the defendants from interfering with the properties. They also ask for an injunction directing the defendants to remove a certain platform and certain mud walls which the defendants have erected.

In their defence the defendants themselves set up an exclusive title as trustees to the pond in question. That issue has been found against by the learned Subordinate Judge. The plaintiffs appeal and the question for determination is whether the learned Subordinate Judge was right in holding that the plaintiffs had failed to make out the case which they set up in their plaint.

Now the acts, upon which the plaintiffs rely as creating in them a title as trustees by immemorial possession or by prescription, whichever may be the more correct description of their claim, are to be found in para 11 of the judgment of the learned Subordinate Judge. He says "that the plaintiffs and the 46 and 47 defendants and their fathers and grandfathers have been maintaining and conserving the plaint tank at their cost and have built a flight of steps, sluices for it, and a Pillayar Kovil, on one of its *bunds*, have been cleaning it and its supply *kal*, repairing and strengthening its *bund* and have also been enjoying the fruits of the trees in the *bund*, selling whithered and fallen trees thereon, and that they are maintaining the Pillayar Kovil also. It is further well proved that the occupants of the houses on its *bund* constructed them with leave of the plaintiffs' ancestors."

That is what the Judge finds with regards to the acts done by the plaintiffs in connection with the village tank.

Mr. Rangachariar suggests that that is putting the case too high in favour of the plaintiffs. However, I will deal with the case on the footing that the learned Subordinate Judge was right in holding that the plaintiffs have established that these acts had in fact been done by the plaintiffs. Then with regard to the rights of the defendants in the pond in question, these are the findings of the learned Subordinate Judge. In para 19 he says: "I have no doubt that the plaint pond just like other ponds in the village is the ancient immemorial pond of the village, and is, therefore, village common property either vested in the State or in the *zemindar*, the proprietor of the entire village". Again in para 22 he says: "In this case (that is the case before him) also the right of every one to use the Oorani is not denied. I have found that from the very nature of the case the plaint Oorani as an ancient village pond is the village common property." Again in para 24: "I, therefore, find on this issue that the plaintiffs' exclusive title as owners or trustees of the plaint Oorani has not been made out and that the plaint Oorani is village common tank to the use of every part of which all the villagers are entitled.

I do not think it necessary to discuss the question of the ownership of the tank with reference to the State or the *Zemindar*. The right which the plaintiffs set up is analogous to the right set up in the case of *Muthaya* v. *Sivaraman* (1). The Subordinate Judge in dismissing the plaintiffs' suit was of opinion that the case before him was governed by

(1) 6 M. 229.

the decision of this Court in the case of *Muthaya* v. *Sivaraman* (1), which went on appeal to the Privy Council, the Privy Council confirming the decision of the High Court of Madras and holding that the plaintiffs had failed to make out the title which they set up.

I do not say that the title set up in *Muthaya* v. *Sivaraman* (1) is identical with that in the present case but it is certainly analogous. I do not say this case is precisely on all fours with *Muthaya* v. *Sivaraman* (1). There are grounds of distinction which have been pointed out in the course of argument. One ground was that there was an admission in *Muthaya* v. *Sivaraman* (1) that the tank was the common property of the villagers. I do not know there is much substance in that distinction, because we have a finding of the learned Subordinate Judge, a finding which is not seriously contested, and which we see no reason to differ from, that here, the pond was the common property of the inhabitants of the village.

Another ground of distinction deserves more serious consideration.

In *Muthaya* v. *Sivaraman* (1), there was a certain agreement and that agreement is set out in *extenso* in the report of the case in the Privy Council—*Sivaraman Chetty* v. *Muthaya Chetty* (2). No doubt, the rights of parties in that case were considered with reference to the special agreement or compromise in that case. But I think it is clear from reading the judgment of the Privy Council as a whole that it was not the view of their Lordships that the rights of the defendants were created by the agreement in that case. I think their view was that the agreement merely embodied rights which previously existed. We find on page 249 of the report: "The terms of the *kararnama* are fatal to the claim of the plaintiffs that they are entitled to repair at their sole expense. Their Lordships do not find anything in the previous evidence to show that these terms are erroneous". That suggests that their Lordships are of opinion, as I have said, that the agreement merely embodied the existing rights.

No doubt, there are grounds of distinction and it may be that the learned Subordinate Judge was not quite right in his view that there was no distinction between the two cases. But, however this may be, I am certainly of opinion that the general principles, upon which the judgments of this Court and of the Privy Council proceeded in the case of *Muthaya* v. *Sivaraman* (1), if applied to the case before us, make it clear that the learned Subordinate Judge is right in his view that the plaintiffs had failed to make out their title as trustees.

Now the acts which were relied upon in *Muthaya* v. *Sivaraman* (1), as creating in the plaintiffs a title by adverse possession or prescription with reference to the point in question in that case, are set out at page 242 of the Privy Council Reports in I. L.R. 12 Mad. Series and they are curiously similar to the acts relied on by the plaintiffs in this case. It would appear also that the allegations in the plaint in the case before the Privy Council were not traversed and that the case proceeded on the assumption that the allegations as to the acts done by the plaintiffs were established. Their Lordships held, as I understand their judgment, that the acts were not sufficient to create the title which the plaintiffs there set up. I am not sure that the Privy Council case is not stronger than the present case, stronger in favour of the title on which the plaintiffs rely for the purpose of excluding the defendants from having any part in the conservancy of the tank. Beyond the statements in the plaint, to which I have referred, we have the admitted fact that in the Privy Council case the plaintiffs dug the tank in question. True it was said they dug it with the permission of the defendants, but we have the admitted fact that they dug the tank either with or without permission. There is no such allegation in the present case. Here there is no evidence that in the first instance, the plaintiffs were the owners of the tank. I think it may fairly be assumed that in the first instance the plaintiffs together with the defendants had precisely the same rights in connection with the tank, that is, rights as villagers. I certainly am not disposed to make any presumption of a lost grant in favour of the plaintiffs.

With regard to the case of *Venkatarama Iyer* v. *Secretary of State* (3), I do not think that that case is in point. There was no question of the rights of trustees as against parties who were entitled to the benefit of the trust. The question was as between rival owners and the only right in question was the proprietary right. Here

(2) 12 M. 241 at p. 248; 16 I. A. 48.

(3) 20 M. L. J. 74; 7 M. L. T. 139; 5 Ind. Cas. 118.

admittedly no beneficiary right is in question. The only right in question is the right of a trustee as trustee.

For the reasons I have given, I hold that the plaintiffs' suit was rightly dismissed and I would dismiss this appeal with costs.

The memorandum of objections also is dismissed with costs.

Aiyling, J.—I agree.

Appeal dismissed.

MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 62 OF 1906.

August 31, 1910.

Present:—Sir Arnold White, KT., Chief Justice, and Mr. Justice Aiyling.

RAMU AIYAR—APPELLANT

versus

PALANIAPPA CHETTY AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act XIV of 1882), *ss.* 278, 281, 283—*Claim by mortgagee—Adjudication in favour of claimant—Failure of unsuccessful party to file suit within one year—Suit by mortgagee—Impeachment of mortgage on grounds urged in claim proceedings and found against—Estoppel—Scope of order under s.* 283 *—Adjudication as to right to physical possession—Title.*

A simple money decree-holder having got attached property subject to a mortgage in favour of plaintiff, the mortgagee put in a claim under section 278, Civil Procedure Code (Act XIV of 1882). The decree-holder impeached the mortgage on the ground that it was invalid for want of sanction under section 257A, Civil Procedure Code, and that it was a sham transaction. These points were found against the decree-holder and the claim was allowed. To these proceedings the mortgagor was not a party. No suit was brought by the decree-holder against the said order. But he purchased the property at the Court sale and then assigned his rights to the appellant. In a suit by the mortgagee to recover money due on his mortgage:

Held (1), that it was not open to the appellant to impeach the mortgage on the grounds urged by his assignor in the claim proceedings; (2) that the fact that the appellant's assignor became the representative of the judgment-debtor, who was no party to the claim proceedings, did not override the estoppel or relieve against the disability imposed by section 283, Civil Procedure Code;

Sardhari Lal v. *Ambika Pershad*, 15 C. 521; 15 I. A. 123; *Sandhu Targanar* v. *Hussain Sahib*, 28 M. 87, *Krishna Satapasti* v. *Sarasvatula Sambasiva Row*, 31 M. 177; 3 M. L. T. 306; *Krishnaswami Naidu* v. *Somasundram Chettiar*, 30 M. 335; 17 M. L. J. 95; 2 M. L. T. 116 (F. B.); *Vadapalli Narasimham* v. *Dronam Raju Setharama Murthy*, 31 M. 163; 3 M. L. T. 256; 18 M. L. J. 26, referred to and explained.

Mahomed Mira Ravuthar v. *Vijaya Raghunatha Gopalar*, 23 M. 227; 21 I. A. 17; 4 C. W. N. 227; and *Mahabir Pershad Singh* v. *Macnaghten*, 16 C. 682; 16 I. A. 107, referred to.

(3) that an order in claim proceedings is not restricted to the determination of rights relative to physical possession, but can also determine questions of title.

Appeal against the decree of the District Court of Chingleput in Original Suit No. 2 of 1903.

Mr. *C. V. Anantakrishna Iyer*, for the Appellant.

Mr. *T. R. Ramachandra Iyer*, for the Respondent.

Judgment.

White, C. J.—The question which we have to decide in this appeal is whether it is open to the appellant to impeach the validity of the mortgage on which the suit is brought. The question arises in this way. The suit is by the mortgagee. The first defendant is the mortgagor. Defendants Nos. 23 and 24 held a money decree against the mortgagor and they attached the mortgaged property. The mortgagee put in a claim, under section 278 of the Civil Procedure Code. The mortgagor was not a party to these proceedings. On the hearing of that claim the mortgage was attacked by defendants Nos. 23 and 24 on two grounds. It was attacked on the ground that it was invalid because the provision of section 257A of the Code had not been complied with and on the ground that it was a sham. Notwithstanding that the mortgage was impeached on the grounds I have stated, the claim of the mortgagee was upheld. Defendants Nos. 23 and 24 became the purchasers at the Court sale held under the order made in the proceedings under section 278; they afterwards assigned their rights to the 25th defendant, who is the appellant before us. Now the present suit is by the mortgagee and he seeks to recover the money due to him from the mortgagor by sale of the mortgaged property. The 25th defendant seeks to impeach the validity of the mortgage. One of the issues raised in the suit was whether the mortgage was bad because the provisions of section 257 A of the Code had not been complied with. The Court of the first instance held it was. The matter came before this Court on appeal and with regard to this question this Court took a different view from that of the Court of first instance and held that section 283 barred the rights of defendants Nos. 23, 24 and 25 to raise the question of the validity of the mortgage with reference to the provisions of section 257A, because they failed to bring a suit within one year from the order made in the

claim proceedings. It held against the 23rd and 24th defendants on the contention which they raised that they were entitled on the ground of minority to escape the operation of this provision of the law of limitation.

Now it is conceded by Mr. Ananthakrishna Aiyar, who argued this appeal on behalf of the appellant, that the grounds of the decision of this Court, to which I have just referred, are equally applicable to the question which we have to consider here, that is to say, the question whether the appellant is entitled to impeach the mortgage with reference to the provisions of section 257A, and on the ground that it is a sham. The parties, against whom the order referred to in section 283 of the Code of Civil Procedure was made, were the judgment creditors of the mortgagor (defendants Nos. 23 and 24), and the 25th defendant derived his title by assignment from them. The contention on behalf of the appellant was that, although the order was made against the parties, from whom the 25th defendant derived his title, inasmuch as these parties were the purchasers at Court auction, the appellant had become relieved of the disability imposed by the provisions of section 283 of the Civil Procedure Code and clothed himself with all the rights of the judgment-debtor. One of these rights was the right to say, "As I was not a party to the claim proceedings I am not bound thereby."

Now that is the argument which is advanced by the appellant and it seems to me it cannot be supported on principle or by authority. The policy of the section is clear. It is stated in the case, to which Mr. Ramachandra Aiyar referred, *i.e.*, *Sardhari Lal* v. *Ambika Pershad* (1), that the object to be secured was speedy settlement of questions of title raised in execution. And as regards the policy of the section, I fail to see that the circumstances of this case give the appellant any special claim for consideration. It may be that the auction purchaser is the representative of the judgment-debtor and not the decree-holder but that is a proposition which can only be accepted subject to certain limitations. I need only refer to the decisions in *Sandhu Targanar* v. *Hussain Sahib* (2), and *Krishna Satapasti* v. *Sarasvatula Sambasiva Row* (3). The proposition, as it seems to me even if we accept it, can have no application to a case where the parties against whom the order was made under the claim proceedings are the identical parties who claim to have the benefit of standing in the shoes of the judgment-debtor. They are none the less the parties against whom the order was made because they have the right to say (assuming they have the right) 'we stand in the shoes of the judgment-debtor.'

Coming to the decision of the Full Bench in *Krishnaswami Naidu* v. *Somasundaram Chettiar* (4), what was held there (so far as it is material to the question we have to consider) was that a judgment debtor who is not in fact a party to the claim proceedings does not in the eye of law become such by reason solely of his being the judgment-debtor. That does not help the appellant.

We were also referred to the decision in *Vadapalli Narasimham* v. *Dronam Raju Setharama Murthy* (5). There, following the principle of the decision of the Full Bench, it was held that a claim under section 281 was not conclusive against, or in favour of, the judgment-debtor under section 283 of the Code unless he was a party to the proceedings in which the order was passed. The other case, *Guruva* v. *Subbarayudu* (6), certainly does not help the appellant because, as it seems to me, it does not carry him so far as the decision of the Full Bench. Then with regard to the other two cases *Mahomed Mira Ravuther* v. *Sarasi Vijaya Raghunadha Gopalar* (7) and *Mahabir Pershad Singh* v. *Macnaghten* (8), I think neither of these authorities supports the proposition which Mr. Anantakrishna Aiyar has asked us to accept. So much for the first point.

The second point is this: it is said that, assuming that the appellant is estopped because the defendants Nos. 23 and 24 are estopped, the order on the claim petition is not an adjudication as regards the question of the validity of the mortgage. It is argued that the order in the claim proceedings merely determines the question of physical possession and does not determine, and was never intended by the legislature to determine, any question of title. Now if we turn to section

(1) 15 C. 521; 15 I. A. 123. (2) 28 M. 87.
(3) 31 M. 177; 3 M. L. T. 306.
(4) 30 M. 335; 17 M. L. J. 95; 2 M. L. T. 116 (F. B.).
(5) 31 M. 163; 3 M. L. T. 256; 18 M. L. J. 26.
(6) 13 M. 366.
(7) 23 M. 227; 21 I. A. 17; 4 C. W. N. 227.
(8) 16 C. 682; 16 I. A. 107.

283 of the Civil Procedure Code, we find the words "The party against whom an order under sections 280, 281 or 282 of the Civil Procedure Code is passed may institute a suit to establish the right which he claims to the property in dispute, but, subject to the result of such suit, if any, the order shall be conclusive". Surely that means the order with reference to the right to claim the property in dispute and not the order with reference to the fact as to whether A or B was in physical possession at the time the order was made. If we turn to the order made by the learned Judge in the claim proceedings, it becomes clear that on one side the title under the mortgage was asserted and on the other side the title under the mortgagor was denied on the ground that the mortgage was fraudulent. And the learned Judge holds, I quote his language, "I must hold, therefore, that Exhibit C has been executed for consideration, notwithstanding that the date of Exhibit C, as compared with the dates referred to by counter-petitioners' Vakil in connection with their suit against Chockalinga Pillai, seems to show that Exhibit C was executed in that connection. In holding that Exhibit C is a genuine document, I also consider the evidence relating to possession which I am going to refer to." The learned Judge adjudicates upon this very question in his order, although it is true that the actual words of his final order are: "That, however, does not interfere with the finding to which I now come that Palaniappa Chetti is in possession of the property mortgaged to him by Exhibit C". I think that must be taken as an adjudication upon the question as to whether he was in possession as the party entitled to possession, that is to say, in possession by reason of the mortgage which he set up as the basis of his claim. I think, therefore, the points which have been taken by the appellant fail.

As regards, the merits Mr. Ananthakrishna Aiyar did not think it necessary to contest the findings of the lower Court.

The result would be that the appeal is dismissed with costs.

Aiyling, J.—I agree.

Appeal dismissed.

CALCUTTA HIGH COURT.

CRIMINAL REFERENCE No. 175 OF 1910.

September 8, 1910.

Present:—Mr. Justice Holmwood and Mr. Justice Doss.

EMPEROR

versus

CHATURBHUJ SAHU—ACCUSED.

Accomplice—Spy or detective—Difference between—Evidence of spy—Corroboration.

One who as a spy or a detective associates with criminals solely for the purpose of discovering and making known their crimes, and who acts throughout with this purpose and without any criminal intent, is not an accomplice and it is immaterial that he encouraged or aided the commission of the crime.

If a witness has made himself an agent for the prosecution before associating with the wrongdoers or before the actual perpetration of the offence, he is not an accomplice, and his evidence does not stand in need of corroboration; but he may be an accomplice if he extends no aid to the prosecution until after the offence has been committed.

Queen-Empres v. *Jave Charam*, 19 B. 363, referred to.

An Excise Deputy Collector deputed B to purchase cocaine from the accused and B purchased it with money supplied by the Excise Sub-Inspector and handed the same over to the Deputy Collector. The accused was tried for illicit sale of cocaine. B in his evidence deposed to the purchase of cocaine from the accused under instructions from the Excise Deputy Collector who stated that he gave such instructions and received the cocaine from him. The accused was convicted upon the uncorroborated testimony of B:

Held, that B was not an accomplice and the conviction was good.

Although the testimony of a spy does not stand in need of corroboration in order to be acted upon, it is entirely for the Judge of facts to decide in each particular case what weight he will attach to this kind of evidence, the question depending upon the character of each individual witness.

Reference under section 438, Criminal Procedure Code, made by the Sessions Judge of Bhagalpur to the High Court, recommending that the order passed by the Deputy Magistrate of Bhagalpur on May 17, 1910, convicting the accused under section 46 of Act V of 1909 and sentencing him to a fine of Rs. 200 be set aside.

Mr. *Huq* and Babu *Sailendra Nath Palit*, for the Accused.

Babu *Srish Chandra Chowdhury*, Junior Government Pleader, for the Crown.

Judgment.

Holmwood, J.—I need only say that I entirely concur in the findings which my learned brother is about to deliver as the judgment of the Court, but I desire to dissociate myself from any reliance on American rulings which are of no authority in this country and, in

my opinion, have no value except in so far as they depend on the prior decisions of English Judges which are in themselves sufficient authority for the view we have taken. I may also point out that in the case of *Queen-Empress* v. *Jave Charam* (1), the Judges cited with approval the English cases upon which we have relied in this case, and, in my opinion, it would be very easy to distinguish that ruling from the present case on the facts and it, therefore, would not be necessary to dissent from it, although I agree with my learned brother that it is opposed to the recent ruling in *Rex* v. *Bickley* (2).

With regard to the order on a similar unreported reference in Chambers which has been referred to before us, I would point out that the matter was not argued before the learned Judges and the order is merely "that for the reasons given by the Sessions Judge, the conviction and sentence are set aside." These reasons having, upon an examination of all the authorities and on a full discussion of the question by learned counsel, turned out to be unfounded, I do not think it necessary to regard this order as a ruling of the Court on a point of law.

Doss, J.—This is a reference by the Sessions Judge of Bhagalpur under section 438 of the Criminal Procedure Code, recommending that the conviction and sentence on the petitioner be set aside on the ground that it is based on the uncorroborated testimony of an accomplice.

The narrative of facts is short and simple. The Excise Deputy Collector of Bhagalpur deputed one Bibhuti Bhusan Fauzdar, a student of Tez Narain Jubilee College, to purchase cocaine from Chatto Sahu, the petitioner. Bibhuti Bhusan purchased a phial of cocaine on April 5th, and 2 phials on April 6th with money supplied by the Excise Sub-Inspector, and handed them over to the Deputy Collector on the 6th. The petitioner was tried for illicit sale of cocaine under the summary procedure by the Deputy Magistrate of Bhagalpur. Bibhuti Bhusan in his evidence deposed to the purchase of cocaine from the accused under instructions from the Excise Deputy Collector, who stated that he gave such instructions, and received the 3 phials of cocaine from him. The Excise Sub-Inspector stated that he gave money to Bibhuti Bhusan in order to purchase the cocaine. The petitioner has been convicted under section 46 of Act V of 1909 and has been sentenced to a fine of Rs. 200.

On these facts the learned Sessions Judge is of opinion that Bibhuti Bhusan must be deemed to have acted as an instigator of the offence committed, and that he cannot, therefore, according to the decision of the Bombay High Court in *Queen-Empress* v. *Jave Charam* (1), be considered in the light of a mere spy or a detective, but is one who falls within the category of an accomplice, whose evidence according to the ordinary rule cannot be believed without corroboration. The question raised is of considerable importance and of not infrequent occurrence in practice. We have, therefore, felt it our duty to examine at some length the authorities bearing on the subject with a view to ascertain the essential ingredient which differentiates a spy or a detective from an accomplice.

In *Rex* v. *Despard* (3), where the accused was tried for high treason, Lord Ellenborough in his summing up to the Jury said: "But there is another class of persons which cannot properly be considered as coming within the description or as partaking of the criminal contamination of an accomplice—I mean persons, entering into communication with the conspirators, with an original purpose of discovering their secret designs and disclosing them for the benefit of the public. The existence of such original purpose on their part is best evinced by a conduct which precludes them from ever wavering in or swerving from the discharge of their duty, if they might otherwise be disposed so to do."

In *Reg.* v. *Dowling* (4), in which the accused was tried on a charge of treasonable conspiracy, the Central Criminal Court held that a person who enters into a conspiracy for the sole purpose of detecting and betraying it, does not require confirmation as an accomplice, although his evidence should be received by the Jury with caution. In his summing up to the Jury, Earle, J., adverting to the particular witness, said: "Although he had been designated as a spy or a traitor, and an accomplice, if his object in entering into the confideracy was not to deceive or entrap any one, but to serve his country, he was entitled to praise, instead of censure. If he

(1) 19 B. 363.
(2) 2 Cr. App. R. 63 ; 73 J. P. 239 ; 53 S. J. 402.
(3) 28 Howell's State Trials 489.
(4) 3 Cox C. C 509.

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only lent himself to the scheme for the purpose of convicting the guilty, he was a good witness and his testimony did not require confirmation as that of an accomplice would do: he was not an accomplice for he did not enter the conspiracy with the mind of a co-conspirator but with the intention of betraying to the police with whom he was in communication."

In *Reg.* v. *Mullins* (5), the Central Criminal Court held that a person employed by Government to mix with conspirators, and pretend to aid their designs for the purpose of betraying them does not require corroboration as an accomplice. Maule, J., in his direction to the Jury, distinguished between two classes of witnesses. As to one class he said: "They were persons who understanding as they say, that there were dangerous designs entertained by certain Chartist Societies, joined the meeting and pretended to sympathise with the views of the conspirators, in order that they might communicate their designs to Government. They joined the scheme for the purpose of defeating it and may be called spies." As to the other class, he said: "On the other hand, they were really chartists, concurring fully in the criminal designs of the rest for a certain time, until getting alarmed or from some other cause they turned upon their former associates and gave information against them. These persons may be truly called accomplices. Now as to spies, I know of no rule of law which declares that their evidence requires confirmation, nor any rule of practice which says that Juries ought not to believe them." Later on, the learned Judge thus stated the reason for this distinction: "An accomplice confesses himself a criminal and may have a motive for giving information as it may purchase immunity for his offence. A spy, on the other hand, may be an honest man, he may think that the course he pursues is absolutely essential for the protection of his own interests and those of society; and if he does so, if he believes that there is no other method of counteracting dangerous designs of wicked-men, I can see no impropriety in his taking upon himself the character of an informer. The Government are, no doubt, justified in employing spies and I do not see that a person so employed deserves to be blamed if he instigates offences, no further than by pretending to concur with the perpetrators."

This case has been recently followed by the Court of Criminal Appeal (Lord Alverstone, L. C. J., and Bigham and Walton, JJ.,) in *Rex* v. *Henry Bickby* (2), where the prisoner was convicted, under 24 and 25 Vict. C. 100, section 59, of having unlawfully supplied a noxious thing to a woman with intent to procure her miscarriage. The woman, who was not pregnant, acted under police instructions in order to trap the prisoner. It was contended in appeal that there was misdirection as no warning had been given to the Jury that they should regard the evidence of the woman to whom the drugs had been supplied as that of an accomplice. The Court held. "That the fact that the woman was a police spy in no way invalidated her evidence; nor must her evidence be regarded as that of an accomplice. As the law stands at present, it seems established that a police spy does not need corroboration."

In *R.* v. *Sankar Shobag* (6), Birdwood and Jardine, JJ., following the rule stated in section 971 of Taylor on Evidence which is based on the summing up of Lord Ellenborough in *Reg* v. *Despard* (3), held that persons, who have entered into communication with conspirators, but in consequence of either a subsequent repentance, or an original determination to frustrate the enterprise, have disclosed the conspiracy to the police authorities under whose direction they continue to act with their guilty confederates till the matter can be so far matured as to ensure their conviction, belong to the class of persons —apparently accomplices—to whom the rule requiring corroborative evidence does not apply and that the early disclosure is considered as binding the party to his duty, and though a great degree of disfavour may attach to him for the part he has acted as an informer, yet his case is not treated as that of an accomplice.

In *Queen-Empress* v. *Jave Charam* (1), Jardine and Ranade, JJ., held with dubiety that the action of the spy and informer in the case, in suggesting to the prisoner at the instance of the police to sell some used tickets and his offering to buy some of them, amounted to a criminal offence, and that as the first

(5) 3 Cox C. C. 526.

(6) Ratanlal's Unreported Criminal Cases p. 428.

instigator of the offence, he should be regarded as an accomplice whose evidence could not be believed without corroboration. In their judgment the learned Judges thus observed: "Mohamed Ali appears from his own account to have been the first instigator of the present offence, not merely a spy, who knowing of criminal doings or doings which will culminate into a crime merely pretends to concur with the perpetrators. Mere good intention does not excuse a criminal act". With every respect to the learned Judges, we are unable to follow this decision which is opposed to the recent ruling by the Court of Criminal Appeal in the case of *Rex* v. *Henry Bickby* (2), where a woman, who asked the prisoner to supply her with a noxious drug to cause her miscarriage and who in doing so acted under police instructions, was clearly the first instigator and yet the Court held that that circumstance did not deprive her of the character of a spy.

The object of the instigation in all these cases is not the perpetration of the offence but the detection of it, not the transgression of law, but the securing of evidence for the enforcement of public justice. It may be argued that the State should not punish, as an offence against itself, an act which was instigated by its own official—a position which was vigorously though unsuccessfully maintained before the Supreme Court of the United States by the counsel for the appellant, in *Grimm* v. *United States* (7). It may be urged with equal force that if the act is an offence, mere good intention on the part of the instigator does not render him less a participant in the crime and hence falling within the ambit of the rule requiring corroboration. But logical conclusions, however attractive, must yield to the overriding necessities of legal policy. The correct solution of the matter, in our opinion, seems to be this:—Spies or decoys are generally employed for the purpose of fettering out habitual offenders in certain classes of offences. In such cases, the punishment is indeed aimed not so much against the offence committed in consequence of such instigation as against the series of similar offences which the offender is believed to have been in the habit of committing before the last offence and which, but for recourse to such stratagem, would have remained undetected for an indefinite period. In respect of such previous offence the spy or informer is *ex hypothesi* not an accomplice. It is not difficult to conceive a large variety of cases in the field of Criminal law where the detection of the offence cannot be successfully effected except by the employment of such artifice. To exclude evidence so obtained for mere lack of corroboration, however unimpeachable such evidence may be in any particular case, would not unoften lead to the disastrous result of placing the transgressors of law beyond the reach of public justice.

The rule laid down in *Despard's case* (3) has been followed in a long and uniform current of decisions in America, where it has been held that one who as a spy or a detective associates with criminals solely for the purpose of discovering and making known their crimes, and who acts throughout with this purpose, and without any criminal intent, is not an accomplice and it is immaterial that he encourages or aids in the commission of the crime.

See *State* v. *Mc Kean* (8). *State* v. *Brownlee* (9); *Wright* v. *State* (10); *People* v. *Bolangas* (11); *Commonwealth* v. *Downing* (12); *Commonwealth* v. *Baker* (13): *State* v. *Baden* (14); *People* v. *Noelke* (15); *Campbell* v. *Commonwealth* (16); *O'Grady* v. *People* (17) (where a string of cases on the point are collected); *Grimm* v. *United States* (7).

In the recent case of *Shephard* v. *United States* (18), where the accused being suspected of being engaged in employing the mails for the dissemination of vicious and immoral literature in breach of the Post Office laws which prohibited the use of the mails for such a purpose, an agent of the Post Office department, acting as a Government detective, wrote decoy letters to the accused which induced the latter to send such objectionable matter in return through the post: it was held that the writing of the decoy letter did not make the detective a party to the offence so as to render his testi-

(7) 156 U. S. 604; 39 Law. Ed. 550.

(8) 36 Iowa 343; 14 Am. R. 530.
(9) 84 Iowa 473; 51 N. W. 25.
(10) 7 Tex. App. 574; 32 Am. R. 599.
(11) 71 Calif. 316.
(12) 4 Gray 29.
(13) 155 Mass 289; 29 N. E. 512.
(14) 37 Minn. 212; 34 N. W. 24.
(15) 94 N. Y. 137; 46 Am. R. 128.
(16) (1841) Penn. 187.
(17) 42 Colo. 312; 95 Pac. 346.
(18) (1908) 60 Fed. 584.

mony subject to the rule relating to accomplices.

The case of *Connor* v. *People* (19), cited by the learned counsel for the appellant in the case of *R.* v. *Bickley* (2), has, as pointed out in the judgment of the Court, no bearing upon the present question. Moreover, it is opposed to the ruling of the Supreme Court of the United States in the cases of *Grimm* v. *United States* (7) and *Andrews* v. *United States* (20).

But though the testimony of a spy does not stand in need of corroboration in order to be acted upon, it is entirely for the Judge of fact to decide in each particular case what weight he will attach to this kind of evidence, the question depending upon the character of each individual witness.

It may sometimes be difficult to draw the line of discrimination between an accomplice and a pretended confederate, such as a detective, spy or decoy; but we think, that the line may be drawn in this way:—If the witness has made himself an agent for the prosecution, before associating with the wrongdoers or before the actual perpetration of the offence, he is not an accomplice; but he may be an accomplice, if he extends no aid to the prosecution until after the offence has been committed.

With regard to the order on a similar reference in Chambers, which has been referred to before us, it is sufficient to say that in the face of the authorities which we have already discussed, we are unable to accept the opinion implied in the order as sound.

For these reasons, we are unable to accept the recommendation of the learned Sessions Judge to set aside the conviction and sentence.

(19) 36 Am. St. R. 295 at p. 300; 18 Col. 373.

(20) 162 U. S. 420; 40 Law. Ed. 1023.

CALCUTTA HIGH COURT.

CRIMINAL REVISION NO. 935 OF 1910.

August 24, 1910.

Present:—Mr. Justice Holmwood and Mr. Justice Doss.

GOBINDA RAJWAR—ACCUSED—PETITIONER

versus

H. J. APKAR—COMPLAINANT—OPPOSITE PARTY.

Workman's Breach of Contract Act (*XIII of* 1859), *ss.* 1, 2, 4—*Accused bound himself to work until re-payment of amount advanced—No advance on account of any work—Advance as loan.*

Where the accused, in consideration of an advance received from the complainant, bound himself to work for the complainant until the re-payment of the amount advanced: *Held*, that the advance was made not on account of any work contracted to be performed, but as a loan, and that the accused could not be proceeded against under the Workman's Breach of Contract Act for breach of the contract.

Proceedings of Madras High Court, 12th December 1873, 7 M. H. C. R. xxx, followed.

Rule against the order of the Deputy Magistrate of Purulia, dated March 31, 1910, under sections 2 and 3 of Act XIII of 1859, directing the petitioner to return to work and complete his term of agreement, an application for the revision of which order was rejected by the Sessions Judge of Manbhum on May 5, 1910, as well as against the subsequent order of the said Deputy Magistrate, dated June 30, 1910, sentencing the petitioner to three months' rigorous imprisonment under section 2 of Act XIII of 1859.

Babu *Nagendra Nath Ghosh*, for the Petitioner.

Mr. *Bagram*, Counsel, for the Opposite Party.

Judgment.—This was a rule calling on the Deputy Commissioner of Manbhum as also the opposite party to show cause why the conviction and sentence passed on the petitioner under Act XIII of 1859, should not be set aside, and from the order passed by the Bench, which issued the rule that the contract should be translated and copies thereof furnished to the Court, we presume that the reason why this rule was issued was that the Bench was of opinion that such contract might not be enforceable under this Act.

It is not necessary for us to consider the other point whether the contract on which the advance was made is still in existence and whether its determination by the closing of the factory does not bring the case within the principles laid down in the case of *Narsingh Prosad* v. *King-Emperor* (1), for we think that this rule must be made absolute on the simple ground that a contract of the nature of the contract in this case does not bring a person who committed a breach of it within the purview of section 2 of this Act. The contract is entirely indefinite and is of the same nature as the contract which

(1) 12 C. W. N. 869; 8 Cr. L. J. 134; 8 C. L. J. 313; 35 C. 1028.

was animadverted upon by the High Court of Madras in their *Proceedings 12th December 1873* (2), where the defendant, in consideration of an advance of Rs. 95, received from the complainant, bound himself to work for the complainant until the re-payment of the amount advanced, just as in this case. For the breach of this contract the complainant proceeded against the defendant under the provisions of Act XIII of 1859 and the Third Class Magistrate directed him to perform the work according to the terms of this contract. The District Magistrate referred that order to the Madras High Court as illegal on the ground that it sanctioned a species of slavery, and the High Court found that the contract is clearly not within the Act. A construction of the Act must not be adopted which would enforce a contract in violation of a law of a more stringent nature. This is precisely the view which we hold with respect to this contract. Much reliance is placed upon section 4 of the Act, which enacts that "the word contract as used therein shall extend to all contracts and agreements, whether by deed or written or verbal, and whether such contract be for a term certain, or for specified work, or otherwise," and it is contended on the strength of the last words "or otherwise" that the penalty provided by this Act is applicable to breaches of all kinds of contract between, speaking generally, employer and workmen.

But section 4 is manifestly controlled by section 1 and the words of that section and of the preamble clearly show that the Act is intended to apply to those contracts only between employer and workmen, where the latter has received from the former "an advance of money *on account of any work* which he shall have contracted to perform."

In this case the work performed by the workman used to be paid for at a certain rate without any deduction from the money he had received in advance.

It is quite clear that the advance was made not on account of any work contracted to be performed but as a *loan*, and that re-payable not when the borrower chose to pay but when the employer chose to realise. See *Ram Prasad* v. *Dirgpal* (3). We, therefore, think that the contract which would extend the provisions of this highly penal statute to cases for which it was never intended cannot be enforced.

For these reasons, we make the rule absolute and set aside the conviction and sentence and direct that accused be acquitted and discharged from his bail.

Rule made absolute.

(2) 7 M. H. C. R. xxx.
(3) 3 A. 742 at p. 744.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 1142 OF 1908.

September 28, 1910.

Present:—Mr. Justice Mookerjee and Mr. Justice Doss.

JURO RAM DAS AND OTHERS—PLAINTIFFS—APPELLANTS

versus

GOBINDA DEB MISRA—DEFENDANT—RESPONDENT.

Religious brotherhood—Samuha Bhaktas—*High Priest of satra of Jorehat—Dismissal of High Priest by members of brotherhood—Regularly constituted assembly duly held for the purpose.*

Even if it is assumed that the members of the religious brotherhood, the *Samuha Bhaktas*, are vested with an unrestricted power to dismiss the *Burah Satria* or the High Priest of the *satra* of Jorehat in Assam, yet the dismissal must be by a majority of the brotherhood at a regularly constituted assembly duly held for the purpose.

Where it appeared that the *Samuha Bhaktas* were divided into two factions, one of which was in favour of the retention of the defendant as the High Priest, while the other was hostile to him, and the hostile party held a preliminary meeting on April 17, 1903, and determined to call a meeting of the entire brotherhood on the following date to secure the dismissal of the defendant, and criers were sent about the *satra* to announce by beat of drum that a meeting of the *Samuha Bhaktas* would be held to appoint C. M. as the High Priest, and there was an assembly on April 18, which was attended only by those in favour of the dismissal of the defendant, and they then appointed C. M. as the High Priest:

Held, that these proceedings were irregular and the decision of the members present could not rightly be deemed as the expression of the wish of the majority of the *Samuha Bhaktas*; that the defendant should be removed from the office of High Priest, as there was no certainty about the body of persons entitled to exercise their choice in this matter, and there was nothing to indicate that a meeting was called after due proclamation and sufficient notice in respect thereof, and there were no materials to prove that a majority of the religious brotherhood assembled at a meeting regularly convened did at the time express their wish that the defendant should be dismissed from his office.

Appeal from the decree of the District Judge of the Assam Valley Districts, dated

JURO RAM DAS *v.* GOVINDA DEB MISRA.

March 9, 1908, reversing that of the Munsif of Gauhati, dated September 3, 1907.

Babus *Dwarka Nath Chuckravarti*, *Surendra Nath Roy* and *Satyendra Nath Roy* for the Appellant.

Dr. *Rash Behary Gosh*, and Babu *Baikuntha Nath Dass*, for the Respondent.

Judgment.—The substantial question of law raised for our consideration in this appeal is one of some novelty, and probably one of first impression so far as the Courts of this country are concerned. The question relates to the legality and sufficiency of the steps taken by the plaintiffs-appellants for dismissal of the defendant-respondent from the office of High Priest of a religious brotherhood. The facts, in so far as it is necessary to state them for the decision of the question of law raised before us, lie in a narrow compass and may be briefly narrated. Sree Sankar Deb, the great religious reformer of Assam, was the founder of the Mahapurushia Sect of Vaishnabs, a brief account whereof will be found in the treatise on Hindu Castes and Sects by Dr. Jogendra Nath Bhuttacharya (page 478) as also in the *Imperial Gazetteer of India* (1908), Volume VII, page 85. In Assam, there are several monastries appertaining to the sect called "*satras*," which are usually presided over by a superior of the Kolita caste. The most famous of these *satras*, or religious colleges, is situated at Barpeta, where are to be found the tombs of Sankar Deb, and his principal disciple, Madhab Deb. The *Samuha Bhaktas* or the religious brotherhood, constitute the ruling power in the Satra, and it is they who appoint and dismiss the *Burah Satria*, the High Priest of the Satra, otherwise known as the Barpeta Adhikar. The defendant was admittedly the High Priest of the Barpeta Satra and was appointed to the office upon the dismissal of his predecessor, Mahessur Deb, in or about the year 1890. The case of the plaintiff is that on the 18th April 1903, an assembly of the *Samuha Bhaktas* of Barpeta Satra dismissed the defendant from the office of *Burah Satria*,; and appointed as his successor, Chaturbhsha Deb, the son of Mahessur, the predecessor of the defendant. The plaintiffs, who are members of the religious brotherhood, commenced this action on the 4th May 1903, for a declaration that the defendant had been dismissed from the office of *Burah Satria* and for a perpetual injunction to restrain him from the performance of the duties of that office. The defendant resisted the claim upon every conceivable ground which it is not necessary for our present purpose to recapitulate; it is sufficient to state that he denied that he had been validly dismissed by a majority of the religious brotherhood or that there was any good reason to justify his dismissal. The original Court dismissed the suit on the preliminary ground that as according to the plaintiffs, the defendant had been dismissed and his successor in office duly appointed, the latter alone was competent to maintain an action, if the defendant unlawfully continued to discharge the duties of High Priest. Upon appeal, the District Judge held that the plaintiffs, as members of the religious brotherhood, were competent to maintain the suit in a representative capacity. In this view, he reversed the decision of the Court of first instance, and remanded the suit for trial on the merits. The order of remand was confirmed by this Court on appeal. The first Court thereupon considered two questions, namely, *first*, whether the *Samuha Bhaktas* were competent to dismiss the High Priest, even though he was not proved to be guilty of any misconduct, and, *secondly*, whether the defendant had been, as a matter of fact, dismissed by a majority of the *Samuha Bhaktas*. Upon both these questions, the Court found in favour of the plaintiffs, and consequently made a decree in their favour. Upon appeal, the learned District Judge has held that the *Samuha Bhaktas* were not competent to dismiss their High Priest in the absence of good and sufficient reason to justify such action, that such reasons had not been established in the present case, and that the defendant had not been proved to have been dismissed by a majority of the religious brotherhood at a meeting regularly convened for the purpose. In this view, the District Judge has reversed the decision of the original Court and dismissed the suit with cost. The plaintiffs have now appealed to this Court and on their behalf the decision of the District Judge has been assailed on two grounds, namely, *first*, that the *Samuha Bhaktas* have an absolute right to dismiss their High Priest and are not bound to assign any reason in support of the action they may take; and, *secondly*, that the defendant has been dismissed by a majority of the religious brotherhood assembled at a

meeting regularly held for the purpose. In our opinion, it is unnecessary to examine the first of these questions, because even if it is assumed that the members of the religious brotherhood are vested with an unrestricted power to dismiss the High Priest at their pleasure, it is manifest that the defendant had not been proved to have been dismissed by a majority of the brotherhood at a regularly constituted assembly duly held for the purpose.

The learned District Judge has found that, in or about the year 1903, the *Samuha Bhaktas* were divided into two factions, one of which was in favour of the retention of the defendant as the High Priest, while the other was distinctly hostile to him and wanted to re-place him by the son of his predecessor in office. The malcontents, if we may so describe them, had from time to time given indications of their attitude; on the 19th January 1903, they applied to the Sub-Divisional Magistrate and invited him to preside at a meeting which they proposed to hold with a view to secure the dismissal of the defendant. The Magistrate refused to intervene in the matter and issued an injunction by which the petitioners were restrained for a period of two months from carrying out their purpose. On the 17th April 1903, the malcontents held a preliminary meeting. What transpired at the meeting cannot be ascertained with absolute certainty. But this much is fairly clear that the only persons assembled on that date were those hostile to the defendant, and they determined to call a meeting of the entire brotherhood on the following date to secure the dismissal of the defendant. At their instance, criers went about the Satra and announced by beat of drums that a meeting of the *Samuha Bhaktas* would be held to appoint Chaturbhuja Deb Misra as the High Priest. There was an assembly on the 18th April 1903, which was attended only by those in favour of the dismissal of the defendant. The members present were practically unanimous in their decision to dismiss him: they then appointed Chaturbhuja as the High Priest, garlanded him and placed him on the seat reserved for the High Priest. The learned District Judge has held that these proceedings were irregular, and that the decision of the members present could not rightly be deemed as the expression of the wish of the majority of the *Samuha Bhaktas* that the defendant should be removed from the office of High Priest. In our opinion, the view adopted by the District Judge is manifestly reasonable and his conclusion cannot be successfully challenged.

It is not necessary for our present purpose, even if it is practicable, to furnish an exhaustive enumeration of all the elements which must be established to validate the dismissal of the High Priest of religious brotherhood from his office. But there are certain fundamental conditions which must be fulfilled before it can be predicated that a majority of the brotherhood is in favour of such dismissal. The question requires examination from a three-fold point of view, namely, *first*, the precise ascertainment of the body of persons whose decision is final in the matter; *secondly*, the essential steps antecedent to the determination of the wish of the majority of the religious brotherhood and, *thirdly*, the procedure for ascertainment of the wish of the majority.

In so far as the first of these points of view is concerned, five elements have to be taken into consideration, namely, *first*, membership of the religious brotherhood; *secondly*, representation of an individual member or of a family as the unit; *thirdly*, age; *fourthly* sex and *fifthly*, residence. It is obvious that no person is entitled to take part in the deliberation and affect by his views the decision of the question of dismissal of the High Priest, unless he is a member of the religious brotherhood, that is, unless he is one of the *Samuha Bhaktas*. But it does not follow conversely that every member of the brotherhood is entitled to take part in the deliberation. The learned District Judge has pointed out that in the litigation of 1891, when the legality of the dismissal of Mahessur was called in question, Mr. Teunon, the then District Judge, held that every member of the religious brotherhood was not entitled to vote and that only the head of a joint family of *Bhaktas* could vote, provided that the family was descended from one of the 280 original families named in the copperplate grant of the Raja of Assam, given at the time of the foundation of the sect and mentioned in the judgment of this Court in *Ram Dass* v. *Mohesur* (1). Then, again, a question may arise whether a person, who has not attained

(1) 7 W. R. 446.

majority, can vote on the occasion of the removal from office of the High Priest of the brotherhood. There is also a further question, whether women can vote, because as the learned Judge puts it, there is a suffragette question in Barpeta, and Mr. Teunon appears to have held that women could vote if they were the heads of families of *Bhaktas*. Finally, a question must necessarily arise from the point of view of the residence of the members of the brotherhood. We have no precise information as to whether the members of the fraternity resident in the town of Barpeta or in the district of that name, or even beyond these local limits, are entitled to be invited to take part in these deliberations. A bare statement of these points will show that, in the absence of an electoral roll, the matter must be involved in considerable uncertainty. We have thus really no definite information as to the body of persons competent to determine whether the High Priest of the Satra is or is not to be dismissed. We have, it is true, the broad negative test of exclusion that no one, who is not a member of the fraternity, is entitled to take part in the decision of the question. But beyond this, nothing is known with precision. It has not been determined whether members of the fraternity are entitled to vote individually or whether they are entitled to vote only as heads of families deemed to be the units for this purpose. Nor do we know whether the privilege may be exercised by infants as well as by persons *sui juris*, by men as well as by women, by residents as well as by non-residents. This last element may obviously give rise to questions of considerable nicety, because if it is proved that non-residents are entitled to take part in the deliberation, a dispute may very well arise, in an individual case, whether the change of residence is temporary or permanent, a question the answer to which must ultimately depend upon the intention of the party concerned. It is reasonably plain, however, from what we have already stated that the qualifications of the voters have not, up to the present time, been determined with any approach to precision, much less has any attempt been made to frame a complete list of the persons who fulfil the necessary or prescribed conditions.

If we consider the matter from the second point of view mentioned above, the difficulties in the way of the plaintiffs appear to be equally insuperable. In order that the decision of the members of the religious brotherhood assembled at a meeting may be deemed operative, it is clear that the meeting must have been properly convened after sufficient notice and due proclamation. Sufficient notice is requisite for a three-fold purpose, namely, *first*, to allow all members of the brotherhood time for deliberation and consultation; *secondly*, to allow all members, specially such as may be temporarily absent from the place, opportunity to attend the meeting; and, *thirdly*, to render it possible for the High Priest sought to be removed, to prepare himself for his defence. For the same purposes, the object of the meeting must be duly proclaimed. These essential elements are all absent in the case before us. The object of the party hostile to the defendant was to take him by surprise, and place him and his supporters at the utmost possible disadvantage. The District Judge is obviously correct in his view that the meeting was not duly proclaimed and that the notice given was unreasonably brief. From this point of view, therefore, the decision of the members assembled cannot be treated as binding upon the defendant.

Finally, if we consider the matter from the third point of view explained above, it becomes obvious that there was no such decision by a majority of the brotherhood as would operate to effect a valid removal of the defendant from his office. In the first place, we have no information upon a question of fundamental importance, namely, what constitutes a quorum at a meeting of this description. It is conceivable that where a religious body is composed of an indefinite number of persons, a quorum for the purpose of removal of the High Priest and for the election of his successor may be deemed to consist of those assembled at a meeting regularly called and convened, although their number may constitute a minority of the whole; in other words, if a meeting is regularly convened, which all the members are entitled and have an opportunity to attend the decision of the majority of those present is binding upon the entire brotherhood. But to sustain such a position, in the absence of any statutory provision or any express direction in that behalf by the founder of the

In re KONDI CHETTY.

institution, the existence of a custom to this effect must be established. No such attempt has been made in the case before us. As we have already explained, the total number of persons competent and entitled to vote upon the question of removal of the High Priest is not known; nor have we any information as to the proportion between the number who assembled at the meeting and the total number competent to exercise their choice. Apart from this initial difficulty, however, it is reasonably plain that the proceedings were conducted with the utmost irregularity at the meeting. No attempt was made to ascertain the votes then and there, so as to determine what might be deemed to be the wish of the majority in the matter. Instead of this, which, indeed, was the most obvious course, an extraordinary method has been pursued; petitions signed by various members of the brotherhood have been produced in the course of this litigation to show on which side particular members have voted. This, clearly, is a procedure which cannot be sustained on any known legal principle. The learned District Judge points out that the votes to be operative must be regarded as given at a particular time or within a specified period; otherwise, it is impossible to say that on the particular date when the meeting was held, the defendant was removed from his office, and his successor was elected pursuant to the wish of the majority. It is not a matter for surprise that in the events which have actually taken place, members have changed sides. Indeed, if the method which has been adopted in the case before us were approved, there would be ample scope for fraud, violence, intimidation, bribery, undue influence and other corrupt practices of a like nature. Clearly, if the decision of the members present at the meeting was intended to be operative, the votes ought to have been counted then and there; or if this was impracticable by reason of the large members assembled, the votes ought to have been recorded with the necessary precautions and subsequently counted. It is impossible to affirm now that the majority of the members assembled at the meeting did at the time indicate their choice that the defendant should be removed from his office and should be succeeded by Chaturbhuja. This aspect of the case is, therefore, fatal to the claim of the plaintiffs.

This analysis of the method adopted by the opponents of the defendant to exercise their choice shows conclusively that they have not taken legal steps to remove him from his office of High Priest of the *Samuha Bhakatas*. There is no certainty, as we have explained, about the body of persons entitled to exercise their choice in this matter. There is nothing to indicate that a meeting was called after due proclamation, and that sufficient notice had been given in respect thereof; on the other hand, there is ample indication to support the contrary view. Finally, the proceedings at the meeting were not regularly conducted, and there are no materials to prove that a majority of the religious brotherhood, assembled at a meeting regularly convened, did at the time express their wish that the defendant should be dismissed from his office. The position which the defendant holds is manifestly one of considerable dignity and importance, and no Court of Justice will tolerate the procedure which has been adopted by his opponents to secure his dismissal. Apart, therefore, from the question, whether the defendant is liable to be removed without proof of misconduct, the conclusion of the District Judge that he has not been validly removed, is well-founded and must be maintained. The result is that the decree made by the District Judge is affirmed and this appeal is dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 165 OF 1910.
CRIMINAL REVISION PETITION No. 129 OF 1910.
September 7, 1910.

Present:—Mr. Justice Aiyling.

In re KONDI CHETTI AND OTHERS—PETITIONERS.

Penal Code (Act XLV of 1860), s. 425—Mischief—Blocking up a channel—Civil rights—Tort.

Where the accused blocked up a channel, the result of which was that the surplus water flowed direct on to the complainant's land and damaged his crop, and the site of the channel was the common property of all the accused:

Held, that the act of the accused did not constitute the offence of mischief and that complainant's remedy for any damage he had sustained lay in an action in the Civil Courts.

MARATTIL MOOSA *v.* NAMPOTAN KANDRIL.

Petition, under sections 435 and 439 of the Criminal Procedure Code, praying the High Court to revise the judgment of the Court of the Joint Magistrate of Hosur, in Criminal Appeal No. 108 of 1909, presented against the decree, finding and sentence in Criminal Case No. 337 of 1909, on the file of the Court, the Second Class Magistrate of Dharmapuri.

Order.—Accused Nos. 1 and 2 in this case own a wet field, to the north of which lies a dry field belonging to their brother-in-law, the third accused. Adjoining both on the east side is a wet field belonging to the complainant in the case. It had been customary for the surplus water from the land of accused Nos. 1 and 2 to pass by a channel through the third accused's land and thence along the northern edge of the complainant's land. The accused filled up the channel for the extent of its course through the third accused's land. As a result, the surplus water of the land of accused Nos. 1 and 2 flowed direct on the complainant's land and damaged his crop.

The above are the facts found by the Sub-Magistrate, and by the Joint Magistrate and although the evidence is meagre on one or two points, I accept them as proved.

The question is whether the act of the accused in closing the channel constitutes the criminal offence of mischief, or is simply an actionable Civil tort.

It is often difficult to draw the dividing line; but I am certainly of opinion that this is a case, in which the criminal intent to cause wrongful loss is not established. In view of their close relationship and alleged common action, no distinction need be drawn between the third accused and accused Nos. 1 and 2: nor has it been by either of the Magistrates.

Their two fields including the site of the channel may, therefore, be regarded as their common property. Now *prima facie* a man has a right to do what he likes with his own: and if his action indirectly prejudices his neighbour, the latter's ordinary remedy is in a Civil Court. Cases arise in which the damage to the neighbour is so inevitable and obvious that an intent to cause wrongful loss may be fairly inferred, but I certainly do not regard this as such a case. The action of the accused is not unlawful in itself: and it is by no means certain that, even in the Civil Court the complainant could compel them to restore and keep open the channel. Where, as in the present case, there are reasonable grounds for doubting whether the accused person was not under a *bona fide* belief that his action was lawful, a conviction for mischief cannot stand: and the aggrieved party should be referred to the Civil Court.

The conviction is set aside: and the fines, if paid, will be refunded.

Conviction quashed.

MADRAS HIGH COURT.

CIVIL APPEAL AGAINST ORDER No. 49 OF 1909.

September 13, 1910.

Present:—Mr. Justice Munro and Mr. Justice Krishnaswami Aiyar.

MARATTIL MOOSA—APPELLANT

versus

NAMPOTAN KANDYIL PARAKUM MARATTIL KOLLANHANDI KALANDAM KUTTI HAJI AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act XIV of 1882), s. 13, Expl. V—Transfer of Property Act (IV of 1882), s. 85—Mortgage—Suit for redemption—Suit to redeem by alleged Karnavan of Malabar Tarwad—Subsequent suit for redemption by junior members—Bar of suit—Res judicata—Karnavan disputing title of junior members.

The Karnavan of a Malabar Tarwad sued for redemption and obtained a decree. In ignorance of his suit and *before he had obtained the decree*, the junior members filed another suit for redemption of the same property with the permission of the Court under section 30, Civil Procedure Code. In the first suit, however, the Karnavan did not implead the plaintiffs in the latter suit and even disputed their title as members of his Tarwad:

Held, that the second suit was not barred by reason of *res judicata*, and that explanation 5 to section 13 of Act XIV of 1882 did not apply.

Appeal against the order of the District Court of North Malabar, dated 17th February 1909, in Original Suit No. 71 of 1908, presented against the decree of the District Munsif of Nadapuram, in Original Suit No. 330 of 1905.

Facts of the case are clear from the following judgment of the lower appellate Court :—

"Plaintiffs are junior members of their Tarwad and have obtained permission, under section 30, Civil Procedure Code, to sue on behalf of their Tarwad for the redemption of the plaint property. Fourth defendant, who denies that plaintiffs are members of the Maratt Tarwad, to which he admittedly belongs, had

previously brought another suit for the redemption of the plaint property, Original Suit No. 29 of 1905, Nadapuram. After plaintiff's suit had been filed, he obtained a decree, which he executed, and is now in possession of the plaint property. The District Munsif has dismissed plaintiffs' suit on the ground that their cause of action has ceased since the decree in 4th defendant's favour and the delivery in execution thereof, and that plaintiffs as junior members are not entitled to maintain this suit. Plaintiffs appeal."

2. "I think there can be no doubt that plaintiffs can maintain this suit, for they have obtained permission under section 30, Civil Procedure Code, to sue on behalf of their Maratt *tarwad*. The suit is, therefore, one brought by Maratt *tarwad*. If they had a cause of action when they filed their suit, that cause of action is not taken away by the decree in Original Suit No. 29 of 1905 to which they were not parties. No doubt, a member of Maratt *tarwad* has obtained possession of the plaint property, but he claims to be in possession as Karnavan of a *tarwad* to which plaintiffs do not belong. In the judgment and the decree in Original Suit No. 29 of 1905, 4th defendant is not described as Karnavan of his *tarwad*, nor did he obtain permission to sue under section 30. No doubt, he based his title to sue on his alleged status as Karnavan, but the decree as framed is not one binding on the *tarwad*. Whether, however, he is in possession as Karnavan or in his personal capacity as an Anandravan, he is not in possession on behalf of the *tarwad* to which plaintiffs belong. Plaintiffs are, therefore, entitled to a decision in this suit as to whether they are members of the Maratt *tarwad*, of which 3rd defendant is Karnavan, for if they are, they (and not 4th defendant) are entitled to possession of the plaint property."

3. "It is suggested that plaintiffs' suit must be dismissed, for the relief which they really seek is a declaration of their status as members of Maratt *tarward*, and this they seek to establish in a small redemption suit. It is not, however, shown that they have by this means defrauded Government of any appreciable amount of stamp revenue, and this is not the ground on which their suit has been dismissed in the lower Court. Until they filed this suit, they had no notice of Original Suit No. 29 of 1905 and, therefore, I do not think that there is any reason to suspect their *bona fides* in bringing this suit."

4. "The suit is accordingly remanded to the lower Court for disposal on its merits. Costs of this appeal will abide the result."

Judgment.—The plaintiffs not having been made parties to Original Suit No. 29 of 1905 brought by the 4th defendant as they ought to have been under section 85 of the Transfer of Property Act, if they were persons interested in the mortgaged property, are, in no way, bound by the decree in that suit. We do not think that Explanation V to section 13, Civil Procedure Code, (Act XIV of 1882), has any application, for the 4th defendant cannot be taken to have claimed anything in common for himself and the plaintiffs, seeing that he contends they are not members of his *tarwad* and was raising this contention before the decree in Original Suit No. 29 of 1905. There is, therefore, no reason why the suit brought by the plaintiffs should not go on. The order of remand is, therefore, right. This appeal is dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 718 OF 1909.

September 16, 1910.

Present:—Mr. Justice Miller and Mr. Justice Krishnaswami Aiyar.

KAVERI AMMAL—APPELLANT

versus

KALI AMMAL—RESPONDENT.

Usufructuary mortgage—Decree for sale barred—Mortgagee obtaining possession after barring of decree—Whether mortgagee's right to possession put an end to before sale—Right of mortgagor to obtain possession.

A usufructuary mortgagee, who was out of possession at date of his suit, obtained a decree for sale which became barred. He subsequently got possession from the mortgagor. In an action by the mortgagor's representative for possession:

Held, that the mortgage decree, which did not deal with the mortgagee's right to possession, did not put an end to his right until sale and that the mortgagor, his representative or assignee could not oust him even though he had obtained possession after the date of his suit.

Sunder Koer v. *Rai Sham Kishen*, 34 C. 150 at p. 161 (P. C.); 4 A. L. J. 109; 11 C. W. N. 249; 5 C. L. J. 106; 17 M. L. J. 43; 9 Bom. L. R. 304; 2 M. L. T. 75, referred to and explained.

Second appeal against the decree of the District Court of Coimbatore, in Appeal Suit

No. 142 of 1907, presented against the decree of the Court of the District Munsif of Coimbatore, in Original Suit No. 1060 of 1905.

Judgment.—We are unable to hold that the District Judge is wrong. There was a usufructuary mortgage. The mortgagee, sued for sale and got a decree for sale. That decree has become barred. The mortgagee who was out of possession at the date of his suit, has got back possession from the mortgagor. The plaintiff who stands in the shoes of the mortgagor claims possession on the ground that the only rights the mortgagee, had became merged in the decree for sale and in support of this contention reliance is placed upon certatin observations of the Privy Council in *Sunder Koer* v. *Rai Sham Krishen* (1). Those observations do not amount to saying that when a decree on a mortgage had not dealt with or purported to deal with the mortgagee's rights to possession, it must be deemed to have been put an end to it. It is conceded that if the mortgagee was in possession at the date of the suit for sale he could not be turned out of possession by the mortgagor after the decree for sale. This can be only on the ground that the mortgagee's right to possession under the mortgage is not put an end to until the sale takes place. We must, therefore, hold that the 2nd defendant is rightfully in possession under his mortgage and dismiss the second appeal with costs.

Appeal dismissed.

(1) 34 C. 150 at p. 161; 4 A. L. J. 109; 11 C. W. N. 249; 5 C. L. J. 106; 17 M. L. J. 43; 9 Bom. L. R. 304; 2 M. L. T. 75.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 525 OF 1909.

September 16, 1910.

Present:—Mr. Justice Miller and Mr. Justice Krishnaswamy Aiyar.

LAKSHMANA CHETTYAR—APPELLANT

versus

GOVINDARAJULU NAIDU AND ANOTHER —RESPONDENTS.

Hindu Law—Debt due by father—Decree against father—Division effected between father and sons before date of suit—Execution—Attachment of sons' properties —Claim by sons— Release of attachment—Suit by decree-holder against sons under s. 283, *Civil Procedure Code (Act XIV of* 1882)*—Partition, whether can be impugned.*

Plaintiff, who had obtained a decree against a Hindu father, attached the properties of his sons, in execution. The sons preferred a claim which was allowed. The plaintiff then sued the sons under section 283, Civil Procedure Code (Act XIV of 1882), for a declaration that their properties were liable to be attached in execution of his decree. He impugned the partition deed between the sons and their father as fraudulent:

Held, that in a suit, under section 283 of Act XIV of 1882, no declaration can be made that plaintiff could proceed against the properties of the sons in execution, as the suit is not to obtain a decree against the sons on the old cause of action for recovery of the debt but for a declaration that the old decree could be executed against their share after a valid partition.

Second appeal against the decree of the Sub-Judge's Court of Kumbaconam, in Appeal Suit No. 628 of 1903, presented against the decree of the Court of the District Munsif of Mannargudi, in Original Suit No. 71 of 1908.

Judgment.—The plaintiff obtained a decree for money against the father of defendants Nos. 1 and 2 and attached property in execution. On the claim of defendants Nos. 1 and 2, half the property was released from attachment. The present suit is under section 283 of the old Code of Civil Procedure. It is found that at the date of the former suit defendants Nos. 1 and 2 were divided from their father. The plaintiff-appellant impugns the partition as in fraud of creditors. The Sub-Judge has upheld the partition as *bona fide*. It is argued that the Sub-Judge has not taken into account certain considerations making in favour of the appellant. The finding is based upon legal evidence and a fair consideration of the evidence as a whole. We must accept it in second appeal. It is next contended that as at the date of the debt the family was undivided the subsequent partition cannot affect the liability of the sons' share. The first defendant was a party to the former suit and the suit was withdrawn as against him. No second suit can be brought against him, on the old cause of action. It is enough to say that the present suit is not based upon the judgment against the father assuming that a judgment debt against the father arising after a valid partition could be a ground of action to enforce the son's liability. As regards the 2nd defendant the suit is not to obtain a judgment against him on the old cause of action for recovery of the debt but for a declaration that the old decree could be executed against the son's share after a valid partition. The executing Court could not proceed against the son's separate property, as it was not joint family property of father and son which the father could dispose of for his debt.

MUSILI NAIDU *v.* NATARAJA CHETTYAR.

In the suit under section 283 no declaration can be made that the plaintiff could proceed against that property in execution. As the suit is framed we must hold that the 2nd defendant also is not liable.

We dismiss the second appeal with costs.

Arpeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 51 OF 1907.

September 12, 1910.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Aiyling.

MUSILI NAIDU—APPELLANT

versus

NATARAJA CHETTYAR AND OTHERS—RESPONDENTS.

Trust—Creation of trust—Abandonment of office by trustees—Acquiescence—Adverse possession—Action in ejectment—Notice—Invalidity of notice—Objection taken for the first time in second appeal.

Where persons, who originally acted as trustees of a temple, were found to have abandoned the office in 1858, and since then the plaintiffs were found to have been exercising the powers and performing the duties of the trustees:

Held, that the presumption was that plaintiffs acquired title to the office of trustees either with the acquiescence of their predecessors or by adverse possession.

Where, in an action in ejectment the notice of surrender was prematurely given, and objection as to want of proper notice was taken for the first time in second appeal:

Held, that the objection should be deemed to have been waived and could not be sustained.

Second appeal against the decree of the District Court of Tanjore, in Appeal Suit No. 171 of 1906, presented against the decree of the Court of the Additional Sub-Judge of Tanjore, in Original Suit No. 32 of 1904.

Judgment.—On the question of dedication we think there is sufficient evidence to support the finding of both the Courts that the property had been granted in trust for the benefit of a temple. The origin of the trust is involved in some obscurity, *e. g.*, whether the Maharaja or the *Mahanamdars* created the trust but that can make no difference when it is found that the properties were in fact granted in trust and have been so treated for about half a century, if not more. It was also argued that there is a difference between the findings of the Sub-Judge and that of the District Judge on the question whether the village was dedicated to the temple or to certain trustees for the performance of a particular service in the temple On the facts of this case we fail to appreciate the force of the distinction sought to be drawn on this point.

The next question raised before us is as to the title of the plaintiffs as trustees. Both the Courts have found as a fact that the *Mahanamdars*, who had originally constituted themselves trustees, abandoned their office as far back as 1858 and that since then the plaintiffs, who are the authorities of the temple, have been exercising the powers and performing the duties of the trustees. That being so, it is not contended that there is anything in law preventing the Courts from coming to the conclusion which they have drawn, that the plaintiffs acquired title to the office of the trustees either with the acquiescence of the *Mahanamdars* or by adverse possession.

The learned District Judge has not dealt with the question of limitation though it was raised by the issues and discussed by the Sub-Judge. We think, however, that the view of the first Court is right on this point. The defendants did not expressly set up any adverse title in themselves until 1899 and the suit was instituted in 1902.

Objection is also taken to the notice which demanded surrender on the 1st July, while it is contended that according to the terms of Exhibit S the defendants could be asked to surrender only on the 10th July. But this objection to the notice was not taken before any of the lower Courts and cannot, therefore, be allowed to be taken for the first time in second appeal.

It is further contended that Exhibit S ought not to have been admitted in evidence as it is not proved to have been produced from proper custody. But as it is found that the plaintiffs were trustees, they must be held to be the proper persons to have custody of Exhibits S.

The appeal fails and must be dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL APPEAL AGAINST APPELLATE ORDER No. 17 OF 1909

September 26, 1910.

Present:—Mr. Justice Wallis and Mr. Justice Krishnaswami Aiyar.

RUDRAMMA AND OTHERS—APPELLANTS

versus

NAGI *alias* NAGAMMA SHATTATI AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act XIV of 1882), s. 329—Re-sale to judgment-debtor—Resistance by judgment-debtor to possession—'Just cause'.

A re-sale by the decree-holder purchaser to the judgment-debtor is 'just cause' within the meaning of section 329 of the Civil Procedure Code for resistance by the judgment-debtor purchaser to obtain possession in execution of the decree.

Muttia v. *Appasami*, 13 M. 504, followed.

Appeal against the decree of the District Court of South Canara, dated 5th December 1908, in Appeal No. 324 of 1907, presented against the order of the Court of the District Munsif of Udipi, dated 29th June of 1907, in Execution Applications Nos. 5 and 27 of 1907 in E. P. No. 152 of 1906, in Original Suit No. 226 of 1905.

Judgment.—The decision in *Muttia* v. *Appasami* (1) shows that a re-sale by the decree-holder purchaser to the judgment-debtor would be just cause within the meaning of section 329, Civil Procedure Code, for the resistance by the judgment-debtor purchaser to obtain possession in execution of the decree. Here there was a re-sale of items Nos. 5 to 13 by two of the decree-holders, the *ejman* and the senior *anandravan*, and there is a finding by the District Judge that this re-sale is binding on the other decree-holders who are the present appellants. This is a sufficient answer to the claim to delivery of items Nos. 5 and 6. As to items Nos. 7 to 13 the respondents have obtained a declaration that there was no real delivery of possession to the decree-holder purchaser. The alleged delivery was after the re-sale which we have held binding on the decree-holders and a good answer to a claim for possession by them. The District Judge has further found that the judgment-debtors are now in possession of these items under the re-sale and in these circumstances it is unnecessary to consider whether on the 3rd December there was only a sham delivery to the decree-holder purchaser or to make any declaration about it as the lower Courts did. We modify the order accordingly and otherwise dismiss the appeal. Each party will bear their own costs in this Court.

Appeal dismissed: Decree modified.

(1) 13 M. 504.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 384 OF 1910.
(REFERRED CASE No. 49 OF 1910).

September 27, 1910.

Present:—Mr. Justice Aiyling.

(IN C. C. No. 133 OF 1910).

In re Karnam VENKATRAO—ACCUSED.

Penal Code (Act XLV of 1860), s. 174—Madras Revenue Summons Act (Mad. Act III of 1869), s. 1—Disobedience to summons issued by Tahsildar*—Revenue enquiry held by Rerenue Inspector under* Tahsildar's *orders—Offence.*

Accused, a Karnam, was summoned by the *Tahsildar* under section 1 of Madras Act III of 1869 to appear before him on a certain day for enquiring into the correctness of the sub-divisions of fields. Accused failed to appear and was convicted under section 174, Indian Penal Code:

Held, (1) that the accused was guilty of an offence under section 174, Indian Penal Code, and that his conviction was right.

Queen-Empress v. *Subbanna*, 7 M. 197, referred to.

(2) that it did not affect the offence that the enquiry for which accused was summoned was not held by the *Tahsildar*, but was deputed to a subordinate officer.

Case referred for the orders of the High Court, under section 438 of the Criminal Procedure Code, by the District Magistrate of Anantapur in his letter, dated 23rd July 1910.

REFERENCE by the District Magistrate was as follows:—

"I have the honour to forward the records in C. C. No. 133 of 1909 on the file of the *Sarishtadar* Magistrate, Kalyandrug, convicting Venkata Rao, a *karnam*, of disobedience to summons issued by the *Tahsildar* of Kalayandrug under Act III of 1869 and sentencing him to fine under section 174, Indian Penal Code, and of Appeal No. 2 of 1910 on that of the Head Quarters Deputy Magistrate, Anantapur, confirming the conviction.

2. In this case, the *Tahsildar* of Kalyandrug issued a summons on 6th November 1909 to the accused, who was *karnam* of Kundarpi, requiring him to appear before himself on the 10th November for checking school. The summons was duly served in time on the accused who failed to appear.

The *Tahsildar* then sanctioned his prosecution, and in due course he was tried before the *Sarishtadar* Magistrate and fined Rs. 10.

3. The purpose for which the accused was summoned was to attend a "checking school," which is the name given to an assemblage of *karnams* under the presidency or control of Revenue Inspector, for the purpose of examining and tracing survey maps with the view to discover whether any errors have been made in dealing with the sub-divisions of fields. No enquiry was held by the *Tahsildar*, who had no intention of holding any. The sole purpose was to secure the attendance of the accused before the Revenue Inspector in charge of the "checking school."

4. Section 1 of the Madras Revenue Summons Act III of 1869 authorizes *Tahsildars* to summon all persons "whose evidence may appear to them to be necessary for the ivestigation of any matter in which they are authorised to hold an enquiry, and also to require the production of any document relevant to the matter under enquiry" and section 4 states that a person may be summoned to produce a document without being summoned to give evidence. These sections indicate that the intention of the Act is to enable *Tahsildars* to summon all persons they think necessary, to give evidence or to produce documents but the evidence or the documents must be relevant to some matter which the *Tahsildar* is enquiring into or is collecting information about. It has been held in the case of *Queen-Empress* v. *Subbanna* (1) that *karnams* may be summoned under the Act to prepare *jamabandi* and census accounts but these accounts are prepared under the supervision of the *Tahsildar*. In this case, though the accused was directed to produce sub-division sketches the production was not to be before the *Tahsildar*, but before the Revenue Inspector. I doubt very much whether the Act authorizes the issue of summons for this purpose.

5. It had been found by both the original and the appellate Courts that the accused did not attend, and that his excuse for non-attendance was not a valid one. For this failure to obey orders he was liable to departmental punishment under the Madras Hereditary Village Officer's Act III of 1895, but I submit that a Criminal prosecution did not lie.

(1) 7 M. 197.

6. The explanations of the Magistrate and of the Head Quarters Deputy Magistrate are enclosed."

Order.—There appears to be no good ground for interfering with the conviction in this case. The *karnam's* attendance before the *Tahsildar* was required for the purpose of enquiry into the correctness and progress of the following sub-divisions of fields

* * * * * *

a very important matter in connection with revenue administration, and one into which the *Tahsildar* was certainly authorized to hold an enquiry. It is a similar case to that dealt with in *Queen-Empress* v. *Subbanna* (1) and the only ground of distinction is that in this case the enquiry was actually conducted, not by the *Tahsildar* himself, but by a Revenue Inspector in the *Taluk Cuttcherry*. It was within the *Tahsildar's* discretion to depute the latter to conduct the inquiry; and even if he intended from the first to do so, it is difficult to see how that affects the legality of the summons.

The conviction and sentence will not be disturbed.

Conviction affirmed.

BOMBAY HIGH COURT.

CRIMINAL REFERENCE No. 69 OF 1910.
CRIMINAL APPEAL No. 302 OF 1910.
September 2, 1910.

Present:—Sir N. G. Chandavarkar, KT., Judge, and Mr. Justice Heaton.

EMPEROR

versus

D. B. WEIR—ACCUSED.

Railways Act (IX of 1890), ss. 47, 101—Great Indian Peninsular Railway Time Table, Part II, O. VII, Rules—Duty of Railway servants to obey rules—Guards—Responsibility for points—Practice—Accused convicted on assumption that he was bound to see to main line points—Accused really responsible for loop line points—Acquittal.

The Rules in Order VII, Great Indian Peninsular Railway Time Table, Part II, although not made under section 47 of the Railways Act, are absolutely within the power of the Great Indian Peninsular Railway Company to impose, so long as they are not inconsistent with the Railways Act or with the General Rules made under that Act. The servants of the Great Indian Peninsular Company are bound to obey the rules in Order VII.

There is no inconsistency whatever between the rules in Order VII and the Railway Act or the General Rules made under that Act.

Under Rule 1, Order 7, the Guard of a train standing in a Railway Station is responsible for the pair of

points immediately leading to the line occupied by his train and for no other points.

The prosecution against a Guard throughout proceeded on the assumption that his duty was to see to the main line points. The evidence was led and the accused defended himself on this assumption. He was convicted exclusively on his failure to obey this duty, considered to have been imposed on him. Under the rules, however, the duty of the Guard was really to see to the points leading to the loop line on which his train was standing and not to the main line points:

Held, that the conviction of the accused should be set aside and the accused acquitted.

Quærie:—Can an accused be convicted under section 101 of the Railways Act for endangering safety of the people by disobeying a rule in the subsidiary rules of a Railway Company?

Mr. *Shah*, Acting Government Pleader, for the Crown.

Mr. *Kolaskar*, for the Accused.

Judgment.—About 18-20 on Friday the 4th March last, the Special Weekly Postal Express from Bombay to Madras left the main line, which is a single line, at the points on the Bombay side of the Bhalwani Station, ran on to a loop line and collided with a goods train on that loop line. Had the main line points been properly set and locked, this could not have happened, but they were not properly set and locked, they were set so as to take any train coming from the Bombay direction on to the loop line though they ought to have been set so as to keep it on the main line. All this is admitted. The mistake happened in this way. The Goods train came into Bhalwani about 17-50 proceeding towards Bombay and took up a position on the loop line. Shortly after arrived a Down Mixed train, that is, a train, coming from the direction of Bombay, came in; for this train the points were correctly set so it kept on the main line and passed into the station. At this time a Mukadam was in charge of the points. After the Mixed train had passed, the Mukadam being under the impression that the Goods train would then pass out going towards Bombay, set the points accordingly. The result was that the goods train could have passed out on the main line and proceeded towards Bombay, but also that any train coming from Bombay must necessarily leave the main line at the points and run on to the loop line where the Goods train was. The Goods train did not leave, as it was known that the Postal Express would presently arrive, but the points were not altered. The Postal Express arrived and the collision happened.

Primarily the Station Master was responsible, but it is said, and it seems to me rightly so, that the Guard of the Goods train was responsible for the safety of his own train; it is also alleged that had he, as it is said he was bound by the rules to do, seen that the main line points were properly set, the collision could not have happened. In respect of his neglect of duty, the Guard of the Goods train was charged by the first class Magistrate at Sholapur as follows:—

"That you on or about the fourth day of March 1910 at Bhalwani, being a Railway servant, endangered the safety of persons travelling in the Down Postal Express by disobeying Order VII Rules 1 and 3, set out in the Working Time Table Part II, by not going to the facing points to see that they were so set as to insure the safety of the Up Goods train in your charge then standing in the siding at Bhalwani Station waiting for the Down Postal Express to pass and waiting at the points till the said Express had passed, with the result that the points being incorrectly set the Express collided with the said Goods train in your charge and several persons in the Express were injured thereby and further that the said facts disclose a negligent omission on your part, the above mentioned rule not being inconsistent with the General Rules published under the Railways Act and which you were bound by the terms of your employment to obey and of which you had notice and thereby committed an offence punishable under section 101 (*b*) and (*c*) of the Railways Act and within my cognizance."

The Magistrate has written a very clear and careful judgment, has found the guard guilty, and has imposed a nominal punishment. Against the conviction the guard has appealed to this Court as being a European British subject he has the right to do. The District Magistrate has also referred the case to us for the purpose of enhancing the sentence.

The duty, which, it is said, the guard of the Goods Train failed to perform, is imposed by Order VII in the Great Indian Peninsular Railway Working Time Table, Part II. The Rules in Order VII are not made under section 47 of the Indian Railways Act, nevertheless they are absolutely within the power of the Great Indian Peninsular Railway Company to impose so long as they

are not inconsistent with the Railways Act or with the General Rules made under that Act. The rules in Order VII are, it is true, merely administrative orders or executive directions, nevertheless the Company's servants are bound to obey them. The Guard of the Goods train was bound by the terms of his employment to obey them and he had notice of them.

There is no inconsistency whatever so far as I can see between the rules in Order VII and the Railways Act or the General Rules made under that Act.

On all these matters the Magistrate has arrived at a correct conclusion and has given good reasons for so doing. I think also that he is right in his appreciation of the evidence.

In this otherwise deplorable case it is satisfactory to find that the Magistrate was rightly able to describe the accused's statement as frank. He may not have accurately remembered what passed between him and the Station Master, but substantially, to the best of his recollection, he has told the truth. He, in his statement, has not put forward idle excuses.

It is perfectly clear that the main line points were not correctly set. It is equally clear that the guard thought that it was his duty to see that they were properly set. It is also clear that the Guard had ample opportunity to reach the main line points. He knew that the Postal Express would presently arrive, but, so far as he knew, there was ample time for him to do other things before it would be necessary for him to go to the points. He also knew that if the Station Staff did their duty, he would, in some way, receive further warning before he need go to the points. So he joined the driver of his train and had tea with him. In so doing he ran the risk, should others fail to do their duty, of being too late to reach the main line points in time to see that they were correctly set. But what ought to have happened and what in the ordinary course of things would happen, did not happen. The Guard received no further warning and the Postal Express came in sight while he was still with the driver on the engine. He did what was possible but that did not enable him to avert a collision. Had he simply done what he believed to be his duty independently of the Station Staff, he could have averted the accident. Therefore, it seems to me that it was his duty to go to the main line points; he failed to do it and failed where he might and ought to have fulfilled it.

It is of vital importance that the Guard should perform his duty, though the members of the Station Staff failed to do theirs. By that means are accidents averted.

It would be unnecessary to say more were it clear that the duty imposed on the Guard of the Goods train was, as has been assumed, a duty to see the main line points properly set. The duty is founded on the rules in Order VII and on no other rules or instructions. But in a case like the present the rules in Order VII do not impose any duty at all on the Guard of the Goods train with reference to the main line points. The duty is thus described in Rule 1: "To see the pair of points facing to the approaching train, which lead into the line occupied by his train, are so set and locked that a collision between the approaching train and his own is impossible". The object of the rule is that the Guard is to prevent a collision with his train, in other words, he is to secure the safety of his own train and is to do it by seeing to the particular pair of points which lead into the line occupied by his train. Generally speaking, that would be the nearest pair of points, not a remoter pair. In this particular case, it would be points No. 3 on the plan produced in appeal and admitted to be correct. If greater clearness be necessary as to the meaning of Rule 1 it is obtained by studying the illustration given in Rule 2. In such case the Guard is responsible for the pair of points immediately leading to the line occupied by his train and for no other points.

Therefore, the rules in Order VII in this particular case did not impose on the Guard any obligation whatever to see to the main line points. But the case throughout proceeded, the evidence was led, and the accused defended himself on the assumption that his duty was to see to the main line points, and he has been convicted because he failed to perform that imaginary duty. The conviction is based exclusively on the failure to obey the rules in this particular; therefore, the conviction must fail because no such duty was imposed by the rules. He cannot in this trial be convicted because of failure to obey the rules in another particular, because he

was not called on to defend himself as to that and we do not know what his defence may be, or what the effect of the evidence, if taken, as to that matter would be.

It is a remarkable thing that apparently every one concerned including the Guard himself supposed that the rules imposed a duty which as a fact they do not impose. There may be many cases in which the points immediately leading to a siding or loop line are the main line points and in such cases the guard would under the rules be bound to look to the main line points but that is not the case here.

The appellant is acquitted and it is ordered that the fine, if paid, be refunded.

Appeal allowed.

(s. c. 85 P. L. R. 1910; 23 P. R. 1910 Cr.)

PUNJAB CHIEF COURT.

CRIMINAL REVISION No. 477 OF 1910.

June 14, 1910.

Present:—Sir Arthur Reid, KT., Chief Judge, and Mr. Justice Chevis.

GIRDHARI LAL AND OTHERS—CONVICTS—PETITIONERS

versus

EMPEROR—RESPONDENT.

Search warrant—Omission to affix seal—Irregularity—Signing outside the limits of jurisdiction—Illegal warrant—Gambling Act (III of 1867), s. 5—Criminal Procedure Code (Act V of 1898), ss. 75, 537.

An omission to affix the seal of the Court on a search warrant issued under the Gambling Act is a mere irregularity cured by section 537, Criminal Procedure Code.

A search warrant signed by the Magistrate at a place outside the limits of his jurisdiction is illegal.

Reg. v. *Lochaka La*, 1 B. 340, distinguished.

A warrant, that is not a legal warrant, is no warrant for the purposes of the Gambling Act.

Benwari v. *Queen-Empress*, 11 P. R. 1895, Cr., followed.

Petition for revision, under section 439 of the Criminal Procedure Code, of the order of Major R. S. M. Burlton, District Magistrate, Jullundur District, dated the 16th February 1910.

Mr. *Pestonji Dadabhai*, for the Petitioners.

Judgment.—On a search warrant issued by a first class Magistrate, the police raided the house of Girdhari, and Girdhari and various persons found in the house at the time have been convicted and sentenced under the Gambling Act. The District Magistrate having dismissed their appeal, the convicts apply to this Court for revision, and on their behalf it is urged, that the search warrant is bad on two grounds:—

(1) that the seal of the Magistrate's Court was not affixed to it;

(2) that the warrant was signed by the Magistrate at a place outside the limits of his jurisdiction.

Section 75 of the Criminal Procedure Code lays down that every warrant of arrest issued under that Code shall bear the seal of the Court, and turning to *Alter Caufman* v. *The Government of Bombay* (1), we find an opinion expressed on pages 668 and 669 as to the necessity of a seal in the case of warrants of arrest issued under Act III of 1864 (an Act to give the Government certain powers with respect to foreigners). But since this ruling was passed the Criminal Procedure Code of 1898 has come into force, and we now find as an illustration to section 537 the case of a Magistrate initialling a document which he is required by law to sign; this is declared to be merely an irregularity not affecting the validity of the proceeding. In our opinion, the omission to affix the seal is a similar irregularity, and, therefore, even granting that law requires that a search warrant issued under the Gambling Act should be sealed with the seal of the Court, we hold that the omission to affix the seal is a mere irregularity cured by section 537 of the Criminal Procedure Code.

The other objection taken to the warrant is a much more serious one. The warrant was signed by the Magistrate at his private house, which is only just outside Jullundur, but situated in Kapurthalla territory. The District Magistrate has quoted *Reg.* v. *Lochaka La* (2), but this seems to us to be rather in favour of the petitioners. There the warrant for the arrest of a non-European British subject in respect of an offence committed in Kathiawar was issued from a place in Kathiawar territory by a Magistrate who, in addition to holding magisterial powers in a British district, *viz.*, the Ahmedabad district, was also Assistant to the Political Agent in Kathiawar. The warrant was issued to the *Foujdar* of Palyad who, though Palyad is in foreign territory, was invested with police powers extending over a certain village of the Ahmedabad district, in which

(1) 18 B. 636.

(2) 1 B. 340.

village the accused was arrested in execution of the warrant. The High Court held that "the offence having been committed in a foreign territory, the presence of Major Wodehouse in the portion of the Ahmedabad District, in which he has jurisdiction, was unnecessary for the purpose of issuing the warrant." Presumably had Major Wodehouse had no powers in Kathiawar he could not legally have issued a warrant while he was in Kathiawar. We are unaware of any ruling to the effect that a Magistrate holding powers within certain local limits (such as a district or sub-division of a district) can exercise those powers from a place beyond the limits of his local jurisdiction. We must, therefore, hold that the warrant is illegal. This is no question of mere irregularity. As has been held in *Benwari* v. *Queen-Empress* (3), a warrant that is not a legal warrant is no warrant at all for the purposes of the Gambling Act.

The convictions are set aside and the petitioners are acquitted. The fines, if paid, will be refunded.

Revision accepted.

(3) 11 P. R. 1895, Cr.

(s. c. 33 M. 299.)

MADRAS HIGH COURT.

ORIGINAL SIDE CIVIL APPEAL NO. 26 OF 1908.

September 29, 1909.

Present:—Mr. Justice Munro and Mr. Justice Abdur Rahim.

THE OFFICIAL ASSIGNEE OF MADRAS —APPELLANT

versus

D. RAJAM AIYAR—RESPONDENT.

Banker and customer—Debtor and creditor—Deposit in bank for payment to another person—Failure of bank before receipt of instructions from such person—Trust—Fiduciary capacity—Test.

A paid a certain sum of money to a bank to be paid over to B who had an account with the Bank. The Bank held the money in suspense and wrote to B for instructions as to disposal of the money. Before B gave any instructions the Bank became bankrupt:

Held, (Per *Munro, J.*), that the Bank became a debtor of B in respect of the money.

Per *Abdul Rahim, J.*:—That the relation between the bank and B was not that of a debtor and creditor and that the Bank held the money in a fiduciary capacity as bailee or agent for B and the money must be regarded as kept apart from the general fund of the Bank.

The real test of a right to follow the money is not whether the sum in question has been rightfully or wrongfully mixed with other moneys, but whether the banker was authorized or not to use the sum in question for his own purposes.

Official Assignee of Madras v. *Smith*, 32 M. 68, 1 Ind. Cas. 712; 5 M. L. T. 124, dissented from.

Appeal from the order and judgment of Sir Arnold White, KT., Chief Justice, in the exercise of the jurisdiction of this Court for the relief of Insolvent Debtors at Madras, in Petition No. 181 of 1906.

Mr. *D. M. C. Downing*, for the Appellant.

Judgment.

Munro, J.—This case cannot be distinguished on the facts from *Official Assignee of Madras* v. *Smith* (1). I would, therefore, set aside the order of the learned Commissioner and dismiss the application with taxed costs throughout.

As my learned brother takes the opposite view, the appeal is dismissed.

Abdur Rahim, J.—The facts of the case are that the cashier of the Madras Railway Company paid into Arbuthnot and Company's bank a sum of Rs. 461-3-5 to be paid to Mr. D. Rajam Aiyar who had no account with the bank. Arbuthnot and Company thereupon wrote to Rajam Aiyar the following letter:—

"Dear Sir, We have the pleasure to advise you of our having received the sum of Rs. 461-3-5 on your account from the cashier, Madras Railway Company, which we hold in suspense pending receipt of your instructions as to disposal of the same. Should you wish to open an account with us, please fill in, sign and return to us the slip attached to the enclosed memo. of our banking terms.

We are, Dear Sir, etc., etc."

Before D. Rajam Aiyar gave any instructions in reply to their letter, Arbuthnot and Company became bankrupt. Upon these facts I would, having regard to what I have already said, hold that Arbuthnot and Company held the money from Rajam Aiyar as trustees. They could not open an account with respect to this money until they received instructions to that effect from Rajam Aiyar and so they held it "in suspense" till then. No evidence has been taken in this case as to what the phrase holding money "in suspense" means as used among bankers. But apparently the parties did not think that the meaning of the expression which is an expression in common use in banking business in this country admitted of any dispute. As

(1) 32 M. 68; 1 Ind, Cas. 712; 5 M. L. T. 164.

admitted at the bar the person whose money is held in suspense is entitled to withdraw it any moment he likes, he neither gets a pass book nor is entitled to draw any cheques or to be paid interest in respect of the amount. In short that money is not held either in current or deposit account. The inference, therefore, clearly is that a banker holding money of a person "in suspense" does not treat it like an ordinary customer's money and the general rule that a banker is entitled to use his customer's money because it is money really advanced to him cannot apply to such money. In *Great Western Railway* v. *London and County Banking Company* (2), Lord Davy lays down that "there must be some sort of account, either a deposit or a current account or some similar relation, to make a man a customer of a bank." That shows that if a person who does not stand in the relation of a customer pays money to a banker he does not become by that fact alone without anythig more a customer of the bank. A banker, as is well-known, often acts as bailee or factor and why should it be presumed that money paid to or held by a banker pending instructions was intended to be appropriated by the banker as his own money when there is no previous course of dealings between the parties to raise such a presumption? In such a case there is no reason why the law should treat the banker on a different footing from any other person into whose custody property belonging to another person has come in a lawful way but without his having acquired a right to it. In those circumstances the law regards the custodian of the property as a *quasi*-trustee standing in fiduciary relations towards the owner of the property and is there any authority for saying that bankers are exempted from the application of such a well-established doctrine of equity? I think not. I am, however, confronted with a recent decision of this Court in *Smith's case* (1) arising out of this very insolvency where a contrary view has been taken [see *Official Assignee of Madras* v. *Smith* (1)].

In that case, the facts of which, it must be admitted, were very similar to those of the present, Benson and Wallis, JJ., lay down broadly that money placed with a banker whether by a customer or by a person who has had no previous dealings with the banker, without any specific instructions as to its application at once becomes money of the banker. The learned Judges rely in support of that proposition on *Foley* v. *Hill* (3) and on certain passages which they cite from the judgments in *Slechi's case* (4) and *Burdick* v. *Gayrick* (5). But the rule laid down in these cases is with express reference to money paid into a bank by a customer and the general observations are clearly not intended to extend to payments by persons who are not customers. The foundation of the common law rule relating to dealings between a banker and his customers is, as I understand it, a contract which the law implies to the effect that the banker shall be entitled to treat money lodged with him in account as a loan made to him, so that he may use it in any way he chooses for purposes of profit, because this is essential to all banking business and were it otherwise, no banking business could be carried on in the way it ordinarily is. And this, a person, who becomes a customer of a bank, is supposed by the law to know and to agree to. But the basis of the rule is gone if the customer paying in a sum of money directs it to be applied in a particular manner. In that case if the banker accepts the money, he must hold it as agent or bailee just as if he was not a banker at all. In the case of a stranger who places money in the hands of a banker there being no reason for inferring that he made the payment by way of a loan to the banker, there seems to be no reason why in the absence of any instructions as to how it is to be applied it must be taken that he authorized the banker to treat the money as his own and not that he was to hold it as trustee, or as *quasi*-trustee for the use of the payer or as agent or bailee for some purpose to be named by him. The proper enquiry with respect to money paid to a banker by a person who is not a customer for the purpose of ascertaining whether the banker held the money in a fiduciary capacity or not, is not whether the payer gave any specific instructions as to the manner in which the money is to be disposed of, but whether there is anything to

(2) (1901) A. C. 414; 70 L. J.K.B. 915; 85 L.T. 152; 50 W. R. 50; 6 Com. Cas. 275.

(3) (1848) 2 H. L. Cas. 28.

(4) 1 Merivale 530.

(5) 5 Ch. App. 233; 39 L. J. Ch. 661; 22 L. T. 502; 18 W. R. 530.

show what the understanding between the parties was, whether the banker was to treat the money in the same way as his ordinary customers' money or hold it either as bailee or agent or as trustee for the payer's use. I may observe that the case must be rare in which a banker should receive a stranger's money without something to indicate how he was to treat the money. However that may be, as in this case and also in *Smith's Case* (1) it appears that Arbuthnot and Company held the money in suspense pending further instructions, in expectation that the person for whom they so held the money would either become their customer or instruct them as to how else they were to dispose of the money, the intention of the parties was perfectly clear that Arbuthnot and Company were not to acquire a right to the money turning themselves into mere debtors of the payer. Then the only other alternative, as I have already pointed out, is that they held the money in a fiduciary character for the person entitled to it and the money must be regarded as kept apart from the general funds of the bank. It may be that in common practice such moneys are mixed up by the banker with his own funds just in the same way as he customarily mixes up moneys received by him as an agent for a specific purpose as pointed out by Cave, J., in *In re Brown, Ex parte Plitt* (6). Such mixing may be technically a breach of trust as pointed out by Bramwell, L. J., in *Ex parte Kelly & Co.* (7), or it may not be a breach of trust at all so long as there are sufficient funds in the bank to cover the amount as suggested by Cave, J., in the above case. But the real test of the right to follow is not whether the sum in question has been rightfully or wrongfully mixed with other money, but whether the banker was authorized or not to use the sum in question for his own purposes. If he was not, then all his drawings from the mixed fund will be attributed to moneys which he was entitled to use and not to moneys which he was not entitled to use. With the utmost deference, therefore, to the learned Judges who decided *Smith's case* (1) I am unable to take the same view of the law on this point and, in my opinion, D. Rajam Aiyar is entitled to recover his money as held by the learned Commissioner and I would dismiss the Official Assignee's appeal.

Appeal dismissed.

Messrs. *King & Josselyn*, Attorneys for Appellant.

[A Letters Patent Appeal No. 143 of 1909 against the above judgment was preferred and the judgment of the learned Commissioner was affirmed. For the full report of that judgment, See 6 Ind. Cas. 383. *Ed.*]

(6) 60 L. T. 397; 37 W. R. 463; 6 Morrell 81.
(7) (1879) 11 Ch. D. 306; 48 L. J. Bk. 65; 40 L. T. 404; 27 W. R. 830.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 222 OF 1909.

September 14, 1910.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Aiyling.

KANIRKAMANNA IMATH NARAYANA MAYOSAD—APPELLANT

versus

MAOSAD KANIRKAMANNA IMATH VASUDEVAN MOSAD AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XII, R. 22 cls. (1) and (4)—Appeal filed out of time—Dismissal of appeal—Memorandum of objections also liable to be dismissed.

Clause (1) of Rule 22 of Order XII of the Civil Procedure Code (Act V of 1908) does not enact anything different from the law of the old Code of 1882.

Where an appeal is dismissed on the ground that it was filed out of time, the memorandum of objections filed by the respondent also fails and cannot be heard and adjudicated upon.

Second appeal against the decree of the Sub-Judge's Court of Calicut, in A. S. No. 258 of 1908, presented against the decree of the Court of the District Munsif of Manjeri, in O. S. No. 31 of 1907.

Judgment.—We think the appellant has entirely failed to account for the 9 days' delay in filing this appeal. The statement of Damodaram Nair that he was lying so ill at Pattambhi from the 24th January to the 1st February that he was unable to send word to the appellant is incredible. The respondents have filed affidavits of three hotel-keepers in which it is stated that Damodaram did not stay at the hotel of any one of them between the 24th January and the 1st February and that there are no other hotels at Pattambhi. No attempt has been taken to answer the respondent's affidavits. Even the appellant has not thought fit to support his *Kariasthem's* statement.

We must, therefore, dismiss with costs the second appeal as having been filed after the time had expired.

The appeal being dismissed for being filed out of time clause (4) of Rule 22 of Order XII does not apply and it is not contended that that clause does apply to a case like the present. But it is argued that the memorandum of objections is saved by clause (1). But we do not find anything in that clause which enacts anything different from the law of the old Code under which, in a case like this, the memorandum of objections would, undoubtedly, fail. The memorandum of objections is, therefore, dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 100 OF 1906.

August 12, 1910.

Present:—Sir Arnold White, KT., Chief Justice, and Mr. Justice Aiyling.

SHIVE GOWDA AND OTHERS—APPELLANTS

versus

C. S. FERNANDEZ AND OTHERS—RESPONDENTS.

Limitation Act (XV of 1877), Sch. II, art. 85—"Mutual, open and current accounts," test of—Advance of loans—Repayment by consignment of goods—Re-payment intended to reduce liability—Sums due on accounts before three years before institution of suit—Limitation.

As a general rule, payments made on account by one party and credited by the other, whether in money or goods, do not render the account mutual so as to defer the operation of the statute to the date of the last item.

To bring a case within the operation of article 85 of Schedule II of the Limitation Act, there must be independent obligations between the parties. The test of 'mutuality' is not the existence of a shifting balance which, though important evidence of mutuality, is not conclusive, but there must be transactions on each side creating independent obligations on the other, and not merely transactions which create obligations on one side, those on the other being merely complete or partial discharges of such obligations.

Plaintiffs advanced to defendants moneys from time to time from 1893, and the defendants sent periodical consignments of coffee to plaintiffs, which the latter sold, crediting the proceeds to the defendant's account. The loans bore interest at 12 per cent. per annum, and the plaintiffs were to have a further charge, which was called a 'commission,' *viz.*, a special rate of interest being three times as high on all sums advanced before the receipt of the first consignment of coffee for the year as on those advanced subsequently. In a suit by plaintiffs for recovery of Rs. 7,587-9-9 being the amount due in November, 1899:

Held, that the suit was barred as to all items except those which accrued due within three years prior to the institution of the suit and that the case was not governed by article 85, of Schedule II of the Limitation Act, as there was no mutuality and reciprocity between the parties, the consignments of coffee having been made simply and solely on account of the antecedent loans and with a view to reduce the balance due thereunder.

Musammat Phool Koomaree v. *Bibee Woonkar Pershad Rustoby*, 7 W. R. 67 at p. 70, *Hirada Basappa* v. *Gadigi Muddappa*, 6 M. H. C. R. 142, *Hargopal Prem-sukdas* v. *Abdul Khan Hajee Mahomed*, 9 B. H. C. R. 429, *Velu Pillai* v. *Ghose Mahamad*, 17 M. 293, *Ram Pershad* v. *Harbans Singh*, 6 C. L. J. 158, *Ganesh* v. *Gyanu*, 22 B. 606, *Laljee Sahoo* v. *Raghoo Mundan Lal Sahoo*, 6 C. 447, *Chittar Mal* v. *Behari Lal*, 32 A. 11; 6 A. L. J. 921; 4 Ind. Cas. 261, referred to.

Appeal against the decree of the District Court of South Canara, in O. S. No. 18 of 1906.

Judgment.

White, C. J.—The main question raised in this appeal is whether the suit is for the balance due on a mutual, open and current account, whether there have been reciprocal demands between the parties within the meaning of article 85 of the second Schedule to the Limitation Act. If so, the defendants' plea of limitation fails. If not, the plaintiffs are not entitled to recover in respect of items in the account prior in date to three years before the institution of the suit.

The District Judge held that article 85 applied and the suit was not barred by limitation, apparently on the ground that the accounts had been open and running for many years. He does not seem to have considered the question with reference to the words of the article "where there have been reciprocal demands between the parties". The oral evidence affords little assistance as to the course of business between the parties and we have to rely in the main on the plaintiffs' accounts.

The plaintiffs are merchants and the defendants are coffee planters, and the plaintiffs' accounts show that from the year 1893, the plaintiffs had been financing the defendants and the defendants had been sending consignments of coffee to the plaintiffs. In April 1893 a sum of Rs. 4,000 was advanced by the plaintiffs and the account for 1893-1894 (Exhibit V) states that a document was executed for this amount. During 1893 further advances were made by the plaintiffs and sundry payments amounted to Rs. 10,700. In January 1894 a consignment of coffee was received by the

palintiffs from the defendants and other consignments were received later. These consignments were sold by the plaintiffs and the defendants were credited with the sale proceeds with interest. A balance was struck in May 1894, the defendants being debited with interest on the moneys paid by the plaintiffs and also with what was termed 'Commission'. This was not really commission but an amount calculated at Rs. 2 per candy, every Rs. 1,000 advanced being taken as the equivalent of 30 candies, in respect of advances made before any coffee was received by the plaintiffs and every Rs. 1,000 being taken as the equivalent of 10 candies in respect of advances made subsequently. The higher rate is described in paragraph 4 of the plaint as damages for the defendants' default in not supplying the full quantity of coffee, in other words, for not keeping the plaintiffs fully secured in respect of advances made by them to the defendant and on their behalf. The accounts for 1894-1895 (Exhibit IV.) and 1895-96 (Exibit III) show that business was continued on the same lines. In June 1896, the defendants made a cash payment of Rs. 13,000 and the balance against them was reduced to Rs. 5,500 (Exhibit II). In May 1897, the balance was Rs. 5,545 odd and on this the plaintiffs claimed to charge interest at 15 per cent. In November 1899, the balance shown in the plaintiffs' accounts (Exhibit A) was Rs. 7,500 odd and this is the amount for which the suit was brought. I am of opinion that, having regard to the course of business so far as it can be ascertaind from the plaintiffs' accounts, the relation between the defendants and the plaintiffs was not that of seller and buyer as regards the coffee consigned to the petitioner, nor that of principal and agent in respect of the coffee sold by the plaintiffs. See *Musammat Phool Koomaree Bibee* v. *Woonkar Pershad Rustoby* (1). But that the contract between the parties was, as would seem to be suggested in paragraph 4 of the plaint and in the concluding portion of paragraph 6 of the learned Judge's judgment, that the plaintiff should finance the defendants, and that defendants should keep the plaintiffs secured in respect of the advances made by the plaintiffs on their behalf by consigning to them coffee of a value equal to the amount of their indebtedness, the defendants being given credit for the proceeds of the coffee as and when sold by the plaintiffs and that if they failed to do this they should make the further payment which is called commission but which is really a payment by way of damages. I do not think it can be said that this a case in which there are independent obligations on both sides. See the judgment of Holloway, J. in *Hirada Basappa* v. *Gadigi Muddappa* (2). No doubt, if at any time the sale proceeds of the coffee had exceeded the amount of the defendants' indebtedness, the plaintiffs would have been accountable for the balance as money received for the use of the defendants. But this, in my opinion, does not in itself make the account mutual or give rise to reciprocal demands. I think the case falls within the principle of the decisions in *Hargopal Premsukdas* v. *Abdul Khan Haji Mahamad* (3) (where certain jewels were sold by the plaintiffs on the defendant's behalf and the defendant credited with the proceeds), *Velu Pillai* v. *Ghose Mahomed* (4), *Ram Pershad* v. *Herbans Singh* (5). *Ganesh* v. *Gyanu* (6), where the dealings consisted of loans on both sides and the parties were also partners in certain transactions, the shares of profit and loss falling to each partner's shares being debited and credited in the accounts, is clearly distinguishable on the facts. I accept the general principle laid down in the American Cyclopedia of Law and Procedure Vol XXV p. 1125 as applicable to the article in question under the Indian Limitation Act:— "As a general rule payments made on account by one party and credited by the other, whether in money or goods, do not render the accounts mutual so as to defer the operation of the statute to the date of last item etc." I am of opinion, though the matter is not free from difficulty, that the case before us does not come within article 85 of the second Schedule to the Limitation Act and that the plea of limitation must be upheld.

The plaintiffs are only entitled to recover in respect of transactions which took place within three years *prior* to the institution of the suit and an account must be taken on this basis. Mr. K. Srinivasa Aiyangar intimated that if the plea of limitation was upheld he would

(1) 7 W. R. 67 at p. 70.

(2) 6 M. H. C. R. 142.
(3) 9 B. H. C. R. 429.
(4) 17 M. 293.
(5) 6 C. L. J. 158.
(6) 22 B. 606.

not press the point that the second defendant and defendants Nos. 3 to 8 did not form a joint family or the plea of discharge. The decree against the defendants Nos. 3 to 8 on the amount (if any) found to be due will be limited to the share of the family property. The appeal is allowed with costs. In the Court below the plaintiffs will have proportionate costs on the amount (if any) found due on the taking of the account.

Aiyling, J.—In the case out of which the present appeal arises the plaintiffs (respondents) sued to recover the balance due on a running account between themselves and the defendants (appellants) from the 24th April 1893 onwards: and the chief contention raised by the latter in appeal is that the suit is time barred as regard all items arising before the 24th May 1897, three years prior to the filing of the suit. This contention, if established, reduces the plaintiffs' claim to a comparatively insignificant amount. On behalf of the respondent it is argued that the account is a mutual, open and current account with reciprocal demands between the parties within the meaning of article 85 Schedule II of the Indian Limitation Act.

The question of limitation is embodied in issue No. 4, but the learned District Judge, in dealing with it in paragraph 6 of his judgment, has confined himself to considering whether the account is open and current (which he rightly decides to be the case): and has apparently left the question of mutuality and reciprocity of demand out of consideration.

The oral evidence is directed to other points but upon the plaintiffs' account (produced and marked as Exhibits A and V and VI aided to some extent by the pleadings of the parties), it is possible to determine the nature of the business. The latter opens on the 24th April 1893 with a loan of Rs. 4,000 from the plaintiffs to the defendants on a bond. The latter is not now in existence; but there seems to be no dispute that the conditions of the loan included interest at 12 per cent. per annum and that re-payment was to be effected by the defendants sending consignments of coffee to the plaintiff, which the latter were to sell crediting the proceeds to the defendants' account. The plaintiffs were further entitled to make a further charge, which is called "Commission."

This charge is not really commission at all, but a special additional interest calculated on all sums advanced, the rate being three times as high on all sums, advanced before the receipt of the first consignment of coffee for the year as on those advanced subsequently. It is agreed that the same conditions applied to the numerous subsequent loans made by the plaintiffs to the defendants, as well as to the sums disbursed by them for purchase of goods and other objects on the defendants' behalf.

The accounts show that on the 5th May 1894 the balance due to the plaintiffs had increased to Rs. 8,650 for which another bond was executed. On the 30th May 1895 it had amounted to Rs. 15,581-4-3 and on the 15th May 1896 to Rs. 18,552-3-4. On the 5th January 1896 it was reduced by a cash payment of Rs. 13,000 (all the previous credits to the defendants being the sale price of coffee received and sold): and on the 6th June 1896 accounts were struck and the balance due to the plaintiff was found to be Rs. 5,500. The account Exhibit II was signed by the 2nd defendant in token of liability. From this time forward there are no further cash loans and only a few disbursements on the defendants' account: but the small consignments of coffee received are insufficient to keep pace with the interest and by the 30th November 1899 the defendants' debt had increased to Rs. 7,587-9-9, the amount sued for.

The learned District Judge sums up the business thus in terms which are in substantial accordance with the pleas of both sides, as well as with the accounts above summarised.

"Defendants have borrowed money from plaintiffs; they have obtained goods of various kinds through them and they have made payments from time to time by sending in coffee."

The question is whether the account is one falling under article 85 above referred to: and it appears to me that it does not.

The oldest Madras case bearing on the point is *Hirada Basappa* v. *Gadigi Mudappa* (2) and followed in *Velu Pillai* v. *Ghose Mahomed* (4). The principle laid down appears to be that the test of mutuality is not the existence of a "shifting balance" (which is important evidence of mutuality but not conclusive), but—to quote Holloway

—"to be mutual there must be transactions on each side creating independent obligations on the other and not merely transactions which create obligations on the one side, those on the other being merely complete or partial discharges of such obligations." This feature, the existence of *independent* obligations, appears to me to be entirely wanting in the present case. A scrutiny of the accounts leaves no doubt that every consignment of coffee was made simply and solely on account of the antecedent loans and with a view to reduce the balance due thereunder. Not only was the balance never shifted to the defendants' credit but there was never any approach to such a desirable state of affairs. Apparently the balance against the defendants was never lower than the initial amount (Rs. 4,000): and the only substantial reduction was by the cash payment of Rs. 13,000 referred to above.

Applying the principle quoted above, I must hold that the account was not a mutual one with reciprocal demands.

Numerous rulings have been quoted by one side or the other, but none of them tend to really shake the above conclusion. That the fact that re-payment was mostly by consignments of goods and not in cash makes no difference may be deduced from *Hargopal Premsukdas* v. *Abdul Khan Haji Mahamed* (3), if an authority were needed. The judgment in *Ganesh* v. *Gyanu* (6) is in complete accord with that in *Velu Pillai* v. *Ghose Mahamad* (4) and follows the same principle; and I can find nothing inconsistent therewith either in *Lalji Sahoo* v. *Raghoo Nundan Lal Sahoo* (7) or in *Chittar Mal* v. *Bihari Lal* (8), the other cases quoted by the respondents' Vakil. The other points raised in appeal may be summarily dealt with. I agree with the District Judge in rejecting the plea of discharge and in holding that the defendants formed a joint family with the 2nd defendant as its managing member.

On the other hand, I can find nothing in Exhibit J which would, as contended by the respondents' Vakil, render the debt personally binding on any but the 2nd defendant.

I would amend the decree of the District Court by reducing the defendants' liability to the items occurring after the 24th May 1897 and by limiting the liability of all the defendants other than the 2nd defendant to their share of the joint family property. The plaintiffs should be allowed proportionate costs in the lower Court, defendants bearing their own and the appellants should recover their costs in this Court from respondents.

Decree varied.

(7) 6 C. 447.
(8) 32 A. 11; 6 A. L. J. 921; 4 Ind. Cas. 261.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1489 OF 1909.

September 21, 1910.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Krishnaswami Aiyar.

K. ABDUL KHADIR MAHAMUD—APPELLANT

versus

P. MAMMAD AND OTHERS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 55, sub-s. 6 (b)—Sale—Lien of purchaser on money paid by him—Recision of contract—Purchaser claiming to have sale completed—Charge.

Section 55, sub-section 6, clause (*b*), of the Transfer of Property Act, applies to the case of the sale having fallen through and the purchaser consequently acquiring right to get back his money, and not to the case where the purchaser has paid the money in performance of his contract and claims to have the sale completed.

Second appeal against the decree of the District Court of South Malabar in appeal Suit No. 172 of 1909, presented against the decree of the Subordinate Judge's Court of Cochin.

Facts.—The following judgment of the lower appellate Court clearly sets forth the facts of the case:—

"There is no dispute as to the facts in this appeal. Fourth defendant mortgaged certain properties with possession for Rs. 1,000 to 1st defendant on 10th September 1895. Fourth defendant borrowed a further sum of Rs. 100 from 1st defendant on 26th April 1896 and executed a *puramkadom* deed. On 12th May 1907, 4th defendant executed a document styled a *karan* in favour of plaintiff. The principal provisions in document are as follows:—

Fourth defendant agreed to sell the properties which he had mortgaged to 1st defendant for a sum of Rs. 3,500 to plaintiff. Fourth defendant authorised plaintiff to pay Rs. 500 to 4th defendant's husband. Rupees 250 was reserved with plaintiff to meet the expenses of redeeming the properties, etc. Fourth defendant further acknowledged having received Rs. 250 in cash.

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There is a further stipulation in the document that plaintiff could sue either alone or jointly with 4th defendant to recover possession of the property, and that after the property was reduced to possession, plaintiff should pay 4th defendant Rs. 1,000 and obtain a formal sale-deed. It is also provided that plaintiff should take steps to recover possession of the properties within one year from the date of Exhibit A.

Plaintiff sued to redeem the mortgage; 4th defendant opposed plaintiff's suit and contended that he could not maintain it. The Sub-Judge found on the first issue that plaintiff was not entitled to sue for redemption and accordingly dismissed the suit.

The short question for decision is whether the Sub-Judge was right in holding that plaintiff could not maintain a suit for redemption.

There can be no doubt that Exhibit A is a contract for the sale of immovable property. Section 54 of the Transfer of Property Act expressly provides that a contract for sale does not of itself create any interest in or charge on such property.

"The mere contract to sell land does not give the purchaser any interest in it of the nature of a right *in rem*. He is not entitled to say, as he can according to English Law, that the property belongs to him from the date when the contract is capable of being enforced specifically." See Shephard and Brown's Commentaries on the Transfer of Property Act, 6th Edition, page 194. See *Mahadeo Chintaman Wadekar* v. *Rao Bahadur Vasudev J. Kiktkar* (1).

The buyer may, by reason of having paid part of the purchase-money, acquire a charge on the property to the extent of the amount of the purchase-money he paid. That may be so, but plaintiff cannot, I think, sue for redemption under section 91 of the Transfer of Property Act.

There is another obstacle in plaintiff's way. Exhibit A is dated 12th May 1907, while the present suit was not instituted till 6th June 1908. It is said that the Sub-Judge's Court was closed for the annual recess on 6th April 1908 and did not re-open till 6th June, and that plaintiff is consequently entitled to deduct the period during which the Court was closed.

1) 23 B. 1 1.

I cannot assent to the contention. Section 5 of the Limitation Act does not apply and plaintiff's suit was not brought in time.

For the above reasons, the lower Court's decree is affirmed, and the appeal dismissed with costs."

Judgment.—Section 55, sub-section 6 clause (*b*) of the Transfer of Property Act gives a charge to the purchaser for purchase-money paid by him unless he has improperly declined to accept delivery. That charge being for money paid pre-supposes that the purchaser has become entitled to get back, the money. If he is not entitled to get it back there is no meaning in giving him a security for that money. We agree, therefore, with Mr. Rosario's contention that the clause applies to the case of the sale having fallen through and the purchaser consequently having acquired a right to get back the money. Till then the money is rightfully that of the vendor and the purchaser has no charge for money that is not due to him. The plaintiff has paid the money in performance of his contract and claims to have the sale completed. Under these circumstances, the purchaser has no charge and cannot sue to redeem on that basis.

The second appeal will be dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE NO. 137 OF 1910.
(CRIMINAL REVISION PETITION NO. 109 OF 1910.).

September 30, 1910.

Present:—Mr. Justice Abdur Rahim.

In re BHAMI LUXUMAN SHANBAGA—PETITIONER.

Criminal Procedure Code (*Act V of* 1898), *ss.* 428, 540—*Power of appellate Court to take additional evidence—Penal Code* (*Act XLV of* 1860), *s.* 411—*Dishonestly receiving or retaining stolen property—Article of small value—Recent possession—Burden of proof.*

The powers of a Criminal Appellate Court, under section 428 of the Criminal Procedure Code, are not analogous to those conferred on a Civil Appellate Court under section 568 of the Civil Procedure Code (Act XIV of 1882). A Court of Criminal Appeal can take additional evidence at any time, only it must record its reasons for so doing.

Where the accused was convicted under section 411, Indian Penal Code, of having been in dishonest possession of stolen property, *viz.*, a copper vessel, which

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was discovered seven months after its loss:

Held, that the conviction was bad, as the onus was on the prosecution to prove guilty knowledge, and the failure of accused to account for his possession did not relieve the prosecution of the burden of proving that his possession was dishonest.

Petition, under sections 435 and 439 of the Criminal Procedure Code, praying the High Court to revise the judgment of the Court of the Sub-Divisional Magistrate of Mangalore, in Cr. A. No. 60 of 1910, presented against the conviction and sentence of the Court of the 2nd Class Magistrate of Bantwal, in C. C. No. 216 of 1910.

Facts.—The accused was charged with, and convicted of, an offence under section 411, or section 380, Indian Penal Code, and sentenced to imprisonment for three weeks and to pay a fine of Rs. 15, in default to one week's further rigorous imprisonment.

The facts of the case are sufficiently clear from the following judgment of the lower appellate Court.

"This is an appeal preferred by one Lakshumana Shanbhaga, a Konkani Brahmin of Buntwal, against his conviction and sentence by the Sub-Magistrate of the place under section 411 or 380 of the Indian Penal Code.

2. The appeal was after some preliminary arguments in connection with bail and the transfer of a connected case from the file of the Sub-Magistrate of Buntwal first heard by me on the 22nd of November last, and I took some further evidence at Buntwal on the 23rd idem. The appellant had been involved in two other cases—one on my file and one transferred to mine from the file of the Buntwal Sub-Magistrate after hearing the arguments already referred to and it was represented to me on his behalf that the trial of the two cases would disclose facts which would materially affect the findings in the appeal and that a decision in regard to the latter might be held over pending the disposal of these two cases. This was assented to by me. The connected cases have since been disposed of and I have given an opportunity to the appellant to further argue his appeal adjourning the case twice to suit the convenience of the Prosecuting Inspector though the latter has not been able to attend on any of the adjourned dates.

3. The three cases, so far as the appellant was concerned, were all connected only in so far as they had reference to their detection or supposed detection and the facts were as follows:—

There had been several thefts in Buntwal and the Police had information that some suspicious properties had been sold by a Mopla, K. D., to the appellant. The Konkani Sub-Inspector resolved to make a search of the appellant's house and on the way was told by P. W. No. 1 in the present case, also a Konkani and by far the most respectable man in Buntwal, that seven months previously he had lost a copper *Kodapana* and that a search might be made for it in the appellant's house. The appellant admitted the receipt of the articles from the K. D. and produced them. The Sub-Inspector also brought out from the house at the same time a *Kodapana* secreted among odds and ends in an inner room, and an old cauldron about which also he had some suspicion, he having heard that some one else had lost a cauldron. He did not formally seize these articles then and there but wanted to make sure that they were stolen before he seized them. The *Kodapana* and the cauldron he subsequently got respectively identified by a servant of P. W. No. 1, the latter not being quite sure of the matter, and by a small boy, the son of a man who had lost a cauldron, and all were taken possession of and a seizure list prepared. Later on, the articles received by the appellant from the K. D. were claimed by a man of the neighbouring village and complaints were recorded from the three claimants and the appellant was charged. In the case of the K. D.'s articles (a *kindi* and *uruli*) and the copper cauldron, I have had to discharge the accused because the claimants were unable to identify their articles when mixed up with others of the same sort, and I should also mention here that they had no noticeable defects or marks by which they could be easily picked out. An owner and especially the women of the house, in my opinion, should have been able to identify them without such remarks. This was not done in the two cases though in the case of the K. D's articles his wife and mother-in-law picked them up in no time; hence the discharge of the accused.

4. The main argument adduced for treating the present case on a par with the other two cases was an alleged discrepancy in connection with the search made. It was in

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evidence that the articles were first seized at about 9 A. M. while the seizure list gave the time as about 11 A. M. This discrepancy was straightforwardly and naturally explained by the Sub-Inspector in the lower Court and the reason for it as explained by him is given by me in the para above. I do not, therefore, think that any capital can be made out of it. Nor do I think that the cases in other respects were similar. Both P. W. No. 1 and the Sub-Inspector swore that the one told the other of the loss of his *Kodapana* and the advisability of making a search for it in the appellant's house long before the search was commenced. The degree of suspicion in regard to the *Kodapana* was, therefore, considerably higher than that in respect of the other articles, *i. e.*, the *Kodapana* was practically seized on a complaint from a respectable man, while the other articles were seized on guess. I, therefore, should hold that the three cases stand on altogether different footings and that each case should stand or fall on its own merits.

5. Turning to the present case, the prosecution evidence was that P. W. No. 1, a rich gentleman, had several *Kodapana* in his house, that of these one had fallen into the well and damaged about the neck a year previously, that about the end of February 1909, the latter vessel which had been kept in the stables was lost and that as the loss was not worth noticing P. W. No. 1 did not complain. Both P. W. No. 1 and an old maid servant (the latter examined at night) could only say that the vessel looked like theirs and they would not give any definite statement that it was theirs. If the case had been fabricated, both could, of course, have asserted that it was theirs. A male servant employed in the stables who had been using it before the theft, however, swore that it was his master's. This was the prosecution evidence. Two witnesses, a brother and a nephew, were examined on behalf of the appellant, one to prove ill-feeling between P. W. No. 1 and the appellant in connection with a certain lease and with the starting of a Konkan school at Buntwal out of temple funds in honour of the late Mr. Subraya Poi of Mangalore, and the other to prove that the *Kodapana* had been in the appellant's family for at least four years. The brother spoke to the existence of the ill-feeling and of the appellant's opposition to the starting of the school, but his evidence was uncorroborated and as regards the school the utmost that was proved was that the appellant was in a hopeless minority. It is also incredible that P. W. No. 1, a Konkani, would try to send a co-casteman of his to jail for such a trivial reason when on account of his position he had the means of worrying his life out of him without bringing disgrace to his caste. As regards the boy, *i. e.*, the nephew, he had hopelessly blundered in the matter of the identification marks on the *Kodapana* and the origin of some of them and his evidence was, therefore, very properly disbelieved by the lower Court.

6. When the matter came up to me in appeal, I thought that the only witness who unhesitatingly identified the vessel having been a mere male servant, the identification was not quite sufficient and to remove all doubts, I examined the wife and the aunt of P. W. No. 1, two very respectable ladies who, I thought, would be the best authorities in matters of domestic utensils. Standing before their family shrine and saying that they did so to remove my doubts, they swore that the vessel was theirs and that it had been stolen from them in February last. I have, therefore, not the ghost of a doubt that they spoke the truth and that the vessel is theirs. I should add here that a Court witness was examined by me at the instance of the appellant to prove enmity between him and P. W. No. 1 and the witness denied it.

7. The only point now for consideration is whether even granting that the prosecution story is true, the appellant could be convicted of theft or of receiving stolen property seven months after the theft without positive evidence of his complicity in the same. It is admitted that if the stolen property was found with him soon after the theft, the burden of proof would be on him to prove that he did not steal it or receive it knowing it to be stolen. It is argued that under *Queen-Empress* v. *T. Burke*(1); *Ina Sheikh* v. *Queen-Empress* (2); *Emperor* v. *Khushali* (3), no such burden could be thrown on him in the present case, there having been an interval of seven months between the date of the theft and the discovery of the property and that as the prosecution had not proved

(1) 6 A. 224.
(2) 11 C. 160.
(3) 29 A. 141; 4 A. L. J. 43; A. W. N. (1906) 308; 1 Cr. L. J. 453.

that he either committed the theft or received the property knowing it to be stolen, he is entitled to an acquittal. The articles concerned in the cases referred to in the Indian Law Reports were such as could be passed from hand to hand and it was ruled by the Calcutta High Court that the question of what was or was not recent possession had to be considered with reference to the nature of the articles stolen. Gold coins, ordinary small vessels used by householders in big towns with a large population, &c., would stand on quite a different footing from a big copper vessel or even a smaller one used by an individual in a small place and found later on in the same small place in the hands of a neighbour. I therefore, do not think that the rulings apply to the present case at all. The vessel in the present case except for a bump at the neck is in thorough repair and I cannot see any reason why the appellant should have secreted it with odds and ends in a hind room—a fact proved by the prosecution and admitted by the defence.

8. I consider in the above circumstances that the appellant was quite correctly convicted and will not interfere with the lower Court's judgment in his case. The appeal is dismissed and I direct that the unexecuted portion of the sentence passed on the appellant be carried out.

Mr. *K. Ramatha Shenai*, for the Petitioner.

The *Public Prosecutor*, for the Crown.

Order.—I am entirely unable to accept the first contention of Mr. Shenai that the powers conferred upon a criminal appellate Court by section 428, Criminal Procedure Code, are analogous to those conferred on a Civil appellate Court by section 568, Civil Procedure Code, of 1882. A Civil Court, even of the first instance, has ordinarily no jurisdiction to take evidence of its own motion: it has to decide the action on the evidence adduced by the parties. But a Criminal Court, according to the Criminal Procedure Code, stands on a different footing. Section 540 of the Criminal Procedure Code gives power to the Magistrate at any stage of the enquiry or trial to examine any witness he may find it to be necessary to come to a proper conclusion in the matter under enquiry or trial.

Section 428, Criminal Procedure Code, also in general terms gives power to the appellate Criminal Tribunal to take additional evidence but before taking such evidence the Court must record the reasons for so doing.

No doubt, such a power cannot be arbitrarily exercised, but if it is exercised in a proper case according to the provisions of section 428, it could be perfectly justified.

But I agree with Mr. Shenai that there is not sufficient evidence of dishonest knowledge in the case. The article found in the accused's house is one copper vessel ordinarily used for drawing water and it was not found until seven months after the loss of the article by its owner. That, in my opinion, cannot be said to be recent possession so as to relieve the prosecution of the duty of proving guilty knowledge. That onus has not been discharged and the fact that the accused's attempt to account for possession of the article failed cannot have the effect of disentitling the accused to contend that the prosecution has failed to prove that his possession of the property was dishonest.

The conviction and sentence will, on this ground, be set aside. The accused has undergone the term of imprisonment.

If he has paid the fine, it will be refunded.

Order set aside.

MADRAS HIGH COURT.

CRIMINAL APPEAL No. 337 OF 1910.

September 13, 1910.

Present:—Mr. Justice Abdur Rahim.

THE PUBLIC PROSECUTOR—APPELLANT

versus

T. R. KALIA PERUMAL NAIDU—ACCUSED.

Madras District Municipalities Act (Mad. Act, IV of 1884), ss. 180 (1) and (5) and 263—Construction of walls for the purpose of erecting house—Construction commenced before receipt of license—Offence.

The word 'building' in clause 5 of section 180 of the Madras District Municipalities Act includes 'mere walls' built for the purpose of erecting a house, and the construction of such walls without the license of the Municipality renders the person constructing them liable to the penalty prescribed in section 263, even though the house, to support which the walls were designed, had not been built.

Appeal, under section 417 of the Code of the Criminal Procedure, against the judgment of acquittal passed on the accused in C.C. No. 237 of 1910 by the Bench Magistrates of Kumbakonam.

HAJARA BIBI *v.* LAL CHAND.

The *Public Prosecutor*, for the Crown.

Mr. *E. R. Osborne* and Mr. *C. R. Subramania Iyer*, for the Accused.

Judgment.—In this case the question relates to the proper interpretation of sections 180 and 263 of the District Municipalities Act. The Bench Magistrates of Kumbakonam have acquitted one T.R. Kalia Perumal Naidu of a charge laid against him with reference to his having constructed certain walls without haivng obtained the license or permission of the Municipality. There can be no doubt that he built the walls for the purpose of erecting a house. He had made an application under section 180 for the necessary license with respect to the house which he wanted to build, but before the receipt of the license he went on laying the foundations and raised a wall, at least one foot high without the permission of the Municipality and the prosecution is with reference to that act of his.

By section 3 of the Act, building is defined as including a wall. Clause (1) of section 180 says:—"Every person intending to construct, re-construct or extend a wall or a building (other than a mere wall) shall, six weeks before beginning to construct, re-construct or extend it, make an application in writing to the Municipal Council for a license to do so." Clause (2) requires that certain particulars should be furnished with the application and in the case of building, a plan or statement showing the levels at which it is intended to lay the foundation. Clause 4 gives power to the Municipality to order alterations as to the character of the proposed construction and clause 5 lays down that on receipt of the license or after expiry of six weeks the applicant may proceed with the construction in accordance with the plan and statement. I take it that section 180 prohibits the raising of any construction in the nature of building etc., except in accordance with the provisions of that section. Then section 263 lays down that if license or permission is required under the Act for the doing of any act in respect of any property and that act is done without such license or permission the person so doing it shall be liable to certain penalties. It is contended by Mr. Osborne who appeared in support of the order of the Magistrates that clause (1) of section 180 does not require any application to be made with respect to a 'mere' wall and, therefore, the word 'building' in clause 5 of that section cannot be held to include 'mere walls' so long as the house, which the walls were designed to support, has not been built. But I am unable to accept this contention. The phrase 'mere' walls in clause (1) does not and could not have been intended, in my opinion, to apply to walls which are intended to support a house. The whole scheme of the Act shows that the construction of a house or of any portion of it is not to go on without the permission or license of the Municipality having been previously obtained. One of the important acts of supervision which the Municipality has to exercise relates to the foundation of the building and if the walls were to be constructed without its permission it seems to me that there would be much difficulty and inconvenience in the way of the Municipality discharging its duties. The order of the Magistrates acquitting the accused is, therefore, wrong and I convict him under section 263 of the Act read with section 180. In the circumstances of the case a fine of Rs. (5) five will be sufficient and I sentence him accordingly.

Order set aside.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL FROM ORDER No. 25 OF 1910.

August 1, 1910.

Present:—Sir George Knox, KT., Judge, and Mr. Justice Griffin,

Musammat HAJARA BIBI AND OTHERS—DEFENDANTS—APPELLANTS

versus

Lala LAL CHAND—PLAINTIFF—RESPONDENT

Partition—Revenue-free land—Revenue and Civil Court—Jurisdiction.

A suit for the partition of a revenue-free plot and for the union of the same into a separate *mahal* can be entertained only by a Revenue Court.

Ijrail v. *Kanhai*, 10 A. 5, followed.

Abdul Karim v. *Ramzan*, A. W. N. (1903) 197, distinguished.

First appeal from an order of the District Judge of Benares, dated the 29th of January, 1910.

Mr. *Muhammad Ishaq* (with him Mr. *Gokul Prashad*), for the Appellants.

Dr. *Satish Chandra Banerji* (with him Mr. *Kalindi Prasad*), for the Respondent.

Judgment.—This appeal arises out of a suit brought by Lala Lal Chand—in this Court respondent. He asks that portions of certain revenue—free plots may be partitioned and separated and that he be put in proprietary possession of the plots so partitioned and separated. The suit was filed before the Munsif of Benares. He held that a suit of this nature was not maintainable in the Civil Court. He, therefore, dismissed the suit. In appeal the learned Judge without giving any reason holds that as the land in suit is of the nature of *hakiat mutfarka*, the suit for their partition was cognizable by a Civil Court. He accordingly remanded the suit for restoration to its original number and decision according to law. In appeal before us the question is again raised whether the Civil Court had jurisdiction to try a suit of this nature. We were referred to the case of *Ijrail* v. *Kanhai* (1).

In that case it was held by a learned Judge of this Court that a suit for partition of a plot of land of this kind could be determined only by the Revenue Courts. This decision was under Act XIX of 1873. We were also referred to the case of *Abdul Karim* v. *Ramzan* (2). The subject-matter of that case was, however, a portion of *abadi* land. Looking into the definition of *mahal* given in Local Act No. III of 1901, *viz.*, that it means not only any local area held under a separate engagement for payment of land revenue but also any revenue-free area for which a separate record-of-rights has been framed, we see no reason why a case of this nature should not be decided by the Revenue Court and it is far preferable and more convenient that those Courts should take cognizance. We hold that the provisions of section 233 (*k*) do refer to a case of this kind and that a suit for partition of revenue-free plots and for the union of the same into a separate *mahal* is contemplated by that section. No Court other than a Revenue Court can entertain a suit of this kind. We allow the appeal, set aside the decree of the Court below, and restore that of the Court of first instance with costs in all Courts.

Appeal allowed.

(1) 10 A. 5.
(2) A. W. N. (1908) 197.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1528 OF 1908.

September 13, 1910.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Aiyling.

SRI RAJAH VENKATAKUMARA MAHIPATI SURYA ROW BAHADUR GARU—APPELLANT

versus

RAOW SEETHARAMAYYA—RESPONDENT.

Madras Irrigation Cess Act (*Mad. VII of* 1865),—*Landlord and tenant—Water-cess—Water-cess levied by Government from* zemindar *for irrigation of tenant's land—Contribution—Right of landlord to recover from tenant—Sanction of Collector—Madras Rent Recovery Act* (*Mad. VIII of* 1865), *s.* 11.

Where the Government collects from the *zamindar* water-cess for irrigation of the tenant's *jiroyati* lands, situate within the *zemindari*, with the aid of Government water, the *zemindar* is entitled to recover the amount thus paid from the tenant.

Such right is not subject to the provisions of section 11 of the Madras Rent Recovery Act, 1865, and does not require the previous sanction of the Collector.

The Rajah of Venkatagiri v. *Vudutha Subharayadu*, 30 M. 277; 17 M. L. J. 145, referred to.

Second appeal and the memorandum of objections put in by the respondent against the decree of the Subordinate Judge's Court of Coconada, in Appeal Suit No. 197 of 1907, presented against the decree of the Court of the District Munsif of Coconada, in Original Suit No. 296 of 1906.

Mr. *T. R. Venkatarama*, for the Appellant.

Mr. *O. Narayanamurti*, for the Respondent.

Judgment.—The only question argued before us relates to the right of the plaintiff-appellant (the Raja of Pittapur) to recover from the defendant the water-cess collected from him (plaintiff) by Government on account of the irrigation of the defendant's "*Jiiroyati* lands" situate within the plaintiff's *zemindari* with the aid of Government water. The decision of the District Munsif in the connected suit (Original Suit No. 352 of 1906) that the said lands are *mamul* wet, and not liable to water-cess has since been reversed on appeal: and it is now admitted that the lands are not *mamul* wet and are liable for the water-cess charged on them.

Such being the case, it is difficult to see why the plaintiff should not be allowed to recover the water-cess which he admittedly paid. He was bound to pay it under the Madras Irrigation Cess Act (VII of 1865) but he paid it solely for the benefit of the

defendant inasmuch as the plaintiff does not claim any enhancement of rent. The case is precisely similar to that dealt with in the *Rajah of Venkatagiri* v. *Vudutha Subbarayadu* (1), except that the defendant is a *jeerayati* tenant and not an *inamdar*. It is on this ground that the Subordinate Judge has distinguished it and has held the plaintiff's right to recover to be subject to the provisions of section 11 of Act VIII of 1865 (the Rent Recovery Act) regarding the sanction of the Collector. The latter section has no application to the present case, which is not a suit involving any dispute as to rate of rent.

The respondent's Vakil, in fact, admits that the case is undistinguishable on this ground and merely argues that the liability to water-cess only dates from the localisation of the *mamul* wet area, which he considered to have been affected by Original Suit No. 352 of 1906. This plea appears to us untenable. No localisation was effected by the judgment in the suit in question, which merely declares that the suit lands were not among those already localised as *mamul* wet.

Issue No. 2 must, therefore, be decided in favour of the appellant, and the decree of the Subordinate Judge set aside in so far as it rejects the appellant's claim for recovery of water-cess.

The suit is, therefore, remanded to the lower Court for disposal according to law. Costs will abide the ultimate result.

The respondent's memorandum of objection is not pressed and is dismissed with costs.

Cause remanded.

(1) 30 M. 277; 17 M. L. J. 145.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 120 OF 1910.

August 10, 1910.

Present:—Mr. Justice Chamier.

RAM BAKHSH—DEFENDANT—APPELLANT;

versus

RAM SARUP AND OTHERS—PLAINTIFFS—RESPONDENTS.

Landlord and tenant—Lease—Planting of trees by tenant without the consent of landlord—Trees belong to zemindar—*Landlord's right to cut trees during subsistence of tenancy—Injunction.*

Where a tenant plants trees without the consent of the landlord, the trees belong to the *zemindar*, but the *zamindar* has no right to enter upon the land and cut the trees during the subsistence of the tenancy. If the landlord enters upon the land and cuts the trees, the tenant is entitled to an injunction restraining the landlord from interfering with his enjoyment of the land so long as the tenancy subsists.

Second appeal from the decision of the Additional Judge of Aligarh, dated the 29th of November, 1909.

Mr. *Parmeshwar Dyal* (for Mr. *Surendro Nath Sen*), for the Appellant.

Mr. *Abdul Raoof*, for the Respondent.

Judgment.—The plaintiffs in this case are tenants of a plot of land, the property of the defendant. The plaintiffs many years ago planted some trees on the land. The defendant, shortly beforet his suit was instituted, entered upon the land and cut down one *babul* tree. It seems to be recognised that this is a test case and that the defendant claims to be entitled to enter upon the land and cut down several other trees planted by the plaintiffs upon the land. The defendant relies upon a decision of this Court in F. A. No. 19 of 1907. But that case has no bearing whatever upon the present case. In that case the plaintiff had planted trees on land belonging to the defendant, a *zemindar*. But in that case there was no question of a lease. The plaintiff was not the tenant of the land on which trees had been planted. In the present case the plaintiffs are the tenants of the land. If they planted trees with the consent of the defendant, it is quite clear that the latter is not entitled to enter upon the land and cut them down. But even if they planted the trees without his consent, it appears to me that he is not entitled to enter upon the land and cut down the trees. Some other remedy may be open to him. But he has no right to disturb the possession of the plaintiffs in this way. The lower appellate Court has given the plaintiffs a decree for the value of the tree. But this they are not entitled to. The tree belonged to the *zemindar*. They may be entitled to damages for the disturbance of their possession by the defendant. But only a nominal sum could be allowed on that account. In my opinion, the decision of the first Court was correct. The plaintiffs are entitled to an injunction restraining the defendant from interfering with the plaintiffs' enjoyment of the land so long as the tenancy subsists. But they are not entitled to a decree for the value of the tree cut down. I set aside the order of the lower

appellate Court and restore the decree of the first Court. Parties will pay their own costs throughout.

Appeal allowed.

MADRAS HIGH COURT.
SECOND CIVIL APPEALS Nos. 1010 AND 1011 OF 1907.
September 20, 1910.
Present:—Mr. Justice Munro and Mr. Justice Sankaran Nair.
T. K. A. SRINIVASACHARIAR—APPELLANT
versus
T. K. A. RAMANUJACHARIAR AND OTHERS—RESPONDENTS.

Insolvency Act (11 and 12 Vic. C. 21), s. 49—Suit for declaration—Insolvency of defendant after institution of suit—Maintainability of suit.

Where plaintiff sued for a declaration that the house in dispute was liable to attachment in execution of his decree against defendant, and the defendant was adjudged an insolvent after the institution of the suit:

Held, that the insolvency of the defendant was no bar to the continuance of the suit and that the provisions of section 49 (11 and 12 Vic. C. 21) did not apply.

Second appeals against the decrees of the District Court of Chingleput, in Appeal Suit Nos. 85 and 87 of 1906, presented against the decree of the District Munsif of Conjeneram, in Original Suit No. 255 of 1905.

Facts of the case are sufficiently clear from the following extracts from the judgment of the District Judge:—

"This was a suit for a declaration that the plaint house is liable to attachment in satisfaction of the plaintiff's decree. The District Munsif of Conjeveram gave a decree to the plaintiff. Both the plaintiff and 1st defendant now appeal."

"The suit house originally belonged to the 2nd defendant, the father of defendants Nos. 3 to 7, and the brother of the 1st defendant. In Original Suit No. 305 of 1902 on the file of the Conjeveram Munsif's Court, one Kanakammal obtained a decree against the 2nd defendant and brought the house to sale, at which Varada Sreenivase Iyengar purchased it for Rs. 860. From him the 1st defendant purchased it for Rs. 1,500 under a sale-deed (Exhibit II). The plaintiff also obtained a decree against defendants Nos. 2 to 7 in Original Suit No. 313 of 1902, and in execution thereof attached the house. The 1st

defendant put in a claim, which was allowed. Hence the present suit."

After dealing with the questions of fact, the District Judge thus disposed of the point of law raised by defendants' Vakil:—

"Another point has been raised as to the insolvency of the 2nd defendant which occurred since the institution of the suit. On the authorities quoted, I am not satisfied that the plaintiff cannot ask for a mere declaration to attach the suit house."

The plaintiff preferred a further appeal to the High Court on the following, among other grounds:—

"1. The 2nd defendant having been declared an insolvent, the lower Courts acted illegally in proceeding with the present suit.

2. The lower Courts erred in failing to consider that the plaintiff is one of the scheduled creditors, and is not entitled to proceed with the present suit in respect of his scheduled debt.

3. The provisions of the Indian Insolvency Act, 1848, 11 and 12 Victoria, Chapter 21, have been overlooked.

4. The suit should not have been proceeded with without joining the Official Assignee as party.

5. The rights of the second defendant having become vested in the Official Assignee the lower Court ought to have directed the Official Assignee, who is really the interested party, to be joined as party."

Judgment.

IN SECOND APPEAL No. 1010 OF 1907.

We think there are materials to justify the inference drawn by the District Judge. Section 49 of 11 and 12 Victoria, Chapter 21 is no bar to the suit.

IN SECOND APPEAL No. 1011 OF 1907.

The second appeal is dismissed with costs.

Appeals dismissed.

MADRAS HIGH COURT.
FIRST CIVIL APPEAL No. 133 OF 1907.
September 13, 1910.
Present:—Mr. Justice Miller and Mr. Justice Sankaran Nair.
MIDUATHA PERUMAL NAICK—APPELLANT
versus
M. PERUMAL NAICK AND OTHERS—RESPONDENTS.

Hindu Law—Proof of self-acquisition—Admission

that some properties are ancestral—Burden of proof.

Where the question was whether certain properties of a Hindu were his separate properties, and the person alleging them to be his separate properties admitted that a part of them were ancestral:

Held, that the burden of proof lay upon him to show that particular properties were acquired without the aid of ancestral property.

Appeal against the decree of the Sub-Judge's Court of Tuticorin, in O. S. No. 11 of 1905.

Judgment.—The question is whether the property is the separate property of the first defendant and the Exhibits A,B, and C contain admissions by the 1st defendant that a part of this property was ancestral; if that is true, the burden of proof is put upon him to show that particular properties were acquired without the aid of ancestral property. The Sub-Judge dealing with these admissions holds that they must have been false statements made by the 1st defendant and that the burden of proof is not, therefore, put upon him but we are unable to accept the explanations suggested by the Sub-Judge. They are improbable and have nothing to support them. The explanation of the 1st defendant himself that he made the admission under a misapprehension of the legal meaning of "self-acquired property" is different and the Sub-Judge has not found whether it is true or false

The admissions contained in Exhibits A,B, and C are *prima facie* evidence of the existence of the ancestral property and the Sub-Judge was wrong in treating them as of no value; and we cannot accept his view that the burden of proof in spite of them remained upon the plaintiff. The suit was, therefore, wrongly dismissed and we reverse the decree and remand the suit for disposal according to law.

Costs will abide the event.

Appeal allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 653 OF 1906.

August 11, 1910.

Present:—Mr. Justice Munro and Mr. Justice Sankaran Nair.

VENKATASAMI NAICKEN AND ANOTHER—APPELLANTS

versus

RAMANATHAN CHETTYAR AND OTHERS—RESPONDENTS.

Mortgage—Mortgage decree—Purchase of mortgaged property by the decree-holder—Sale by mortgagor of part of mortgaged property prior to decree—Purchaser not impleaded as party to mortgage suit—Right of private purchaser to redeem his own share—Transfer of Property Act (IV of 1882), s. 60—Right of mortgagee to claim interest according to mortgage deed—Interest.

Where in the execution of a mortgage decree, the mortgagee decree-holder purchased in Court sale some of the items of the mortgaged property, and one of these items was sold before the date of the decree by the mortgagor to the appellant, who was not impleaded as a party in the mortgage suit:

Held (1) that the sale in Court auction must be treated as valid and that the mortgagee must be taken to have split up his security and precluded himself from objecting to an apportionment.

(2) that the appellant was entitled to redeem his own share only on payment of the proportionate amount which the item sold to him was liable to contribute rateably to the debt secured by the mortgage.

(3) that on the said amount the mortgagee was entitled to interest according to the mortgage-deed and not according to the decree.

Umes Chunder Sircar v. *Zahur Fatima*, 18 C. 164; 17 I. A. 201 and *Thenappa Chettyar* v. *Marimuthu Nadan*, 31 M. 258; 18 M. L. J. 344; 4 M. L. T. 293, followed.

Ganga Das Bhattar v. *Jogendra Nath Mitra*, 5 C. L. J. 315; 11 C. W. N. 403, not followed.

Second appeal against the decree of the District Court of Madura, in Appeal Suit No. 338 of 1902, presented against the decree of the Court of the District Munsif of Madura, in Original Suit No. 294 of 1899.

Judgment.—Parasamma Naik and Venkatammah mortgaged seven items of property to one Ramanathan Chetti, who, in execution of a mortgage decree obtained by him, purchased items Nos. 1, 4, 5 and 7 himself. Another item No. 2 was purchased by a third party who is not before us. Before the date of the mortgage decree, item No. 4 was sold by the mortgagor to the appellant, who was not made a party to the suit brought by Ramanathan Chetty and who, therefore, cannot be prejudicially affected by the proceedings in the suit.

The question now before us is whether the appellant is entitled to redeem his own share only on payment of the proportionate part of the mortgage part of the mortgage-debt only, or whether the mortgagee is entitled to insist on payment of the entire mortgage amount. It is contended by Mr. Sundara Aiyar that, if the sale in execution of his decree is not binding on the appellant so far as item No. 4 is concerned, he is entitled to treat the sale so far as the other items also are concerned as invalid. The mortgagor does not contend that the sale is invalid as

to items Nos. 1, 5 and 7. Neither the mortgagor nor the purchaser impugns the validity of the sale of item No. 2. We have been referred to no authority in support of the contention that in these circumstances the mortgagee, purchaser, is entitled to treat the sale with reference to the other items also as invalid and we see no reason to treat the sale as invalid. Treating the sale then as valid, the mortgagee has acquired by purchase the interest of the mortgagor in some of the items and there is no doubt that he must be taken to have split up his security and precluded himself from objecting to an apportionment. It was then contended that the appellant must at least pay the proportionate share of the share of the debt chargeable on the items other than those which he has purchased. When the mortgagee has split up his security and precluded himself from objecting to an apportionment, we are of opinion that he is not entitled to insist upon the appellant redeeming more than his own share on payment of the proportionate amount which item No. 4 is liable to contribute rateably to the debt secured by the mortgage. The words of section 60 of the Transfer of Property Act are in favour of the view. We shall, therefore, ask the District Judge to return a finding on the question, what is the proportionate amount which the plaint property item No. 4 in the mortgage instrument is liable to contribute rateably to the debt secured by the mortgage? Further evidence may be taken. The finding should be submitted within six weeks and seven days will be allowed for filing memoranda of objections.

In compliance with the above order, the District Judge submitted the following

FINDINGS.

I have been called upon to submit a finding as to the proportionate amount which the plaint property item No. 4 in the mortgage instrument is liable to contribute rateably to the debt secured by the mortgage.

2. As to what the debt secured by the mortgage is, I think the matter is settled by the ruling reported in *Ganga Das Bhattar* v. *Jogendar Nath Mitra* (1), where it is held that "when a party, who has been excluded from a mortgage suit and has thus not been afforded an opportunity to redeem, subsequently seeks to exercise his right of redemption, he is entitled to do so upon the same terms as if he had been made a party to the original suit. The party who has been improperly excluded from a mortgage suit is entitled to claim that he should not be placed in a worse position than what he would have occupied, if he had been made a party to the original suit; if he had been so made a party, he would have been entitled to redeem upon payment of the sum ascertained by the decree together with interest upon such sum at the Court rate between the date of the decree and the date of actual realisation; in other words his liability to pay interest at the contract rate would have terminated on the date of the decree when the liability would have passed from the domain of contract into the domain of judgment; from that date his liability would have been determined by the decree and interest would have run at the Court rate allowed by the decree."

3. The debt secured by the mortgage in the present case will, therefore, be the amount of the decree obtained by the 1st respondent (Exhibit B) *viz.*, Rs. 678-12-4 *plus* interest at the rate allowed in the decree. The proportionate amount which plaint item No. 4 in the mortgage is liable to contribute rateably depends on the ratio which the value of item No. 4 covered by the mortgage bore at the time of execution of the mortgage to the total value of the mortgaged property.

4. A Commissioner was appointed to determine these values. No objections were filed to his report except by the appellants in the second appeal, *viz.*, 1st and 2nd defendants. They objected to the Commissioner's valuation of item No. 4. At the time fixed for hearing the appeal, after receipt of the Commissioner's report, only the appellants in the 2nd appeal, *viz.*, the 1st and 2nd defendants, appeared by their Vakil. The respondents, including the plaintiff and their Vakil, were absent. I agree with the 1st and 2nd defendants' Vakil that the Commissioner's valuation of item No. 4 is not correct. It must be remembered that item No. 4 is only 1/5th of $3\frac{3}{4}$ *gulis* of a tope 10—14—0 *gulis* in extent (*Vide* paragraph 30 of the District Munsif's revised judgment on pages 78 and 79 of the printed papers). Now Exhibit I under which the 1st and 2nd defendants acquired title to

(1) 5 C. L. J. 315 at p. 316; 11 C. W. N. 403.

the $3\frac{3}{4}$ *gulis*, out of which Venkatammal had a 1/5th share, which the plaintiff has since acquired, shows that the $3\frac{3}{4}$ *gulis* are situated just to the north of the river, *i. e.*, that they are in the southern portion of the tope. It follows that the Commissioner in valuing Venkatammal's share in the tope was wrong in determining it on the basis of the average value per *guli* of the entire tope, for, as he points out, the northern portion of the tope has become very valuable recently, as land suitable for building sites, whereas the southern portion is much less valuable.

5. The sale-deeds Exhibits IV to VII range from the years 1893 to 1896 and we must take the lowest price in these sale-deeds, *i. e.*, Rs. 31-4-0 per *manai* as the basis on which to fix the value of Venkatammal's share in the southern portion of the tope. As shown by the Commissioner in his report, if a *manai* is worth Rs. 30, a *guli* which consists of $10\frac{2}{3}$ *manais* must be worth Rs. 320. Venkatammal's share which was 1/5th of $3\frac{3}{4}$ *gulis*, *i. e.*, $\frac{3}{4}$ *guli*, must, therefore, be worth only Rs. 240 according to this mode of calculation. Defendants Nos. 1 and 2 are prepared to have Venkatammal's share valued in accordance with the price paid in Exhibit I, *i. e.*, Rs. 2,000 for $5\frac{1}{4}$ *gulis*. This would give the value of the $\frac{3}{4}$ *guli* as 2,000/7 or Rs. 285. I fix Rs. 285 as the value of item No. 4 at the time of execution of the suit mortgage.

6. As regards the valuation of the other items secured by the mortgage, the 1st and 2nd defendants accept the Commissioner's valuations which are as follows :—

Item No. 1	valued at Rs.	336	(*Vide* Exhibit A).
„ 2	„	70	(*Vide* Exhibit III).
„ 3	„	1,563	(*Vide* the Commissioner's report).
„ 5	„	500	(*Vide* „).
„ 6	„	150	(*Vide* „).
„ 7	„	500	(*Vide* „).

The total of items Nos. 1 to 3 and 5 to 7 thus comes up to Rs. 3,119 ; adding the value of item No. 4, we get Rs. 3,404 ; the ratio of the value of item No. 4 to the total value of all the items secured by the mortgage is, therefore, 285/3404 or nearly 1/11, a fraction which the appellants in the second appeal (*i. e.*, 1st and 2nd defendants) accept. I find, therefore, that the figure required by the High Court is Rs. 61-11-3 *plus* subsequent interest at the rate allowed in Exhibit B up to date of realization.

After the return of the above finding, the High Court delivered the following

Judgment.—Under the judgment of the Privy Council in *Umes Chunder Sircar* v. *Zahur Fatima* (2), the plaintiffs are entitled to interest calculated according to the mortgage deed and not according to the decree. The case of *Ganga Das Bhatter* v. *Jogendra Nath Mitra* (1), relied upon by the District Judge, has been dissented from in *Thenappa Chettiar* v. *Marimuthu Nadan* (3) which follows *Umes Chunder Sircar* v. *Zahur Fatima* (2). We must, therefore, ask the District Judge to find, on this basis, the proportionate amount which plaint item No. 4 is liable to contribute.

The finding should be submitted within four weeks from the date of this order, and seven days will be allowed for filing objections.

In compliance with the above order, the District Judge submitted the following

FINDING :—

I have been asked to submit a finding as to the proportionate amount which plaint item No. 4 is liable to contribute on the basis that the plaintiffs are entitled to interest according to the mortgage deed and not according to the decree.

2. I have found that item No. 4 is liable to contribute 1/11 of the total debt secured by the mortgage. The debt secured by the mortgage at the rate of interest provided in it up to the date of plaint was Rs. 678-12-4, as appears from the decree. The amount to be contributed by item No. 4 on the date of plaint was 1/11 of the above, *viz.*, Rs. 61-11-3. The amount which item No. 4 will have to contribute on the date it is paid will, therefore, be this sum of Rs. 61-11-3 with compound interest calculated on it at the mortgage rate from the date of plaint to the date of realization. It makes no difference whether compound interest is calculated on Rs. 678-12-4 (the amount due on the date of plaint) from the date of plaint up to date of realization and the total divided by 11 or whether we

(2) 18 C. 164; 17 I. A. 201.
(3) 31 M. 258; 18 M. L. J. 344; 4 M. L. T. 293.

take 1/11 of Rs. 678-12-4, *viz.*, Rs. 61-11-3 and calculate compound interest on that sum from date of plaint to date of realization. The result will be the same in either case.

3. My finding, therefore, is that the amount which plaint item No. 4 has to contribute is Rs. 61-11-3 *plus* compound interest calculated on that sum from date of plaint to date of realization.

4. The respondents contended that the interest in the mortgage bond was penal and unconscionable. The appellant's pleader has put in a statement now, marked as Exhibit H, which shows that the amount to be contributed by plaint item No. 4 with interest up to this date is Rs. 802-9-0 whereas it was only Rs. 61-11-3 on the date of the plaint (the 6th May 1899). The interest claimed, therefore, seems to be in excess of what would appear to me to be reasonable compensation under section 74 of the Indian Contract Act, but it is not open to me to go into this question. I merely note the fact that the question was raised before me.

After the return of the above finding the High Court delivered the following.

Judgment.—Accepting the finding, we modify the decree of the District Judge by directing that defendants Nos. 1 and 2 do pay to the plaintiff within six months from this date Rs. 61-11-3 and compound interest thereon at 15 per cent. per annum with annual rests from the 6th May 1899 to this date and that the aggregate amount thus due do bear interest at 6 per cent. per annum till payment. The parties will pay and receive proportionate costs throughout.

Decree modified.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 1150 TO 1182 OF 1908.

August 16, 1910.

Present:—Mr. Justice Munro and Mr. Justice Sankaran Nair.

SUPPAN SERVAI AND OTHERS—APPELLANTS

versus

DORASINGAM, MINOR *Zemindar* OF SIVAGANGA, THROUGH THE MANAGER OF THE COURT OF WARDS—RESPONDENT.

Landlord and tenant—Claim for varam *rent—Absence of contract for rent—Madras Rent Recovery Act (Mad. Act VIII of* 1865*), s.* 11 (2).

In the absence of a contract for rent, express or implied, a landlord is entitled to demand *varam* from his tenant. To such a case clause 2 of section 11 of the Madras Rent Recovery Act has no application.

Second appeals against the decrees of the District Court of Madura, in A. S. No 72 of 1907, and other connected cases, presented respectively against the decisions of the Head Assistant Collector of Ramnad, in Summary Suits Nos. 340 &c, of 1906.

Judgment.—In the absence of a contract for rent, express or implied, the plaintiff is entitled to demand *varam*, clause II of section 11 of the Madras Rent Recovery Act, VIII of 1865, having no application in these cases. No express contract is set up, and we think that the District Judge is right in finding that there was no implied contract. The rates of Rs. 20 and Rs. 25 were found paid in *Fusli* 1306 and as early as *Fusli* 1310 we find the plaintiff claiming *varam* as an alternative. There is also no evidence of payments for any period, prior to *Fusli* 1306, from which an implied contract could be found.

The second appeals are dismissed with costs.

Appeals dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 822 OF 1909.

September 19, 1910.

Present:—Mr. Justice Munro and Mr. Justice Sankaran Nair.

RAMANATHAN CHETTYAR AND OTHERS—APPELLANTS

versus

KARUPPAYEE AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act XIV of 1882*), ss.* 98, 157—*Hearing of suit after settlement of issues—Absence of parties and pleaders—Procedure—Decreeing plaintiff's suit without recording reasons—Dismissal of suit.*

Where, at the hearing of a suit after the settlement of issues, both parties and their pleaders are absent, the suit should not be dismissed but the Court, dealing with the claim, should pass an order under section 98, Civil Procedure Code (Act XIV of 1882), and then record reasons for any decision it arrives at on the materials before it.

Second appeal against the decree of the District Court of Madura, in Appeal Suit No. 691 of 1907, presented against the decree of the District Munsif of Tirumangalam, in Original Suit No. 432 of 1905.

HIRA RODHIANI *v.* SOKHYONO PATTOJOSHJI.

Facts.—At the first hearing of the suit, after the settlement of issues the Munsif passed the following order:—

"Parties and Vakils absent. I decide all the issues for plaintiff. Judgment for plaintiffs as prayed with costs."

On appeal, the District Judge passed the following judgment :—

"Both parties being absent, the District Munsif ought to have dismissed the suit under sections 98 and 157, Civil Procedure Code. The suit is dismissed. Each party will bear its own costs in both Courts."

Plaintiff appealed to the High Court.

Judgment.—The District Judge is in error in thinking that under sections 98 and 157 of the Civil Procedure Code, the District Munsif ought to have dismissed the suit. What section 98 lays down is that in circumstances like the present, the suit shall be dismissed unless the Judge, for reasons to be recorded, otherwise directs. The District Munsif passed no order under section 98 but decreed the plaintiff's suit without recording any reasons. We, therefore, set aside the decrees of the Courts below and remand the suit to the District Munsif for disposal according to law. Costs will abide and follow the result.

Cause remanded.

MADRAS HIGH COURT.
SECOND CIVIL APPEAL No. 337 OF 1909.
September 20, 1910.
Present:—Mr. Justice Abdur Rahim and Mr. Justice Krishnaswami Aiyar.
HIRA RODHIANI AND OTHERS—APPELLANTS
versus
SOKHYONO PATTOJOSHJi—RESPONDENT.

Civil Procedure Code (Act XIV of 1882), s. 574--Judgment of Appellate Court—What should it contain.

The judgment of a Court of first appeal should contain the points for determination, the reasons for the Judge's conclusions and it should also set forth the nature of the case and the grounds urged before the Judge in appeal.

Second appeal against the decree of the District Court of Ganjam, in Appeal Suit No. 255 of 1908, presented against the decree of the District Munsif of Aska, in Original Suit No. 419 of 1907.

SADAYA PILLAY *v.* AMURTHACHARI.

Facts appear from the following judgment of the lower appellate Court:—

"1. The lower Court disbelieves the oral and documentary evidence of the appellants (defendants) as to the alleged partition.

2. One of the appellants' grounds of appeal in his appeal memo is that plaintiff, who alleged dispossession, was bound to prove that he held possession within 12 years of the suit. This is not argued in appeal.

3. Upon a review of the oral and documentary evidence on bothsides, I agree with the lower Court's findings and dismiss the appeal with costs."

Judgment.—We must set aside the judgment of the District Judge on the ground that it is not in compliance with the law as enunciated in section 574 of the Code of Civil Procedure of 1882. The Judge does not state the points for determination nor the reasons for his conclusion, as required by the legislature, and it is not possible for us on reading the judgment of the appellate Court to ascertain the nature of the case or the grounds urged before him in appeal. The appeal must be re-heard and disposed of in accordance with law.

Costs will abide the result.

Cause remanded.

MADRAS HIGH COURT.
SECOND CIVIL APPEAL No. 49 OF 1909.
September 8, 1910.
Present:—Mr. Justice Abdur Rahim and Mr. Justice Krishnaswami Aiyar.
SADAYA PILLAY—APPELLANT
versus
AMURTHACHARI AND ANOTHER—RESPONDENTS.

Civil Procedure Code (Act XIV of 1882), ss. 278, 281, 283—Claim proceedings, order in--Suit by aggrieved party instituted after a year—Judgment-debtor not a party in claim proceedings—Limitation—Limitation Act (XV of 1877), Sch. II, art. 11.

Where the judgment-debtor was not a party to claim proceedings, the party aggrieved by the order therein can institute a suit to establish his right after the expiry of a year from the date of the order and the suit will not be barred under article 11 of Schedule II of the Limitation Act.

Kedar Nath Chatterjee v. *Rakhal Das Chatterjee*, 15 C. 674, *Morshia Baraya* v. *Elahi Bux Khan*, 3 C. L. J. 381; *Sardhari Lal* v. *Ambika Pershad*, 15 C. 521 at p. 525; 15 I. A. 123, referred to.

Koyyanna Chittemma v. *Doosy Gavaramma*, 29 M 225; 16 M. L. J. 136, and *Moideen Kutti* v. *Kunhi Kuti*.

MAHOMED MEERA *v.* RAMALINGAM

Ali, 25 M. 72; 12 M. L. J. 411, referred to and explained.

Perengaryprom v. *Parameswarem Nambudry*, 4 M. H. C. R. 472, distinguished.

Second appeal against the decree of the District Court of Trichinopoly, in Appeal Suit No. 200 of 1907, presented against the decree of the Court of the District Munsif of Ariyalur, in Original Suit No. 220 of 1906.

Mr. *Sheshagiri Iyer*, for the Appellant.

Judgment.—The plaintiff had preferred a claim under section 278 of the Civil Procedure Code and his claim was disallowed under section 281 of the Civil Procedure Code. Within a year of the order disallowing the present plaintiff's claim, the judgment debt was satisfied otherwise than by the sale of the attached property. The present suit is now brought to establish the plaintiff's right to the properties as usufructuary mortgagee and for recovery of possession from the defendants. It has been held that the suit is barred under article 11 of Schedule II of the Limitation Act. Mr. Seshagiri Iyer, appearing for the plaintiff, who is the appellant before us, contends that the order under section 283 enures in favour of or against the decree-holder or the claimant and not the judgment debtor. The judgment-debtor according to this contention is not a party within the meaning of section 283 and this contention would seem to be supported by the decisions in *Kedder Nath Chatterjee* v. *Rakhal Das Chatterjee* (1) and *Morshia Barayze* v. *Elahi Bux Khan* (2) where the proposition is laid down that in proceedings under section 278, the real question for decision is not whether the title to the property belongs to the judgment-debtor or the claimant but whether the property should be released from the attachment or not. We may also point out that the observations of their Lordships of the Privy Council in *Sardhari Lal* v. *Ambika Pershad* (3) would indicate that besides the claimant, the only other party within the meaning of section 280 is the judgment-creditor. But *Koyyana Chittemma* v. *Doosy Gavaramma* (4) and *Moideen Kutti* v. *A. Kunhikutti Ali* (5) proceed upon the view that if the judgment-debtor be made a party by the proceedings and there has been an adjudication between him and the claimant, the suit of the claimant would be barred as against him if not brought within a year. Even supposing that to be the correct interpretation of the section of the Code in question—and we do not think that the respondent can properly put her case any higher—we find that in the present case respondent, who was judgment-debtor in the claim proceedings, neither appeared nor was there any adjudication of the claim as between her and the present plaintiff. We may point out that the decision in *Netictom Perengaryprom* v. *T. Parameswaren Namubudry* (6) proceeds upon the Code of 1857 where the language employed is different from that of the Code of 1882. We, therefore, hold that the view taken by the lower appellate Court on the question of application of article 11 of the Limitation Act is wrong. The decree of the lower appellate Court will be set aside and the case will be remanded to it for disposal on the other issues. Costs will abide the result.

Appeal allowed.

(1) 15 C. 674.
(2) 3 C. L. J. 381.
(3) 15 C. 521 at p. 525; 15 I. A. 123.
(4) 29 M. 225; 16 M. L. J. 136.
(5) 25 M. 721; 12 M. L. J. 411.
(6) 4 M. H. C. R. 472.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 615 OF 1908.

September 1, 1910.

Present:—Mr. Justice Munro and Mr. Justice Sankaran Nair.

MAHOMED MEERA LEVVAI MARAKKAYAR AND ANOTHER—APPELLANTS

versus

T. K. RAMALINGAM PILLAY AND OTHERS—RESPONDENTS.

Landlord and tenant—Lease—Occupancy right, presumption of—'Kudi miras' meaning of.

Where a Collector leased all the temple lands in a village to tenants in 1831, and there was nothing to show how the temple acquired the lands, and the tenants claimed permanent occupancy rights:

Held (1) that the lease to tenants being proved, the presumption was that they came into possession after that date as assignees.

(2) that there was no presumption of occupancy rights in the tenants' favour and it was for them to show that they were the representatives-in-title of tenants, who, by length of possession, or assertion of occupancy rights, may be presumed to have been occupancy tenants.

(3) that the expression '*kudi miras*', occurring in a deed of lease, may be taken as indicating the existence of occupancy rights in tenants.

Second appeal against the decree of the District Court of Tanjore, in Appeal Suit No. 1131

of 1906, presented against the decree of the Court of the Subordinate Judge of Negapatam, in Original Suit No. 6 of 1905.

Judgment.—The question for decision is whether the temple of Sreemanthere Pureswara Swami owns both the *melwaram* and *kudivaram* in the suit lands which form part of the *Inam* village Mangal in the Thirutharapoondy *Taluk*, Tanjore District, or whether the appellants-defendants hold these lands with occupancy rights. Both the lower Courts have decided in favour of the temple and it is contended before us that this conclusion is erroneous, as it is based on misconstruction of documents and erroneous inferences from admitted facts

There is no evidence of the terms of the grant by the Raja of Tanjore to the temple and the Judge rightly holds that the *Inam* settlement title-deed Exhibit B, and the *Inam* Registers, Exhibits Band C, do not lead to any conclusion whether it was the land or the assessment which formed the subject of the grant.

The Judge is also right in holding that on behalf of the temple, the Collector leased all the cultivable village land including the plaint lands by Exhibit A in 1831 to the eight tenants named therein, whether on their own behalf solely or as representatives of the other tenants in the village also makes no difference. With one exception to be presently noticed, the terms are similar to those of the *muchilikas* in other suits which have been held by this Court not to confer any occupancy right. That one exception is the use of the terms '*Kudimiras*' which is defined in Wilson's Glossary as land held in hereditary right. '*Miras*', no doubt, involves ownership and the term '*Kudimiras*' by constant usage in that District, according to the Judge, had acquired a meaning which indicates a permanent tenure. But we find only one signature to Exhibit A has the prefix '*Kudimiras*' though the Judge states two signatures have it, while the same person is described in Exhibit P., the *Thasildar's* letter accompanying Exhibit A, as a *Purakudïmiras* and in the Revenue accounts only two years later Ayya Pillai and other lessees are called Purakudies (Exhibits J, J5). It is clear, therefore, that the lessors, the Revenue authorities, did not recognize them as tenants having any occupancy right under Exhibit A.

It has not been proved when the defendants or their predecessors-in-title obtained possession. The lease Exhibit A having been proved, the presumption is that they came into possession after that date as assignees.

Then it is contended that though Exhibit A may not confer any permanent right of occupancy, it is not inconsistent with it and the defendants' predecessors-in-title have been in possession before Exhibit A. The defendants have not shown who among the eight lessees in Exhibit A is their predecessor-in-title and the evidence is clear that all of them cannot be presumed to have been holding on the same permanent tenure. Two of them are styled *Olavadai Kudimiras*, one *Kudimiras*, two of them simply *Purakudies*, in the previous *pymash* accounts. The evidence in the case also shows that the tenants hold on different tenures. They are described as *Olavadai*, *Kudimiras*, *Olavadai*, *Miras*, *Olavadai Kudimiras* in Exhibit F. and XII, while in Exhibit F3 they are described as *ullur Purakudies* and *asalur Purakudies*. *Kudimiras* may be taken to indicate occupancy right and *assal grammam Purakudies* the absence of it and *ullur Purakudi* an inalienable occupancy right, while the meaning to be attached to the other terms would depend upon the facts of each case, though it may be admitted that, generally speaking, '*Mirasi*' indicates ownership. The temple was also receiving Topo rent and fish rent. A portion of the village was at one time Pannai. It is unnecessary to go so far as the Judge and hold that no tenant has any occupancy right and the temple was leasing such portion as it pleased by special contract. It is enough to say that though some tenants may have had occupancy rights, other tenants had not that right, and there being no presumption in the defendants' favour, it is for them to show that they are the representatives-in-title of tenants who by length of possession or assertion of occupancy right may be presumed to have been occupancy tenants. They have not proved it and this second appeal must, therefore, be dismissed with costs. As regards the memo of objections, the Judge finds that it is not shown that the properties are included in Exhibit A or that they are held by the defendants in connection with

any tenancy which the plaintiff can determine. His decision is, therefore, right and the memo of objections is dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.
FIRST CIVIL REVISION PETITION No. 334 OF 1909.
August 19, 1910.
Present :—Mr. Justice Miller.
A. P. PATCHAPERUMAL CHETTY—
—DEFENDANT—PETITIONER
versus
G. E. SAMPATHU CHETTY—
PLAINTIFF—RESPONDENT.

Madras Presidency Small Cause Court Rules, Rule 98—Failure to apply for permission under the Rule—Court allowing plaintiff to proceed with suit—Irregularity—Revision.

Where a plaintiff who had to apply to Court under Rule 98 of the Madras Presidency Small Cause Court Rules for permission to proceed with the suit, failed so to apply, but he was nevertheless permitted by Court to proceed with the suit and obtained a decree :

Held, that the High Court would not interfere in revision on the mere failure of the plaintiff to apply under Rule 98.

Petition under section 115 of Act V of 1908 and section 15 of the High Courts Act praying the High Court to revise the judgment and decree of the Court of Small Causes, Madras in Suit Nos. 159, 93 of 1907.

Judgment.—The plaintiff by Rule 98 had to obtain permission to proceed with the suit. Whether he applied for permission or not does not appear but he was permitted to proceed and there is no ground for interference on that score. Having been, whether on application or not, permitted to proceed, the plaintiff went into the box and gave evidence, sufficient if believed, to dispose of the suit. I am unable to say that the learned Small Cause Judge is shown to have committed any irregularity in considering the evidence though the judgment does not refer to it.

The Civil revision petition is dismissed with costs.

Petition dismissed.

MADRAS HIGH COURT.
FIRST CIVIL APPEAL No. 173 OF 1905.
September 6, 1910.
Present:—Mr. Justice Miller and
Mr. Justice Munro.
THE SECRETARY OF STATE FOR INDIA IN COUNCIL—APPELLANTS
versus
KOMANDUR NARASIMHACHARIAR (DIED) AND OTHERS—RESPONDENTS.

Grant—Grant of land by Collector—Favourable assessment—Long occupation by grantee—Sudden enhancement of assessment by Government—Illegality.

Where lands were granted by the Collector, whether with or without authority, at a favourable rate of assessment, and the grantee enjoyed them on such conditions for nearly a hundred years, and then full assessment was levied by Government :

Held, that the imposition of the full assessment was illegal and could not be levied.

Appeal against the decree of the District Court of Nellore, in Original Suit No. 15 of 1904.

Judgment.—It is proved by the evidence in this case that the land was granted by Mr. Travers, the Collector, in 1808 and 1809 and held ever since by the grantee and successors-in-title without variation in the assessment until 1903.

Exhibit III shows that the lands were granted permanently for cultivation on a favourable rate of assessment ; if this grant was legally made, the action of the Government in fully assessing the land is illegal and to prove the legality of the grant is the evidence of long and undisputed occupation in accordance with it, and the fact, also stated in Exhibit III, that though an investigation into the legality of Mr. Travers' grants was made on two occasions in 1824 and 1853 and lists of unauthorized grants were submitted to the Government, this particular grant did not appear in either list. The mere fact that Mr. Travers made some grants without authority is not evidence that the grant now in question is defective and there is sufficient evidence the other way to warrant us in accepting the conclusion of the District Judge.

We dismiss the appeal with costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 72 OF 1908.

September 16, 1910.

Present :—Mr. Justice Munro and Mr. Justice Sankaran Nair.

AKKAMMAD MOHIDEEN SAHIB AND OTHERS—APPELLANTS

versus

SOWMYA NARAYANA AIYENGAR AND OTHERS—RESPONDENTS.

Execution proceedings—Parties unnecessarily impleaded—Failure to prefer claim—Estoppel—Civil Procedure Code (Act XIV of 1882), ss. 244, 278.

Some persons, who were wrongly impleaded as defendants in execution proceedings, did not prefer any claim to plaintiff's attachment and sale of property therein:

Held, that they were not estopped, by the said circumstance, from making a claim in any subsequent suit or proceedings.

Second appeal against the decree of the Subordinate Judge's Court of Tinnevelly, in Appeal Suit No. 241 of 1906, presented against the decree of the Court of the District Munsif of Satur, in Original Suit No. 13 of 1905.

Judgment.—The appellants in this case were no parties to the suit in which the decree Exhibit A was passed, nor are they the representatives of the judgment-debtor under that decree. The plaintiff in his execution application chose, under no provision of law of which we are aware, to include them in the list of defendants, but we do not think that this circumstance alone, and there is nothing else, could alter the real position of the appellants which was merely that of strangers. As strangers they were not bound to make any claim either under section 244 or section 278 of the Civil Procedure Code of 1882, and they are not estopped by their failure from making a claim in the present suit. We must ask the Subordinate Judge to find on the evidence on record what interest the appellants had at the date of the suit in the house in dispute.

The finding should be submitted within six weeks and seven days will be allowed for filing objections.

In compliance with the above order, the Subordinate Judge submitted the following

FINDING.

The High Court have remanded the appeal to this Court for submission of a finding on the evidence on record on the following issues:—

"What interest had the appellants at the date of the suit in the house in dispute".

2. The appellants in second appeal are defendants Nos. 6, 7 and 12 in the suit. The 11th defendant was also an appellant in appeal but she died before the second appeal was preferred. The 6th and 12th defendants are her son and daughter and they are her legal representatives but not 7th defendant, who is the son of the 6th.

3. A money decree was obtained against the 6th defendant and his late elder brother, Mustan Sahib, in Original Suit No. 366 of 1893, and in execution thereof this house (9/14 share in it) was brought to sale and purchased by 13th defendant—*Vide* Exhibit J, the sale certificate issued to the auction purchaser on 5th March 1900. By this sale whatever interest the 6th defendant had in this house was sold away and nothing more was left for him unsold. It is conceded by the appellants that 6th defendant had a half share for him in this house and we must hold that that share was already sold away by Exhibit J.

4. The 7th, 11th and 12th defendants are the son, mother and sister of the 6th and they have no interest in them to this house during his life-time.

5. The remaining $\frac{1}{2}$ share of the house belonged to the 6th defendant's elder brother, the late Mustan Sahib, whose heirs are defendants Nos. 1 to 5 That share was partly sold away by Exhibit H and partly by Exhibit J and the sales thereunder were held good and binding against the defendants Nos. 1 to 5 who became entitled to it by inheritance on the death of Mustan Sahib and who have allowed the decree made in this suit to become final against them. It is not even pretended by the appellants that they are in any way interested in the half share of the late Mustan Sahib.

6. It is, however, contended on appellants' behalf that this house belongs to 3rd, 4th and 7th defendants by purchase under Exhibit IV, dated 22nd July 1895 and that 7th defendant has $\frac{1}{3}$ share for him under this purchase. This purchase was set up in defence on behalf of defendants Nos. 3 and 4, but the District Munsif found it to have been a sham conveying no title under it. There was no defence put in on behalf of this 7th defendant to the suit and he was declared *ex parte*. The appellants who were all *ex parte* before the District

Munsif, do not appear to have set up the title of the 7th defendant under Exhibit IV in their appeal petition or questioned the finding of the District Munsif on that purchase. The finding of the District Munsif on Exhibit IV has, therefore, to be accepted as correct and I accepted it so when I disposed of the appeal.

7. As stated before, 6th defendant lost his title to the house by Exhibit J, dated 5th March 1900. The other defendants Nos. 7, 11 and 12 have no interest for them in this house during the life-time of the 6th defendant. The suit was instituted on 6th January 1905—nearly five years after the 6th defendant lost his title to the house. My finding on the issue is that the appellants had no interest for them in the house in dispute at the date of the suit.

No costs.

After the return of the finding the High Court delivered the following

Judgment.—Accepting the finding, we dismiss the second appeal with costs.

Appeal dismissed

MADRAS HIGH COURT.

CIVIL APPEALS AGAINST ORDERS NOS. 190 AND 191 OF 1909.

September 9, 1910.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Krishnaswami Aiyar.

IN A. A. O. No. 190.

RAMASAMI REDDI AND OTHERS—APPELLANTS

versus

AUTHI LAKSHMI AMMAL AND OTHERS—RESPONDENTS.

IN A. A. O. No. 191.

CHINNA CHENGA REDDI AND OTHERS—APPELLANTS

versus

MUTHAMMAL *alias* MUTHIALAMMAL—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XLIII, R. 1 cl. (A)—Claim for mesne profits—Order of remand by appellate Court—Appeal against order of remand, whether lies—Provincial Small Cause Courts Act (IX of 1887), Sch. II, Cl. 31—Ejectment decree—Claim for mesne profits after decree—Form of action—Damages for trespass—Limitation Act (XV of 1877), Sch. II, arts. 39, 109 and 120.

Plaintiff, who obtained an ejectment decree against defendant, sued him for mesne profits. The first Court dismissed the suit as barred. On appeal the District Judge held it was in time and remanded the suit for disposal on the merits. On second appeal to the High Court:

Held, (1) that as the claim for mesne profits is exempted from the cognizance of the Small Cause Court under clause 31 of Schedule II of the Provincial Small Cause Courts Act and an appeal would have lain if the suit was decided on the merits, an appeal lay to the High Court against the order of remand.

(2) that the suit was not governed by article 109 of Schedule II of the Limitation Act, but being in the nature of an action for damages for trespass, article 39 applied to the case.

Girish Chunder Lahiri v. *Shoshi Shikhareswar Roy*, 27 I.A. 110 at p. 124; 27 C. 85; *Mobaruk Ali* v. *Boistub Churn Chowdhry*, 11 W. R. 25, *Radha Churn Ghuttuck* v. *Zumuroonissa Khanum*, 11 W.R. 83; 2 B. L. R. A. C. 67 and *Pandit Lachmi Narayan* v. *Sheikh Mazhar Hassan*, 12 C. W. N. 650, referred to.

Abbas v. *Fasih-ud-din*, 24 C. 413, not approved.

Appeals against the orders of the District Court of Chingleput, dated the 31st day of March 1909, in Appeal Suits Nos. 25 and 24 of 1908, presented against the decrees of the Court of the District Munsif of Chingleput, in Original Suits Nos. 142 and 143 of 1903 respectively.

Judgment.—The plaintiff, having obtained a decree in ejectment against the defendants, sued them for the profits of the land for *Fasli* 1312. The present suits were instituted on the 12th February 1906. The objection was taken that the suits were barred. The District Judge held that article 109 of Schedule II of the Indian Limitation Act applied and that the suits were within time and remanded the cases to the Munsif. The defendants have preferred these appeals. The respondent raises a preliminary objection that no appeal lies in this case under Order XLIII, Rule 1 clause (A) of the Civil Procedure Code of 1908. There is a change of language in this clause of the new Code. It says that an appeal would lie from the remand order only if an appeal would lie from the decree of the appellate Court. We have then to determine whether there would be a second appeal if the appellate Court had passed a decree. The suit is framed as one for mesne profits. The form of the plaint determines the nature of the suit. Such a suit as the present is exempted from the cognizance of the Small Cause Court under clause 31 of the 2nd Schedule to the Small Cause Courts Act. A second appeal would, therefore, lie in case there was a decree of the appellate Court. The present appeal from the remand order is, therefore, regular. We overrule the preliminary objection.

As regards the merits of the appeals, we think the District Judge is wrong in applying article 109. It must be taken to be concluded

between the parties by the decree in ejectment that the defendant was in possession between the date of the institution of the former suit and the date of the judgment. The judgment of two of the learned Barons of the Exchequer differing from the learned Chief Baron in *Pearse* v. *Coaker* (1) was in favour of the view, and we think that a judgment for possession against a defendant must be deemed to decide that the defendant was in possession at least at the date of the judgment. But did defendant wrongly receive the profits of the land during the period for which the plaintiff claims? The finding is that the land lay waste. We cannot agree with the passing observation in *Abbas* v. *Fasih-ud-din* (2) that to such a suit as the present where the defendant has not received the profits, article 109 has any application. We have then to decide between article 39 and the residuary article 120. Is the present action one for compensation for trespass upon immovable property? We have come to the conclusion, though not without hesitation, that it is. The action under the English law in such a case as the present was trespass. See Warvelle on Ejectment, page 584. A claim for mesne profits when the plaintiff has been ousted from possession, is essentially one for damages. Though the measure of profit is what, under the explanation to section 211 of the Civil Procedure Code the defendant might with due diligence have received, the claim still sounds in damages for trespass. This is the view which has been taken in *Girish Chunder Lahiri* v. *Shoshi Shikhareswar Roy* (3), *Mobaruk Ali* v. *Boistub Churn Chowdhry* (4); *Radha Churn Ghuttuck* v. *Zumuroonissa Khanum* (5) and *Pundit Lachmi Narayan* v. *Sheikh Mazhar Hassan* (6). We are obliged to hold that the plaintiffs can only recover mesne profits for the period between the 12th February 1903 and the 20th June 1903 under article 39 of the Act. We modify the District Judge's orders accordingly. The costs will be provided for in the revised decrees.

Decree modified.

(1) L. R. 4 Ex. 92; 38 L. J. Ex. 82; 20 L. T. 82.
(2) 24 C. 413.
(3) 27 I. A. 110 at p. 124; 27 C. 951.
(4) 11 W. R. 25.
(5) 11 W. R. 83; 2 B. L. R. A. C. 67.
(6) 12 C. W. N. 650.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 376 OF 1910
(REFERRED CASE No. 46 OF 1910.)

September 28, 1910.

Present:—Mr. Justice Munro and Mr. Justice Sankaran Nair.

BALLA—ACCUSED

versus

THE DISTRICT MAGISTRATE OF SOUTH CANARA—REFERRING OFFICER.

Workman's Breach of Contract Act (XIII of 1859), s. 2—Order directing performance of work after period fixed in the contract—Illegality.

A Magistrate cannot, under section 2 of Act XIII of 1859, order work to be performed after the expiry of the term fixed in the contract of the parties.

Case referred for the orders of the High Court, under section 438 of the Criminal Procedure Code, by the District Magistrate of South Canara, in his letter dated 27th June 1910, Dis. No. 675 D. Magisterial of 1910.

Reference by the District Magistrate was as follows:—

"One Balla, the accused in Civil Case No. 36 of 1910, on the file of the second class Magistrate, Beltangady, entered into a verbal contract with Shivannaya (complainant) on 6th March 1909, to raise an embankment to the *bund* of the complainant's field within one year in consideration of having received an advance of Rs. 20. The accused having failed to fulfil the contract, the said Shivannaya filed a complaint under section 2 of the Workman's Breach of Contract Act (XIII of 1859,) before the Sub-Magistrate on 6th March 1910, *i.e.*, after the expiry of the contract period, and the Sub-Magistrate passed orders on 15th March 1910, directing the accused to perform the work contracted for within two months from the date of the order.

2. The Deputy Magistrate, Puttur, considers this order illegal and remarks: "The contract was to finish the embankment, before 6th March 1910, having been entered into on 6th March 1909, on which date Rs. 20 were advanced to the respondent as per complaint petition. This complaint was filed on 7th March 1910 and the Sub-Magistrate passed orders on 15th March 1910 to complete the work in 2 months. It seems to me that after the contract period was over, the complainant had no right to move the Court and the Court had no power to pass an order." He relies on Revision Case

ANTHAVAIPU GOPINATHAN *v.* TANGUDI LINGAYYA.

No. 777 of 1883, quoted in Weir's Criminal Rulings in support of his opinion. The Sub-Magistrate, however, argues that time was not of the essence of the contract in question. "The essential part of the agreement is," he says "that a specific work, *viz.*, a stone *bund* 90 *kols* long 1 *kol* broad and 1½ *kols* high should be constructed within a reasonable time, the year being fixed merely as a guide to do what would be a reasonable period (Weir II 705)." He adds that under Madras High Court Proceedings dated 8th March 1884, (Criminal Revision 184 of 1884), Magistrates can pass orders directing the labourer to work after the time contracted for expires.

3. I concur in the opinion of the Deputy Magistrate as it cannot be considered that the one year's time stipulated upon was merely to serve as a guide regarding the period within which the work had to be executed. It is obvious that the work was such as could have been completed within a much shorter period and that the parties concerned were allowed a year's time with a view to get the work done within a definite period.

4. The records of the case are enclosed.

Order.—We agree with the view of the District Magistrate that under section 2 of Act XIII of the 1859, a Magistrate cannot order the work to be performed after the expiry of the term fixed in the contract, and, therefore, set aside the order of the Sub-Magistrate.

Order set aside.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 412 OF 1909.

August 19, 1910.

Present:—Mr. Justice Miller.

ANTHAVAIPU GOPINATHAN AND OTHERS —PETITIONERS

versus

TANGUDI LINGAYYA—RESPONDENT.

Limitation Act (IX of 1908), s. 7—Joint decree-holders—Execution—Limitation.

Section 7 of the Limitation Act of 1908 would apply where time has not run out under Act XV of 1877 before coming into force of the new Act.

Petition under section 25 of Act IX of 1887, praying the High Court to revise the order of the Court of the District Munsif of Sompeta, dated 17th March 1909, in Execution Petition No. 159 of 1903, in Small Cause Suit No. 320 of 1904.

KANDAPPA CHETTY *v.* CHINNAPPIA.

Judgment.—Section 7 of the Limitation Act of 1908 applies to joint decree-holders and provides that time shall not run against any of them so long as one of them whose concurrence is necessary to give a discharge is under disability.

The Act of 1908 came into force before time ran out and must be applied to the case.

The order so far as it refuses execution is, therefore, wrong and is set aside and the execution petition is remanded for disposal according to law.

Costs will be paid by the respondents.

Order set aside.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 515 OF 1909.

August 12, 1910.

Present:—Mr. Justice Sankaran Nair.

S. KANDAPPA CHETTY—PLAINTIFF—PETITIONER

versus

CHINNAPPIA GOWNDEN—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act XIV of 1882), s. 591—Order for compensation embodied in decree—Appeal.

There is no appeal against an order for compensation, though it is embodied in the decree.

Section 591, Civil Procedure Code, does not apply to such a case.

Narasingha Bhakshi v. *Govinda Bhakshi*, 24 M. 62, followed.

Petition under section 115 of Act V of 1908, praying the High Court to revise the order of the District Court of Salem, in Appeal No. 253 of 1907.

Judgment.—It has been decided in *Narasingha Bhakshi* v. *Govinda Bhakshi* (1), that there is no appeal against an order for compensation though it is embodied in the decree.

I am also of opinion that section 591 does not apply.

The petition is dismissed with costs.

Petition dismissed.

(1) 24 M. 62.

TALUKDARI SETTLEMENT OFFICER *v.* UMASHANKAR.

(s. c. 12 Bom. L. R. 837.)

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 120 OF 1909.

August 16, 1910.

Present:—Sir N. G Chandavarkar, KT., Judge, and Mr. Justice Heaton.

THE TALUKDARI SETTLEMENT OFFICER—DEFENDANT—APPELLANT

versus

UMASHANKAR NARSIRAM PANDYA —PLAINTIFF—RESPONDENT.

Land Revenue Code (Bom. Act V of 1879), s. 79 A —Collector—Summary jurisdiction does not exclude jurisdiction of Civil Court—Wrongful possession—Possession under decree of Civil Court—Not wrongful.

The power conferred on the Collector by section 79A of the Land Revenue Code (Bombay Act V of 1879) as amended by the Gujarat Talukdari Act (Bombay Act VI of 1888), can be exercised only in cases of wrongful possession, and, though for the exercise of the power the Collector has to form his own opinion and decide whether in any particular case the possession is wrongful, there is no provision in either the Code (Act V of 1879) or the Act (VI of 1888) which gives finality to the Collector's order of eviction so as to exclude the jurisdiction of a Civil Court to decide that the person evicted by that order was in rightful occupation.

When a man is put into possession by a competent Court, it is not open to the Collector to set at naught the decision of the Court, merely because section 79 A empowers him to evict a person in wrongful possession.

Possession obtained under the decree of a Civil Court is not wrongful.

First Appeal from the decision of the District Judge of Ahmedabad, in Suit No. 101 of 1905.

Mr. *G. S. Rao*, Government Pleader, for the Appellant.

Mr. *L. A. Shah*, for the Respondent.

Judgment.

Chandavarkar, J.—Section 79A of the Land Revenue Code, as amended by Act VI of 1888 (the Gujarat Talukdari Act), confers on the Collector the power to evict summarily any person who is found in "wrongful possession" of a *talukdari* land or estate. It is only in cases of wrongful possession that the power can be exercised, and, though for the exercise of the power the Collector has to form his own opinion and decide whether in any particular case the possession is wrongful, there is no provision in either the Land Revenue Code (Bom. Act V of 1879) or the Gujarat Talukdari Act (Bom. Act VI of 1888) which gives finality to the Collector's order of eviction so as to exclude the jurisdiction of a Civil Court to decide that the person evicted by that order was in rightful occupation. In the present case the respondent was put into possession by a competent Court of law after an adjudication that as against the *talukdar* he (the respondent) was entitled to the land in dispute. If that adjudication and the lawful possession had in consequence of it bound the *talukdar* as *res judicata*, it is not open to any authority, in the absence of any express provision of law, to set aside the adjudication of a competent Court as a nullity and as not binding him, merely because section 79A empowers him to evict a person "in wrongful possession." The possession here was not wrongful; and on that ground I am of opinion that the decree in appeal ought to be confirmed with costs.

Heaton, J.—Under cover of section 79A of the Land Revenue Code (Bom. Act V of 1879) the *Talukdari* Settlement Officer has assumed to himself the power to decide a point which had already been decided by a Court of competent jurisdiction; and further he has assumed to himself the power to decide that what the Court had declared to be right was wrong. The precise point he decided was whether the *talukdar* or his vendor was entitled to possession of the particular land in suit. That was the identical point which had been decided by the Court. Section 79A of the Land Revenue Code contemplates a reasonable ground for proceeding on the part of the Collector before he summarily evicts under the section. In this case there was not a reasonable ground for proceeding. It is not reasonable, under our system of administering justice, for an executive officer to set at naught the decision of a competent Court and to act directly contrary to it, in a matter solely affecting the rights of the parties whose dispute had been determined by the Court. I think that the *Talukdari* Settlement Officer was singularly ill-advised in acting as he did and I think that the injunction given by the Court below is perfectly correct and must be confirmed with costs.

Decree confirmed.

S. N. DAR, B. A. LL. B.,
Vakil High Court,
SRINAGAR (Kashmir)

LADHA EBRAHIM AND CO. *v.* ASSISTANT COLLECTOR, POONA.

(s. c. 12 Bom. L. R. 839.)

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 220 OF 1908.

July 22, 1910.

Present:—Sir Basil Scott, KT., Chief Justice, and Mr. Justice Batchelor.

LADHA EBRAHIM AND CO.—APPELLANT

versus

THE ASSISTANT COLLECTOR, POONA —RESPONDENT.

Land Acquisition Act (*I of* 1894),—*Compensation for land of* Maharki Watan—*Order not decree*—*Heriditary Offices Act* (*III of* 1874), *s.* 10—*Collector's power subject to control by the High Court*—*Jurisdiction of Collector to issue certificate to set aside order under Land Acquisition Act.*

A piece of land, the subject of acquisition under the Land Acquisition Act (1894), was registered in the Revenue Records as *Maharki Watan*. On reference to the Court under section 18 of the Act, it was decided that the owners of the buildings on the said land had acquired it by adverse possession, and were, therefore, entitled to the compensation money allowed for it.

The Collector, however, after the decision of the Court, forwarded to it a certificate purporting to be issued under section 10 of the Watan Act in order that the 'order for the payment' of the compensation might be set aside "in accordance with the provisions of sections 10 and 13" of Bombay Act III of 1874. The Court cancelled its former order directing the payment of compensation money for the land to the owners of the buildings thereon.

On appeal to the High Court:

Held, (1) that the Collector, before issuing his certificate under section 10 of the Watan Act, was called upon to make some inquiry, and, thus exercising a judicial function, was subject to control by the High Court, should he make his authority a mere cloak for illegal and wholly unreasonable proceedings.

Collector of Thana v. *Bhasker Mahadeo*, 8 B. 264 at p. 268, referred to.

Nilkanth v. *Collector of Thana*, 22 B. 802, referred to.

(2) That the land, at the date of its acquisition by Government, having become already the property of the owners of the buildings by adverse possession, there was no question of its passing into ownership to them by virtue of, or in execution of, a decree or order of the Court.

(3) That even if it could be said that there was any danger of the passing of the ownership by virtue or in execution of a decree or order in the Land Acquisition Act proceedings, it could not be said that that result was arrived at without the sanction of Government who set the machinery of the Act in motion for the acquisition of the land.

(4) An award under the Land Acquisition Act of 1894, is not a decree or order capable of execution under the Civil Procedure Code and is, therefore, not within the purview of the section.

First appeal from the decision of the District Judge of Poona, in Reference No. 13 of 1906.

Mr. *Branson*, with *D. A. Khare*, for the Appellant.

Mr. *G. S. Rao*, Government Pleader, for the Respondents.

Judgment.—In the year 1906 the Government of Bombay took action to acquire by the machinery of the Land Acquisition Act, 1894, part of Survey No. 29 of Nisbat Manjre in the Poona Collectorate with the buildings thereon.

The land, the subject of the acquisition, was registered in the Revenue Records as Maharki Vatan. It was in the occupation of Messrs. Ladha Ebrahim and Co., to whom the buildings erected upon it admittedly belonged.

On the 19th of March, the Assistant Collector passed an award whereby he awarded to Messrs. Ladha Ebrahim & Co., for the buildings Rs. 10,777 and to the Mahars collectively, who claimed to be interested as *Watandars*, Rs. 4,508 for the land. He directed that the latter sum should be credited in the Government Treasury in the names of the Mahar claimants and that the interest accruing thereon should be paid to them by the *Mamlatdar*. There is nothing to indicate that this was under any arrangement come to with the Mahar claimants under cl. (4) of section 31 of the Land Acquisition Act but for the purposes of this judgment we will assume that these directions were not *ultra vires*.

The award was not accepted by Messrs. Ladha Ebrahim & Co., and the Assistant Collector accordingly, as required by them, referred the matter to the Court under section 18 of the Act.

The objections of Messrs. Ladha Ebrahim & Co., were both as to the amount of the compensation and the persons to whom it was payable. Under the latter head the objectors claimed the whole of the compensation for the Maharki land on the ground that they had acquired it by adverse possession. This claim was decided in their favour by the award of the Court delivered on the 22nd of August 1907. Messrs. Ladha Ebrahim & Co., thus became entitled as against the Mahar claimants to the compensation money Rs. 4,508. On the 23rd of November 1907, however, the Collector of Poona forwarded to the Court of the District Judge a certificate purporting to be issued under section 10 of the Watan Act in order that the 'order for the payment' of

the compensation amounting to Rs. 4,508 to Messrs. Ladha Ebrahim & Co., might be set aside 'in accordance with the provisions of sections 10 and 13' of Bombay Act III of 1874. The District Judge holding that the Court had no jurisdiction to decide whether property is Watan or not in face of the Collector's certificate cancelled his former order directing the compensation money to be paid to Messrs. Ladha Ebrahim & Co.

From this decision Messrs. Ladha Ebrahim & Co. appeal contending that the Collector's certificate was issued without jurisdiction and is of no effect.

Section 10 of the Watan Act of 1874 empowers the Collector to issue a certificate when it appears to him that by virtue of or in execution of a decree or order any Watan property has passed or may pass without the sanction of Government into the ownership or beneficial possession of any stranger to the Watan.

In considering whether the action of the Collector in the present case was within his powers various questions arise.

Is there a decree or order in this case such as is contemplated by the section: if so has any property passed or can it conceivably pass by virtue or in execution of such decree or order: and if so has it passed or may it pass without the sanction of Government?

With regard to the first question we think the reasoning of the majority of the Court in *Nilkanth* v. *Collector of Thana* (1), sufficiently establishes that an award under the Land Acquisition Act of 1894 is not a decree or order capable of execution under the Civil Procedure Code and is, therefore, not within the purview of the section. As regards the second question the award of the Court which was the cause of the certificate made it quite clear that the Mahars' property had been acquired by Messrs. Ladha Ebrahim and Co., by adverse possession before the commencement of the proceedings for the acquisition of the land by Government under the Land Acquisition Act.

The Collector is called upon to make some inquiry before issuing his certificate "and thus exercising a judicial function is subject to control by this Court, should he make his authority a mere cloak for illegal and wholly unreasonable proceedings." See *Collector of Thana* v. *Bhaskar Mahadeo* (2). It could not appear to the Collector if he had perused the award of the Court which he wished to have set aside that Messrs. Ladha Ebrahim and Co., were in ownership of the land at the date of its acquisition by Government otherwise than by adverse possession. Even if it could be said that there was any danger of the passing of the ownership by virtue or in execution of a decree or order in the Land Acquisition proceedings it could not be said that that result was arrived at without the sanction of Government who set the machinery of the Act in motion for the acquisition of the land.

Moreover, it has been said by a Full Bench of this Court in *Rachapa* v. *Amingowda* (3), that it cannot be supposed that the "Bombay Legislature had any such purpose in its contemplation when enacting section 10 of the Act as to take advantage of the errors of the Civil Courts by maintaining a possession obtained by their wrongful operation or to interfere with the jurisdiction of the High Court to reverse and prevent the execution of erroneous decrees of Courts subordinate to it." Yet if we allowed the Collector to intervene and say as in effect he does "I wish the award of the Assistant Collector to stand and that of the Court on the reference under section 18 to be set aside" we should be crediting the Legislature with such an intention.

For these reasons we restore the award of the Court and direct the District Judge not to act on the certificate of the Collector.

The Government must pay the costs of the appellant.

Ladha Ebrahim and Co.'s Appeal No. 15 of 1908, as to the amount of compensation, is dismissed with costs.

(1) 22 B. 802.
(2) 8 B. 264 at p. 268.
(3) 5 B. 233 at p. 293.

JEEVANDAS *v.* RANCHOLDAS.

(s. c. 12 Bom. L. R. 844.)

BOMBAY HIGH COURT.

CIVIL APPEAL No. 46 OF 1909.

August 5, 1910.

Present:—Sir Basil Scott, KT., Chief Justice, and Mr. Justice Batchelor.

JEEVANDAS DHANJI—APPELLANT

versus

RANCHODDAS CHATURBHAI—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 48—Application to transmit decree not an application for execution—Transmission of decree by Baroda Court to the Bombay High Court—Application to attach property in Bombay not the subject of previous applications made to the Baroda Court barred as made after twelve years from the date of decree.

The plaintiff had obtained a decree in the Amreli Court in the Baroda State on the 17th July 1893. He had presented certain applications for execution to the Amreli Court, of which the second was presented on the 10th July 1905. This application was for attachment of the defendant's property in whatsoever villages and at whatsoever places within the jurisdiction of the Amreli Court. The Court made the order of attachment on 25th July, 1905. Subsequently, however, on the application of the plaintiff the decree was transmitted for execution to the High Court of Bombay. On the attachment of the defendant's property in Bombay made on application by the plaintiff to the High Court, it was objected by the defendant that the application was barred under the provisions of section 48 of the Civil Procedure Code, 1908:

Held, that the plaintiff's application to the High Court, having been made in accordance with the provisions of Order XXI, Rule 11 of the Civil Procedure Code, was a substantive application with regard to the property in Bombay which was not the subject of any previous application, and was, therefore, barred by section 48 of the Code.

Husein v. *Saju Mahamad*, 15 B. 28, distinguished.

An order by a Court passing a decree for the transmission of the decree for execution to another Court is not an order for the execution of the decree, nor is an application for the transmission an application for execution.

Nilmony Singh Deo v. *Biressur Banerjee*, 16 C. 744; and *Suja Hossein* v. *Monohur Das*, 22 C. 921, referred to.

Appeal against Original Suit No. 562 of 1889 90 from the following Judgment of

Macleod, J.—This case appears to me to be covered by the decision in *Husein Ahmed* v. *Saju Mahamad* (1). The plaintiff in that case obtained a decree against one Haji Aji Hussein Mahomed in the Small Causes Court at Rangoon on 3rd May 1883. The defendant having died, a notice was issued on 12th November 1886 against his legal representative under section 248 of the Civil Procedure Code, 1882. No cause being shown the Rangoon Court on 2nd February 1887, declared that the decree was revived and ordered that it should be executed. The decree was transferred for execution to the First Class Subordinate Judge's Court at Surat, and a *darkhast* for execution was presented at Surat on the 27th April 1887. The defendant contended that the decree was time-barred. Sargent, C.J., in delivering the judgment of the appeal Court, held that the Judge to whom the decree was transmitted for execution could have had power to determine whether execution was barred if no order for execution had been made by the Court transmitting the decree, and merely the decree and certificate of non-satisfaction had been sent, but when such order had been made by that Court, it was binding on the parties until reversed on appeal. It seems difficult to distinguish that case from the present one. The order made by the Rangoon Court was made under section 249 of the Civil Procedure Code of 1882, corresponding with Order XXI, Rule 23 of the Civil Procedure Code of 1908. The *darkhast* presented to the Surat Court was not treated as a fresh application, but as made under the order of the Rangoon Court. This case would seem if anything considerably stronger as the Amreli Court has issued an order for execution to issue for attachment of the defendants' movable property. I have been referred to the case of *Nilmoni Singh Deo* v. *Biressur Banerjee* (2) as an authority for the proposition that the Court which passed the decree is only competent to transfer it for execution in the manner directed by section 224, Civil Procedure Code, 1882, and that the application for execution should be made to the Court which has jurisdiction to issue process. If that were correct I cannot see the object of the direction in Order XXI, Rule 6, that the Court sending a decree for execution shall send a copy of any order for the execution of the decree. But in any event in the case above cited the Appeal Court considered that the application made to the transmitting Court which was an application for certificate to enable the decree to be executed at Burdwan was not an application to execute the decree but an application to send the decree for execution. Therefore, no order for execution had been made by the Court passing the decree, and the saggestion, that that Court

(1) 15 B. 28.

(2) 16 C. 744.

was not competent to make an order for execution, if an application for execution had been made, appears to be obiter. The case of *Husein* v. *Saju Mahamed* (1) is cited with approval in *Lakshmishankar Devshankar* v. *Raghumal Girdharilal* (3).

There can be no doubt that the Baroda Appeal Court have treated the *darkhast* of the 10th July 1901 as still alive. They expressly state that if it had been presented on the 15th July 1906, there would have been ground to believe that the decree was barred, but they held that the decree was capable of execution when the application for transfer was made and it could only be capable of execution because of this *darkhast*. It is true that the judgment proceeds to state that it will be for the Bombay High Court to consider whether the decree is capable of execution or not according to the law of limitation in force there, but apparently the Judge did not have in their mind at the time the decision in *Husein* v. *Saju Mahamad* (1). Standing by itself the application for transfer would have been out of time, it was not so because of the *darkhast* of the 10th July 1905 and the order made thereon on the 25th July 1905. In my opinion, therefore, the application made to this Court was not a fresh application.

The defendant No. 2 appealed.

Mr. *Jayakar*, with Mr. *Mulla*, for the Appellant.

Mr. *Desai* with Mr. *Jardine* (acting Advocate-General) and Mr. *Jinnah*, for the Respondent.

Judgment.—This is an appeal from an order of Macleod, J., made in Chambers, dismissing an application by the 2nd defendant to quash certain execution proceedings which had been taken against him in the Bombay High Court.

The plaintiff had obtained a decree in the Amreli Court in the Baroda State on the 17th July 1893. He had presented certain applications for execution to the Amreli Court, of which the second was presented on the 10th July 1905, within twelve years of the passing of the decree. In that application he prayed as follows:—

"I pray for recovery of the amount of Rs. 7,637-4-10 from the defendants in accordance with the claim as shown in the application for execution. The same is as follows:—(1) On account of some urgent cause and occasion the defendants are now going to come specially to Okhamandal. Therefore, at that time as to whatever movable properties I may point out for taking under attachment in whatsoever villages and at whatsoever places in Okhamandal the same may be attached and sold by auction and the moneys derived therefrom may be paid to me. (2) If the defendants' movable property be insufficient to satisfy the moneys then you would be pleased to cause the moneys to be recovered and given to me by enforcing for that purpose an order for imprisonment against the defendants. The defendants are absconding to a foreign territory. They have now no property at all within the jurisdiction of this Court. Therefore, simultaneously with enforcing execution as against movable property you will also compel them to appear before this Honourable Nyayadhishi Court."

On the 25th of July 1905, an order was made by the Amerli Court to the effect that—

"The *darkhast* (application for execution) after having been registered in the register book an order for execution should be issued for attaching the defendants' movable property. The other prayer is for arrest and imprisonment of the defendant. As to that matter along with the order dealing with the case of non-satisfaction of moneys from movable property a notice should be issued against the defendants calling upon them to show cause why an order should not be issued for their arrest and imprisonment."

Upon that notice a subsequent order was made on the 30th July 1908 declining to issue execution against the defendants personally.

The plaintiff then applied to the Amreli Court for an order transmitting the decree for execution to the High Court of Bombay. That application was refused on the 17th October 1908.

An appeal was preferred to the appellate Court sitting in Baroda, upon which an order was made setting aside the order of refusal of the Amreli Court.

The judgment of the Baroda Court is important. The Judges say:

"We hold that when the decree was such as could be executed, the lower Court should not have objected to granting the appellant's application. Had the *darkhast* of the appel-

(3) 6 Bom. L. R. 661.

lant been presented on the 15th July 1906 instead of on the 15th July 1905 after the date of the decree, then it could have been held that the decree was no longer such as could be executed. Such is not, however, the case in the present proceedings. Hence the appellant's decree was not time-barred but was within time. We, therefore, decide that the application made by the appellant for a certificate for the execution of the decree in the Bombay High Court deserves to be granted. When the decree is sent to the Bombay High Court for execution, that Court will see whether the decree can be executed according to their law of limitation. But that point has not been considered here. It seems that the question is a difficult one. But according to our law the decree is such as can be executed."

In an earlier part of the judgment upon the question whether the lower Court was right in deciding that the application having been made after twelve years the decree became time-barred and could no longer be executed, the learned Judges hold that—

"Properly speaking the application was not a *darkhast* but an application. What particulars there ought to be in a *darkhast* for execution of a decree is stated in the Civil Procedure Code, section 228. As the said particulars are not stated in this application, the same does not become a *darkhast*. But it is an application made according to Civil Procedure Code, section 217. Such an application for the transfer of a decree is a step-in-aid of the execution of the decree within the meaning of cl. 4, art. 179, Schedule II of Act XV of 1877. The British High Courts have held as above."

Mr. Justice Macleod having an incorrect translation of the plaintiff's application for execution, dated the 10th July 1905, was under the impression that the application was for attachment of "whatever movable property the defendants might have at Okhamandal or any other place whatever." That, however, was not the application. The words were: "in whatsoever villages and at whatsoever places in Okhamandal the same may be attached." Okhamandal being within the jurisdiction of the Amreli Court, the application for execution was in order in so far as it related to movable property in Okhamandal. Mr. Justice Macleod being of opinion that there was an order for execution based upon an application for execution of movable property of the defendants wherever situate held that he was bound by the order of the Amreli Court for execution against the movable property mentioned in the application of the 10th July 1905 and that, therefore, the attachment against the property of the defendant in the Mulji Jetha Market in Bombay, which was more particularly specified in an application to the Prothonotary after the decree had been transmitted from Baroda to Bombay for execution, was a good attachment.

In coming to that conclusion he felt himself to be bound by the decision of this Court in *Husein* v. *Saju Mahamad* (1). That was a case in which after decree had been obtained against a judgment-debtor in the Court of Small Causes at Rangoon in 1883 and after the judgment-debtor who had been arrested in execution had died in gaol in December 1883, an application was made to the Rangoon Court in November 1886, under section 248 of the Civil Procedure Code, for the execution of the decree against the judgment-debtor's legal representative. The Rangoon Court in February 1887, ordered that the decree should be executed and it was thereafter transferred for execution to the Court of the First Class Subordinate Judge at Surat, and a *Darkhast* for execution was presented in that Court on the 22nd April 1887 against property in Surat. It was objected by the defendants on the record that the decree was barred by limitation. The Subordinate Judge overruled the objection and ordered execution to issue being of opinion that the plea of limitation could not then be raised. The District Judge, on the other hand, considered himself competent to enquire into the propriety of the order for execution made by the Rangoon Court in February 1887. It was, however, held by this Court on appeal that the District Judge had no power to determine whether the execution was barred in February 1887 or not, for an order for execution, though it may be erroneously made, is nevertheless valid unless reversed in appeal.

In our opinion, the case of *Husein* v. *Saju Mahamad* (1) has no application here. The order for transmission by the Baroda Court is not an order for execution, nor is the application for transmission by the Baroda Court to the Bombay Court an application

for execution; and we are of opinion that the objection taken on behalf of the judgment-debtor that the present application against the property of the judgment-debtor in the Mulji Jetha Market in Bombay is barred by the provisions of section 48 of the Civil Procedure Code. That section provides that where an application to execute a decree, not being a decree granting an injunction, has been made, no order for the execution of the same decree shall be made upon any fresh application presented after the expiration of twelve years from the date of the decree sought to be executed. Here, we have an application made to the Prothonotary of this Court in Bombay after the transmission by the Baroda Court of the decree and that application is a substantive application with regard to the property in Bombay which was not the subject of any previous application. It is an application made in accordance with the provisions of Order XXI, Rule 11.

There is ample authority for the proposition that an order by a Court passing a decree for the transmission of a decree for execution to another Court is not an order for the execution of the decree, nor is an application for the transmission an application for execution: *Nilmoni Singh Deo* v. *Biressur Banerjee* (2); *Suja Hossein* v. *Monohur Das* (4). The whole of the argument on behalf of the plaintiff upon this point has been devoted to the attempt to satisfy this Court that the order for transmission is an order for execution. It is, however, clear from the records of the Baroda Court itself that the application for transmission was treated as an application for transmission and nothing more, and that the order, which was made for transmission, was not treated as an order for execution but as an order for transmission *re* the execution of the plaintiff's decree.

Here, therefore, we are concerned with a fresh application made more than twelve years after the date of the decree, and it is clear from the provisions of section 48 of the Civil Procedure Code that it cannot be entertained.

We, therefore, reverse the decision of the lower Court, and make the defendant's summons absolute with costs throughout.

The amount withdrawn must be refunded.

(4) 22 C. 931.

The order for costs will include poundage expenses.

Decree reversed.

Attorneys for the Appellant: Messrs. *Malvi*, *Hiralal*, *Mody* and *Ranchoddas*.

Attorneys for the Respondent: Messrs. *Dikshit*, *Dhanjisha* and *Soondardas*.

(s. c. 12 Bom. L. R. 852.)

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL NO. 19 OF 1910.

August 18, 1910.

Present:—Sir Basil Scott, KT., Chief Justice, and Mr. Justice Batchelor.

PURSHOTUMDAS RAMGOPAL—APPELLANT

versus

RAMGOPAL HIRALAL—RESPONDENT.

Civil Procedure Code (*Act V of* 1908), *Sch. II*, *R.* 11—*Arbitration Act* (*IX of* 1899), *s.* 10—*Arbitration—No award given—Difference of opinion between arbitrators—Arbitrators stating special case for opinion of Court—Appeal from the Court's order—Reference with the intervention of Court—Inapplicability of the Arbitration Act.*

The parties to a suit agreed to refer the matter in dispute to arbitration, and a Consent Judge's order was obtained. They further agreed to refer to the same arbitrators their disputes regarding properties which did not form the subject of the suit. The agreements provided that in the case of disagreement between the two arbitrators appointed, the matter in difference was to be referred to an umpire. The arbitrators differed, and without referring their differences to an umpire, stated a special case for the opinion of the Court on the points of difference between them. The case was decided by the Chamber Judge. On appeal against the decision:

Held, that it was not a case which fell under Rule 11 of the Second Schedule of the Civil Procedure Code. There was no award which could be adopted by the mere expression of its opinion, and the case could only be a statement of questions of law for the opinion of the Court. The case fell under section 10 of the Indian Arbitration Act in so far as it related to the agreement which was not the subject of the Court's order, and, therefore, no appeal lay.

Where there is a reference with the intervention of a Court of justice, the provisions of the Indian Arbitration Act do not apply and the powers of the arbitrators are governed by the Second Schedule of the Civil Procedure Code

Appeal against Suit No. 781 of 1908 from the following Judgment of

Macleod, J.—The arbitrators having differed have stated a special case for the opinion of the Court on the following points:—

(1) Whether before partitioning the joint family properties a reasonable sum should be set apart for the marriage expenses of the third defendant.

(2) Whether before partitioning the joint family properties a reasonable sum should be set apart for the maintenance and marriage and '*Moklava*' expenses of Ratni, or in the alternative, a reasonable sum presented to her which may be appropriated for her marriage and '*Moklava*' expenses. The first question is covered by the decision of Scott, J., in *Jairam Nathu* v. *Nathu Shamji* (1), and must be answered in the affirmative. It was also contended in that case that if provision was to be made for the marriage expenses of the plaintiff's unmarried brother, provision should also be made for the expenses of the plaintiff's son and daughter but this was disallowed as regards the son because nephews are excluded in a partition between brothers and as regards the daughter because in the *Mitakshara* it is stated that the marriage expenses of sisters must be provided for in a partition between brothers but no mention is made of nieces. It would seem, therefore, that in a partition between brothers and their father the marriage expenses of the sister should be provided out of the joint estate. Mayne says: "Having ascertained what property there is to divide, the next step is to ascertain its amount. For this purpose it is necessary first to deduct all claims against the united family for debt due by it or for charges on account of maintenance, marriage or family ceremonies which it would have to provide for, if it remain united." (section 470). It is suggested that this passage does not refer to a partition between a father and his sons, but in the case above cited, Scott, J., considered that it did refer to such a partition. Therefore, I answer the second question as follows:—A reasonable sum should be presented to Ratni to be appropriated to her marriage and '*Moklava*' expenses.

An objection might have been made to the Court answering the questions in favour of Ratni on the ground that she was not a party to the suit. But no such objection was made before me, and if necessary any such objection can be met by adding her as a party to the suit.

The plaintiff appealed.

Mr. *Jayakar* with Mr. *Setalvad*, for the Appellant.

Mr. *Desai*, for Respondent No. 1.

(1) 8 Bom. L. R. 632.

Mr. *Bhandarkar*, for Respondents Nos. 2 and 3.

Judgment.—The question arises in this case at the outset whether any appeal will lie.

The appeal is preferred against an opinion expressed by the learned Chamber Judge upon a special case stated to him, purporting to be stated in the matter of an arbitration between the plaintiff and the defendants in Suit No. 731 of 1908, pursuant to a Consent Judge's Order of the 16th July 1909 and in the matter of the Indian Arbitration Act, 1899, and an arbitration between Purshotumdas Ramgopal and Ramgopal Hiralal, Badrinarayan Ramgopal and Keshavdeo Ramgopal, pursuant to an agreement between them dated the 9th July 1909. The parties to this last-named agreement are the parties to Suit No. 781.

The special case states that the suit was instituted for partition of the properties other than the immovable properties situate outside the jurisdiction of the Court belonging to the joint family consisting of the plaintiff and the defendants. On the 9th of July 1909, two agreements were entered into between the parties.

Clause 3 of the special case states:—

"By the first agreement the parties agreed *inter alia* to refer to the award, determination and final arbitration of Messrs. Tribhuwandas Narotamdas Malvi and Merwanji Kaikhusro Alpaiwalla, Attorneys of this Honorable Court, to ascertain and determine the movable properties and assets specified in the said agreement belonging to the said joint family in which the said arbitrators might hold the said Purshotum Ramgopal entitled to the reliefs claim in the above suit and to effect a partition of the said properties between the parties on the footing that each of them was entitled to an equal one-fourth share therein."

Clause 4 says:—

"By the second agreement the parties agreed to refer to the award, determination and final arbitration of the said Messrs. Tribhuwandas Narotamdas Malvi and Merwanji Kaikhusro Alpaiwalla to ascertain the properties other than those that may be held by the said arbitrators to be covered by the aforesaid suit and to take necessary accounts in respect thereof, and to effect a partition

thereof between the parties on the footing aforesaid."

Clause 5 states:—

"By a Consent Judge's Order dated the 16th July 1909 made in the said suit, the said first agreement of reference was declared to be for the benefit of the third defendant and sanctioned, and it was ordered that the matters mentioned in the said agreement of reference be referred to the arbitration of the said arbitrators.

Then the case proceeds to state certain questions which have arisen as to whether moneys should be set apart for the marriage expenses of certain male and female members of the family and for the maintenance of a girl named Ratni. Clauses 12, 13 and 14 are as follows:

"12. The arbitrator Tribhuwandas Narotamdas Malvi awards that no sum should be set apart for the expenses of marriage of Keshavdeo, or for the expenses of marriage and '*Moklava*' and maintenance of Ratni; nor, in the alternative, any sum presented to her which may be appropriated for her marriage expenses.

"13. The arbitrator Merwanji Kaikhusro awards that a reasonable sum should be set apart for expenses of marriage of Keshavdeo and for the expenses of marriage, '*Moklava*' and maintenance of Ratni; or, in the alternative, a reasonable sum may be presented to her out of the joint family property which may be appropriated for her marriage expenses.

"14. The questions of law for the opinion of the Court are whether before partitioning the said joint family properties a reasonable sum should be set apart by the arbitrators out of the said properties:

"(1) To provide for the marriage expenses of the third defendant Keshavdeo, the unmarried son of Ramgopal Hiralal, the first defendant, and

"(2) To provide for the maintenance, marriage and '*Moklava*' expenses of Bai Ratni, the unmarried daughter of the first defendant.

"(3) Or, in the alternative, a reasonable sum may be presented to her which may be appropriated for her marriage and, '*Moklava*' expenses."

It was necessary to provide for the reference to the arbitrators by the two agreements because owing to want of jurisdiction all the questions between the parties could not be raised in the suit in which the Consent Order was made.

Now, where there is a reference with the intervention of a Court of justice, the provisions of the Indian Arbitration Act do not apply, and the powers of the arbitrators are governed by the second Schedule of the Civil Procedure Code. (See the preamble to the Indian Arbitration Act and section 89 of the Civil Procedure Code). Therefore, with regard to the arbitration so far as it affects the subject of the suit, the arbitrators could only take the opinion of the Court under Rule 11 of Schedule II of the Civil Procedure Code, which provides that upon any reference by an order of the Court, the arbitrator or umpire may, with the leave of the Court, state the award as to the whole or any part thereof in the form of a special case for the opinion of the Court, and the Court shall deliver its opinion thereon and shall order such opinion to be added to and form part of the award. With regard to the other agreement of the 9th of July the provisions of the Indian Arbitration Act apply. The only section of that Act, which gives the arbitrators power to take the opinion of the Court, is section 10 (*b*), which provides that they shall have power to state a special case for the opinion of the Court on any question of law involved.

It is conceded that if the arbitrators are merely stating a case for the opinion of the Court before they have made an award no appeal lies, as has been decided, in England with reference to section 19 of the Indian Arbitration Act of 1889, in *In re Knight and Tabernacle Permanent Building Society (arbitration)* (1) and *In re Holland Steamship Company and Bristol Steam Navigation Company* (2). It is, however, contended that this special case is an award in the form of a special case which the arbitrators were competent to submit either under Rule 11 of the second Schedule of the Civil Procedure Code or section 10 of the Indian Arbitration Act, and that an appeal is expressly provided for by section 104 of the Civil Procedure Code.

With reference to the scope of section 10 (*b*) of the Indian Arbitration Act, it is

(1) (1892) 2 Q. B. 613; 62 L. J. Q. B. 33; 67 L. T. 403; 41 W. R. 35; 57 J. P. 229.

(2) (1906) 95 L. T. 769; 23 T. L. R. 59.

material to note that in the English Arbitration Act, upon which the Indian Arbitration Act was based, there are two sections providing for references to the Court by arbitrators, namely, section 7 (*b*), which permits the arbitrators to state an award as to the whole or part thereof in the form of the special case for the opinion of the Court, and section 19, which permits them to state, in the form of a special case for the opinion of the Court, any question of law arising in the course of the reference. It appears to us that the legislature in framing section 10 (*b*) of the Indian Arbitration Act has deliberately followed the wording of section 19 of the English Act and in framing Rule 11 of the 2nd Schedule of the Civil Procedure Code has followed the wording of section 7 (*b*) of the English Act.

According to the decisions of the Court of Appeal in England in *In re Knight and Tabernacle Permanent Building Society* (1) and *In re Kirkleatham Local Board and Stockton and Middlesborough Water Board* (3), an appeal lies from the opinion of the Court expressed upon an award stated in the form of a special case, and that is provided for by section 104 of the Civil Procedure Code.

It has, therefore, been necessary for counsel on behalf of the appellant to argue that the special case with which we are concerned is an award stated in the form of a special case. This argument is only material with reference to the arbitration proceeding under the Consent Judge's Order of the 16th of July. The agreement which was adopted by that order provides that "the arbitrators are authorised from time to time to make an *interim* award or awards or make or direct partial distribution or distributions of the said property and in case the said arbitrators shall, by reason of disagreement or any other cause, fail to make an award or determine any matter or matters hereby referred to them, the matter or matters as to which there shall be such failure be and they are hereby referred to the umpirage and decision of such person as the said arbitrators shall before entering upon this reference appoint to act as umpire who shall likewise have authority to make an *interim* award or awards." The agreement, therefore, provides that in the case of disagreement between the arbitrators which prevents them from making an award such as is contemplated in the agreement, the matter in difference is to be referred to an umpire who shall make the award.

Now, the special case discloses a difference of opinion between the arbitrators, and there has been no reference to any umpire; and we are unable to hold that the mere use (in our opinion, a mistaken use) of the word "award" in clauses 12 and 13 of the special case, converts a reference to the Court for its opinion upon a difference between arbitrators into an award in the form of a special case. The special case is in no sense an award. The award would have to provide, if any provision is in law necessary for the expenses of the marriage of Keshavdeo or of Ratni, what sum should be set aside; but no sum is mentioned in the case as having been agreed upon between the arbitrators as a reasonable and proper sum. Again, the special case leaves it open to the Court to take a view which is not the view of either of the arbitrators upon the question submitted.

There is, therefore, no award which can be adopted by the Court by the mere expression of its opinion, and the case can only be, as it is expressed to be in clause 14, a statement of question of law for the opinion of the Court.

We, therefore, are of opinion that this is not a case which falls under Rule 11 of the second Schedule of the Civil Procedure Code; but that it falls under section 10 of the Indian Arbitration Act in so far as it relates to the agreement which was not the subject of the Court's order of the 16th July 1909: and that, therefore, no appeal lies.

We dismiss the appeal with costs.

Appeal dismissed.

Attorneys for the Appellant: Messrs. *Malvi, Hiralal, Mody* and *Ranchoddas.*

Attorneys for the Respondent: Messrs. *Bicknell, Merwanji* and *Romer.*

(3) (1893) 1 Q. B. 375; 4 R. 194; 67 L. T. 811 57; J. P. 421; 62 L. J. Q. B. 180.

VIBUDAPRIYA *v.* ESOOF SAHIB

MADRAS HIGH COURT,
CIVIL APPEAL No. 81 OF 1906.
September 5, 1910.
Present:—Mr. Justice Wallis and
Mr. Justice Krishnaswami Aiyar.

VIBUDAPRIYA THIRTHASWAMI AND OTHERS—APPELLANTS
versus
ESOOF SAHIB AND OTHERS—RESPONDENTS.

Highway—Public user—Dedication—Unrestricted dedication, presumption as to—Burden of proof—Rival religious sects—Marching in procession with music on a highway—Hindu temple—Dedication by trustees, presumption of.

Dedication must be presumed from the user by the public of a thoroughfare as a highway, whoever was the owner of the soil at the time of dedication.

Reg. v. *East Mark*, 75 R.R. 653; 11 Q. B. 877; 17 L. J. Q. B. 177; 12 Jur. 322 and *Turner* v. *Walsh*, 6 App. Cas. 636; 50 L. J. P. C. 55; 45 L. T. 50, referred to,

The rule of English Common Law that dedication of a highway arises by the fact of the private ownership of the soil does not apply to India.

Where a Hindu temple stood on such highway there is no presumption that the dedication was by the trustees of the temple any more than that the common owner of the site of the temple and of the road founded the temple and gave it the site and dedicated the highway to the public.

Where there has been a general user by the public, a dedication without reservation would be presumed, if that was possible, and the burden of proving the reservation will lie on the party contending for it.

Ballard v. *Dyson*, 9 R. R. 770; 1 Taunt 279; *Poole* v. *Huskinson*, 63 R. R. 782; 11 M. and W. 827 and *Marquiss of Stafford* v. *Coyney*, 7 B. & C. 257; 5 L. J. (o. s.) K. B. 285; 31 R. R. 186; *Reg.* v. *Pratt*, 99 R. R. 792; 4 E, & B. 860; 3 C. L. R. 686; 24 L.J.M.C. 113; 1 Jur.(N.S.)681; 1 Dear C.C. 502; 3 W. R. 372; 25 L. T. (o. s.) 65; *Harrison* v. *Duke of Rutland*, (1893) 1 Q. B. 142; 62 L. J. Q. B. 117; 4 R. 155; 68 L. T. 35; 41 W. R. 332; 57J.P. 278; *Hickman* v. *Maisey*, (1900), 1 Q.B. 755; 69 L. J. Q. B. 511; 82 L. T. 321; 48 W. R. 385, referred to.

Though the proper use of a highway is for passing and re-passing and user for any other purpose may amount to a trespass, marching in procession with music is not an excessive use of a highway.

Sadagopachariar v. *Krishnamurti*, 30 M. 185; 4 A L. J. 333; 11 C. W. N. 585; 5 C. L. J. 566; 17 M. L. J. 240; 9 Bom. L. R. 663; 2 M. L. T. 204, referred to.

Sadagopachariar v. *Rama Row*, 26 M. 376; *Kandasawmy Mudali* v. *Subramanyya Mudali*, 32 M. 478; 6 Ind. Cas. 716 and *Maunady Mudali* v. *Nallaya Govindan*, 32 M. 527; 6 M. L. T. 285; 19 M. L. J. 467; 4 Ind. Cas. 870, followed.

Though property vested in trustees cannot be presumed to have been dedicated as a highway, where such dedication would be contrary to the purposes of the trust, a procession with music by Mahomedan inhabitants will not, in the absence of evidence, contravene the purposes of the trusts of a Hindu temple, even assuming that the dedication was by the trustees of the temple.

Rex. v. *Inhabitants of Leake*, 39 R. R. 521 at p. 529; 5 Bar and Ad. 469; 2 N. and M. 583; *Neaverson* v. *Peterborough Rural Council*, (1902) 1 Ch. 557; 71 L. J. Ch. 378; 89 L. T. 738; 50 W. R. 549; 66 J. P. 404, referred to.

Appeal against the decree of the Subordinate Judge's Court of South Canara, in Original Suit No. 44 of 1904.

Mr. *Sundara Aiyar*, for the Appellants.

Mr. *Narayana Rao*, for the Respondents.

Judgment.

Krishnaswami Aiyar, J.—The plaintiffs are trustees of a Hindu temple. They have instituted the action to restrain the defendants, who represent the Mahomedan inhabitants of Udipi, by means of a permanent injunction from marching in procession through the portions marked III *a* and III*b*, in the plan Exhibit W, W, W. The Subordinate Judge has given them a decree as prayed for as regards III*b*. The defendants made no claim to go in procession along III*b*, and as the respondents in the appeal before us no attempt was made by them to object to that portion of the decree. As regards III*a*, the Subordinate Judge has restrained the defendants from going in procession with music and reciting prayers while religious worship is going on in the plaintiff's temple. Mr. Sundara Aiyar, who argued the case for the plaintiffs who are the appellants before us, did not contest the right of the defendants to go in procession along III*a*. But he argued against their right to go in procession with music or repeating prayers, at any time along III*a* whether worship was or was not carried on in the Hindu temple. Mr. Narayana Rao for the respondents objected to the Subordinate Judge's decree restricting their right to go with music and reciting their prayers to hours when there was no worship going on in the Hindu temple. The right to go in procession with music was the principal bone of contention before us. No serious effort was made to impugn the finding of the Subordinate Judge that III*a* belongs to the temple. We are not prepared to dissent from that finding. In addition to the evidence detailed by the Subordinate Judge, we may advert to the fact disclosed by the plan and the evidence of the plaintiffs' witnesses Nos. 2 and 4 that there are traces of an old temple wall outside the limits of the streets in question and on three sides of it.

Starting then from the position that the sub-soil of III*a* vests in the temple, the next

question is what rights the public have over the surface. III*a* is a part of the big trunk road leading from Manglalore to Kliyasapur was the only road between those places till the coast road was opened less than forty years ago according to the plaintiff's second witness. It is not in evidence when III*a* was laid out. Its origin is lost in antiquity. The public has used it as a thoroughfare from time immemorial. Dedication must be presumed from the user as a highway, whoever was the owner of the soil at the time of the dedication. *Regina* v. *East Mark* (1) and *Turner* v. *Walsh* (2) decide that the Crown is no exception. There is no evidence in this case of dedication by the trustee of the temple. The general *prima facie* presumption of law in England is that the free-hold of the road *ad medium filum* is in the proprietors of the land on either side: see *Haigh* v. *West* (3) and *London and North Western Railway* v. *West Minister Corporation* (4) and that when the road was originally formed, the proprietors on either side each contributed a portion of his land for the purpose. *Holmes* v. *Bellingham* (5) and *In re White's Charities, Charity Commissioners* v. *The Mayor of London* (6). This rule is carried so far in England as to raise the presumption that the waste land on each side of the road is the property of the adjoining owners. *Steel* v. *Prickett* (7) and *Doldem Pring* v. *Pearsey* (8). These presumptions are based upon the fact that property in land vests in private owners. Dedication, therefore, of a highway under the Common Law arises by the fact of the private ownership of the soil. It may be open to question how far these principles have any application to India where it is not the accepted theory that the property in land for which *patta* is issued is in the grantee of the *pattah* from Government more than in the Government itself. [See however *Mobarnck Shah* v. *Toofany* (9) and *Balliar Singh* v. *The Secretary of State for India in Council* (10)]. In the case of waste lands at all events not included in a *pattah* in *ryotwari* tracts the property has unquestionably been treated as vesting in the Government. There is no reason to suppose that the dedication of III*a* was originally made by the trustees of the temple rather than that a common owner of the site of the temple and of the road founded the temple and gave it the site and dedicated the highway to the public. The argument of Mr. Sundara Aiyar assumed that the trustees of the temple must have dedicated the highway. He then proceeded to contend that it was upon the defendants to show that the dedication was unrestricted *viz.*, without any reservation, that an unrestricted dedication ought not to be presumed as that would be contrary to the powers of trustees of a Hindu temple, who could not make a grant injurious to the interests of the temple and that if there was a dedication without reservation, it would be invalid as contravening the purposes of a Hindu religious foundation like the temple in question. Although the nature of the user is the only basis for determining the extent of the dedication, a general user in the case of a public highway would throw the burden of proving the reservation upon the person contending for it. The law would not restrict the public to the extent of proving the exact mode of user on which there was evidence, requiring the party pleading an unrestricted right to establish it. In *Ballard* v. *Dyson* (11), Chief Justice Mansfield, distinguishing between a public highway and a private way, observed that in general a public highway is open to cattle, though it may be so unfrequented that no one has seen an instance of their going there: but the presumption would be for cattle as well as carriages. In the case of a private way, however, he was of opinion that when there was no grant, usage alone indicated the extent. Although it seems to be the better opinion at the present day that there may be a partial dedication of a highway, limited as to the extent of the user though not to apart of the public [See Qlen on Highways pages 38 and 39: *Poole* v. *Huskinson* (12) and the *Marquis of Stafford* v. *Boyney* (13)], there is no instance in which the public being entitled

(1) 75 R. R. 653; 11 Q.B. 877; 17 L. J. Q. B. 177; 12 Jur. 332.
(2) 6 App. Cas. 636; 50 L. J. P. C. 55; 45 L. T. 50.
(3) (1893) 2 Q. B. 19 at p. 29; 62 L. J. Q. B. 532; 4 R. 396; 69 L. T. 365; 57 J. P. 358.
(4) (1902) 1 Ch. 269; 71 L. J. Ch. 34.
(5) 29 L. J. Ch. 130 at p. 134; 7 C. B. (N. S.) 329; 6 Jur. (N. S.) 534.
(6) (1898)1 Ch. 659 at p. 666; 67 L. J. Ch. 430; 78 L. T. 550; 46 W. R 479.
(7) 20 R. R. 717; 2 Stark. 463.
(8) 7 Ben. B. 304.
(9) 4 C. 206.
(10) 22 A. 96.
(11) 9 R. R. 770; 1 Taunt 279.
(12) 63 R. R. 782; 11 M. & W. 827.
(13) 7 B. & C. 257; 5 L. J. (O. S.) K. B. 285; 31 R. R. 186.

to use the highway at all times and men and cattle and carriages being entitled to pass and re-pass, any restriction was imposed on the manner of passing along the highway. It is true a highway is for passing and re-passing and it may amount to a trespass to use it for other purposes. See *Regina* v. *Pratt* (14); *Harrison* v. *Duke of Rutland* (15); *Hickman* v. *Maise* (16). Mr. Sundara Aiyar has not attempted to argue that marching in procession is an excessive use of a highway. Notwithstanding the observation of Mr. Justice Bhashyam Aiyangar and Mr. Justice Subramania Iyer in *Sadagopachariar* v. *Krishnamurthi Rao* (17), the matter has been finally set at rest by the judgment of the Privy Council, approving entirely the judgment of this Court in *Sadagopachariar* v. *Rama Rao* (18). And the two cases of *Kandasami Mudali* v. *Subramania Mudali* (19) and *Mannadu Mudali* v. *Nallaya Govindan* (20) are explicit upon the point. The presumption of the complete dedication was affirmed in *Mannadu Mudali* v. *Nallaya Govindan* (20) by Benson and Sankaran Nair, JJ., when they said: "There is no evidence as to the origin of the user nor is there any evidence that the dedication was subjected to any conditions". Dedication would be assumed if dedication was possible. *Farquhar* v. *Newbury Rural District Council* (21). Where there has been a general user by the public, a dedication without reservation would be presumed if that was possible. Mr. Sundara Aiyar's contention that a dedication cannot be presumed to have been made by the trustees of the Hindu temple has not been supported by references to the ceremonial or ritualistic practices of Hindu temples.

It has undoubtedly been held that property vested in trustees cannot be presumed to have been dedicated as a highway where such dedication would be contrary to the purposes of the trust. See *Rex.* v. *The Inhabitants of Leake* (22) and *Neaverson* v. *Peterborough Rural Council* (23) and Pratt on Highways page 23. But that is not sufficient to justify a conclusion of no dedication when the user as a highway for all purposes is established and objection is taken only to procession with music as opposed to the religious usages of the temple. It is enough, however, to say that as no evidence has been adduced in this case that the procession with music of the Mahomedan inhabitants would contravene the purposes of the trusts of the Hindu temple, there is no impediment to the presumption of a dedication by the trustees of the highway unrestricted as to the mode in which the procession might be carried. But as pointed out already we are not obliged by any evidence in the case to suppose that the highway was dedicated by the trustees of the temple. If it was not, no question of the legality of unreserved dedication can possibly arise. It follows that the Subordinate Judge was wrong in granting the injunction as regards III*a*. We must, therefore, dismiss the appeal with costs and allow the memorandum of objections in part by dismissing the suit as regards the injunction granted in respect of III*a*. But as the respondents have partially failed with reference to the memorandum of objections, we make no order as to costs in regard to it.

Wallis, J.—I agree, and will only add that, if it were proved that an unrestricted dedication by the trustees would be illegal which has not been proved here, then a presumption in favour of a restricted dedication might arise as in *Grand Junction Canal* v. *Petty* (24); but before such a presumption could be raised, I think an illegality of the kind suggested would have to be very clearly proved.

Appeal dismissed.

(14) 99 R. R. 792; 4 E. & B. 860; 3 C. L. R. 686; 24 L. J. M. C. 113; 1 Jur. (N. S.) 681; 1 Dear. C. C. 502; 3 W. R. 372; 25 L. T. (O. S.) 65.

(15) (1893) 1 Q. B. 142; 62 L. J. Q. B. 117; 4 R. 155; 68 L. T. 35; 41 W. R. 322; 57 J. P. 278.

(16) (1900) 1 Q. B. 755; 69 L. J. Q. B. 511; 82 L. T. 321; 48 W. R. 385.

(17) 30 M. 185; 4 A. L. J. 333; 11 C. W. N. 585; 5 C. L. J. 566; 17 M. L. J. 240; 9 Bom. L. R. 663; 2 M. L. T. 204.

(18) 26 M. 376.

(19) 32 M. 478; 6 Ind. Cas. 716.

(20) 32 M. 527; 6 M. L. T. 285; 19 M. L. J. 467; 4 Ind. Cas. 870.

(21) (1908) 2 Ch. 586; 72 J. P. 445; 25 T. L. R. 39.

(22) 39 R. R. 526; 5 B. and Ad. 469; 2 N. & M. 583.

(23) (1902) 1 Ch. 557 at p. 573; 71 L. J. Ch. 378; 86 L. T. 738; 50 W. R. 549; 66 J. P. 404; 18 T. L. R. 860.

(24) 21 Q. B. 273; 57 L. J. Q. B. 572; 59 L. T. 767; 36 W. R. 795; 52 J. P. 692

In re SOLAI NAICK.

MADRAS HIGH COURT.
FULL BENCH.
CRIMINAL APPEAL No. 290 OF 1910.
October 4, 1910.
Present:—Mr. Justice Abdur Rahim,
Mr. Justice Krishnaswamy Aiyar and
Mr. Justice Aiyling.
In re SOLAI NAICK AND OTHERS—
APPELLANTS.

Criminal Procedure Code (Act V of 1898), ss. 103 and 166—Evidence Act (I of 1872), s. 91—Search list—Parol evidence of the contents of, whether admissible.

The provisions of section 91 of the Evidence Act do not apply to the case of a search list prepared under section 103 of the Criminal Procedure Code.

When a search has been conducted under section 103, Criminal Procedure Code, other evidence can be given regarding the things seized in the course of the search and regarding the places in which they were respectively found, than the list which the law in the section directs to be drawn up containing these particulars.

If the narrative of an extrinsic fact has been committed to writing, it may be proved by parol evidence, even though such writing is required by law.

Jivandas Keshavji v. *Framji Nanabhai*, 7 Bom. H. C. R. 45 at p. 63, referred to.

Appeal against the sentence of the Court of Sessions Judge of Tinnevelly Division, in Case No. 46 of the Calendar for 1910.

ORDER OF REFERENCE TO A FULL BENCH.

In this case a search was made by an officer in charge of a police station in a place not within the limits of his police station and evidence was given of this search. It is contended that under section 166, Criminal Procedure Code, the officer had no power to make this search himself, that the search list drawn up is, therefore, not evidence, and that no evidence can be given of the search. If when a search is conducted, the search list drawn up as directed in section 103 (2), Criminal Procedure Code, is the only evidence that can be tendered as to the facts, which such a document should contain according to section, then the contention must apparently prevail by reason of the provisions of section 91 of the Evidence Act. But on this point there is a conflict of rulings. Thus in the case of *Abdul Kadar* v. *Queen-Empress* (1), it was held that a search list prepared under section 103, Criminal Procedure Code, is the proper and only evidence admissible of the facts which ought to be contained in the search list. On the other hand, in the case of the *Public Prosecutor* v. *Sarabu Chinnaya* (2), it was held that a search list is not evidence of the facts stated therein for the purpose of section 91 of the Evidence Act and that oral evidence was admissible. Again in *In re Elamathan* (3), a Bench of this Court refused to follow the earlier of the above cases and followed the later case. As the matter is one of great importance and continually arising, we think it should be definitely decided. We, therefore, refer to a Full Bench the question whether when a search has been conducted under section 103, Criminal Procedure Code, any evidence can be given regarding the things seized in the course of the search and regarding the places in which they were respectively found other than the list which the law in the section directs to be drawn up containing these particulars.

Mr. *M. D. Devadoss*, for the Appellants.

The *Public Prosecutor*, Contra.

Opinion.—We answer the question referred to us in the affirmative. Section 91 of the Evidence Act lays down "when the terms of a contract, or of a grant or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant, or other disposition of property, or of such matter, except the document itself or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained."

In our opinion, the words 'any matter required by law to be reduced to the form of a document' could not have been intended by the legislature to apply to mere observations of physical facts which under the ordinary law have to be proved by testimony in Court. All the instances in which this section has been applied are cases in which the matter required to be reduced to the form of a document consisted of spoken words or other expressions of the human will. We do not, however, express any positive opinion that the application of the words is to be confined to such cases, but we are quite clear that, as laid down in *Jivandas Keshavji* v. *Framji Nanabhai* (4), if the narrative of an

(1) 2 Weir's Cr. R. 515.
(2) 2 Weir's Cr. R. 776.
(3) 7 M. L. T. 362; 5 Ind. 433.
(4) 7 B. H. C. R. 45 at p. 63.

extrinsic fact as in this case has been committed to writing, it may be proved by parol evidence and this would be so even though such writing is required by law. We need hardly point out that if the provisions of section 91 were to apply to the case of a search list prepared under section 103, Criminal Procedure Code, the results would be startling and there would be grave risks of miscarriage of justice in many trials in criminal cases.

(s. c. 12 Bom. L. R. 860.)

BOMBAY HIGH COURT.

August 6, 1910.

Present:—Sir Basil Scott, Kt., Chief Justice.

T. K. GAJJAR—PETITIONER

versus

LALLUBHAI DHARMCHAND—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, R. 29—Stay of execution—Arbitration Act (IX of 1899), s. 18—Award—Not a decree but enforceable as decree.

An award made under the provisions of the Indian Arbitration Act (IX of 1899), although enforceable as if it were a decree (section 18), is nothing more than an award, and the execution of it cannot be stayed under Order XXI, Rule 29 of the Civil Procedure Code (Act V of 1908).

Mr. *Jardine*, acting Advocate General, for the Petitioner.

Mr. *F. S. Taiyarkhan*, for the Respondent.

Judgment.—On the 1st of August 1910, a summons was obtained from the Sitting Judge in Chambers headed: "In the matter of the Arbitration between Professor Tribhuwandas Kalliandas Gajjar and the firm of Messrs. Jivanchand Lallubhai & Co., and in matter of the Indian Arbitration Act IX of 1899—Professor Tribhuwandas Kalliandas Gajjar—Petitioner; and Lallubhai Dharamchand and the other partners in Jivanchand Lallubhai & Co. —Respondents," calling on the above-named petitioner to appear and show cause, if any, he hath why the execution of the award, dated the 19th January 1910, should not be stayed until the final disposal of Suit No. 850 of 1909.

The award of the 19th January 1910, was an award made under the provisions of the Indian Arbitration Act IX of 1899, whereby the firm of Jivanchand Lallubhai & Co. were directed to pay to Tribhuwandas K. Gajjar the sum of Rs. 2,15,000, Rs. 1,00,000 being payable at once and Rs. 10,000 every subsequent month. At the time of the summons there still remained payable by monthly instalments a sum of Rs. 65,000. Up to that time no steps had been taken to obtain the assistance of the Court in securing the payment of the amount of the award, but under the provisions of the Indian Arbitration Act the petitioner would be entitled to enforce the award as if it were a decree of the Court.

On the strength of that provision in section 15 of the Indian Arbitration Act, the parties against whom the award has been made contend that this Court, under Order XXI, Rule 29, of the Civil Procedure Code, should stay the execution of the award until the disposal of Suit No. 850 of 1909. That is a suit filed by Gulabchand Munalal against Kasturchand Daya, the firm of Jivanchand Lallubhai & Co., the present respondents, and the petitioner T. K. Gajjar, for the winding up of a partnership, in which, it is said, the petitioner was entitled to a share of profits, although not liable for losses, and is liable to the partnership for monies withdrawn to the extent of Rs. 90,000.

Now, such an order for stay can only be made by the Court, if there is a suit pending on the part of a person against whom a decree has been passed, against the holder of a decree of the Court. It appears to me that the petitioner is not a holder of a decree of the Court, nor are the firm of Jivanchand Lullubhai & Co. persons against whom a decree has been passed; for the award, to which the applicants seek to give the force of a decree, is nothing more than an award, although it is enforceable as if it were a decree. In the words of Fletcher Moulton, L. J., used with reference to section 12 of the English Arbitration Act of 1889, that section "gives no power to turn such an award into a judgment. It gives to the award the same status as a judgment for the purpose of enforcement, but it leaves it what it was before, *viz.*, an award." See *In re a Bankruptcy Notice* (1).

The application is, therefore, in my opinion, misconceived, and it is unnecessary to discuss the further question which might arise

(1) (1907) 1 K. B. 478; 76 L. J. K. B. 171; 96 L. T. 131; 14 Manson 1; 23 T. L. R. 214.

as to whether Suit No. 850 by Gulab Chand Muna Lal is such a suit as is within the contemplation of Order XXI, Rule 29, of the Civil Procedure Code, even if we assume that the award is a decree within the meaning of that rule.

I, therefore, discharge the summons with costs.

Counsel certified.

By consent: petitioner to withdraw the sum of Rs. 10,000 lodged in Court by the respondents in satisfaction *pro tanto* of the instalment or instalments due under the award.

Summons discharged.

Attorneys for Petitioner: Messrs. *Bicknell, Merwanji* and *Romer.*

Attorneys for Opponents: Messrs. *Tyabji, Dayabhai & Co.*

(s. c. 12 Bom. L. R. 863.)

BOMBAY HIGH COURT.

ORIGINAL CIVIL SUIT No. 207 OF 1910.

July 22, 1910.

Present:—Mr. Justice Beaman.

PESTONJI FRAMJI MISTRI—PLAINTIFF

versus

FRAMJI BEJANJI BILLIMORIA—DEFENDANT.

Succession Act (*X of* 1865), *ss.* 62, 164—*Will—Construction—Clear and unambiguous terms—Extrinsic evidence.*

A Will provided: "My trustees shall give to my brother, Pestonji Framji Mistri, Rs. 1,500, namely, fifteen hundred, without interest and the yshall get him to vacate the place in my house which he now occupies":

Held, that on the face of them the words were quite clear and unambiguous both as to the property and the person, and therefore, it was not permissible to initiate an inquiry into the facts, (1) that the testator owed the legatee Rs. 1,500, (2) that that sum was not carrying interest, and (3) that in lieu of interest the legatee was residing in the house referred to in the Will.

The construction of Wills must be governed by the terms of sections 62 and 164 of the Indian Succession Act.

Where a testator has left no uncertainty as to the person to be benefited and the property by which the benefit is to be conferred, then the Courts are precluded from going outside the actual words used by the testator, and the effect seems to have been given to this principle by the language of section 164 of the Indian Succession Act.

Original Civil Suit No. 207 of 1910.

Mr. *Jinnah* with Mr. *Bahadurji*, for the Plaintiff.

Mr. *Kanga* with Mr. *Dastur*, for the Defendant.

Judgment.—When this case came on for trial, the first question raised was whether the defendant was entitled to lay before the Court evidence of facts alleged to have been in the testator's mind, and, therefore, necessary to be known to the Court before it could truly apply the language used by the testator in the second clause of the Will. This was, of course, strenuously opposed by Mr. Jinnah for the plaintiff, who, like most counsel of experience, is always most insistent on a legal technicality most ingenious, and I may say persuasive, in proportion as he feels that if this ground fails him his case is lost. Nevertheless, after giving the matter my most anxious consideration during the whole of his argument and the exhaustive and able reply to it by Mr. Kanga, I am still unable to free my mind from the logical compulsion of the technicality upon which Mr. Jinnah has taken his stand.

In this country the construction of Wills must be governed, I think, by the terms of section 62, and, for our particular purpose, section 164 of the Indian Succession Act. Section 164 appears to be advisedly worded so as to narrow the field of inquiry to which large extensions had been given in England. Did that section stand alone, then the argument would have given rise to little difficulty. But the defendant has invoked the assistance of section 62 in his endeavour to escape the narrow limitations imposed by section 164. And the concluding words of section 62 might, no doubt, be thought to give effect to something like the general principle upon which the English Courts have rarely hesitated to act. I own I find it for myself very hard to dissociate those words from the words with which section opens. Those words, I think, must govern all that follows. So read, the section empowers Courts to avail themselves of extrinsic evidence "for the purpose of determining questions as to what person or what property is denoted by any words used in a Will", etc. Now, in the present case, it seems to me that it is only by an undue straining of language that it can fairly be said that any question arises as to determining either the person or property denoted in the disputed clause. Ingenuity might suggest that there really is some uncertainty about the property arising in this

way, that if Rs. 1,500 given to the plaintiff were meant to be given in discharge of a debt and not in addition thereto, then without the assistance of extrinsic evidence the Court reading the words of the Will simply as they stand might dispose of Rs. 3,000 instead of the testator's money. So that to that extent—the difference between Rs. 1,500 and Rs. 3,000—there is really an uncertainty about the property denoted in the disputed clause, to resolve which the section allows the Court to go into extrinsic evidence of all facts which might enable it to apply the testators's language more correctly to the facts which were within his knowledge. That seems to me the only possible line of reasoning by which the defendant might hope to escape the rigidity of section 164, as well as the distinctions insisted upon by some of the very greatest English Judges in dealing with cases of somewhat similar difficulty.

Clause 2 of the Will runs in the following terms: "My trustees shall give to my brother, Pestonji Framji Mistry, Rs. 1,500, namely, fifteen hundred without interest and they shall get him to vacate the place in my house which he now occupies". On the face of them, these words are quite clear and unambiguous both as to the property and the person and if we turn to the authorities upon which the learned counsel have relied, notwithstanding the great Judges, who were responsible for the decisions in *Charter* v. *Charter* (1) and *Harrison* v. *Higson* (2), affirming the well-known doctrine that where there is an ambiguity in the language used by the testator the Judge is entitled by the use of extrinsic evidence to put himself in the testator's shoes or seat himself in the testator's chair, I cannot see any way of distinguishing the facts with which I am at present confronted from those which were incompromisingly dealt with by such high authorities as Lord Halsbury, L. C., Lord Davey and Rigby, L. J. in *Higgins* v. *Dawson* (3). In the other cases there can be no question that very great Judges—one of the very greatest indeed Earl Cairns—inclined somewhat liberally to the view that where there might be any form of ambiguity in the language the Courts might seek illumination from extrinsic evidence throwing any light upon the surrounding facts which then by inference would be used as pointing to the testator's intention. In the last case, however, a sharp line is drawn between the propriety—even the legality—of taking one step in the direction of investigating intention. Their Lordships unanimously insisted, in language which is too plain to be mistaken or misunderstood, that where a testator has left no uncertainty as to the person to be benefited and the property by which the benefit is to be conferred, then the Courts are precluded from going outside the actual words used by the testator, and the effect of that principle seems to have been given by the language of section 164 of the Indian Succession Act. There it is laid down: "Where a debtor bequeaths a legacy to his creditor, and it does not appear from the Will that the legacy is meant as a satisfaction of the debt," etc. Plainly the important words are "and it does not appear from the Will," words which confine the scope of the Court's interpretation in the first instance to the language of the Will and that alone.

In the present instance, clause 2 of the Will is certainly worded in an unusual way and therefrom suspicions or conjectures might well arise as to the testator's intention.

Casually read, the clause does not sound like an expression of the testator's desire to confer a legacy upon some chosen object of his bounty. There are the curious words "without interest," and the immediately following sentence directing the executor to get the legatee to vacate the house. Now the whole force of Mr. Kanga's argument lies in this, that the form of expression is so unusual as to necessitate a further enquiry where it is disputed that the words bear their natural meaning. He contends that even on the face of this clause it does appear from the Will that this was not an ordinary bequest but was intended to be no more than the satisfaction of a debt and he proposes to lay before the Court conclusive evidence of three facts: (1) That the testator owed the legatee Rs. 1,500; (2) that that sum was not carrying interest; and (3) that in lieu of interest the legatee was residing in the house referred to in that clause at a rent reduced in proportion to what would otherwise have been interest on Rs. 1,500. If those facts were shown, I do not doubt that almost any person would

(1) (1874) L. R. 7 H. L. 364; 43 L. J. P. 73.

(2) (1894) 1 Ch. 561; 63 L. J. Ch. 385; 70 L. T. 868.

(3) (1902) A. C. 1 at p. 10; 78 L. J. Ch. 132; 85 L. T. 763; 50 W. R. 337.

arrive at the conclusion, at which Mr. Kanga wishes the Court to arrive, that the clause read in the light of the facts clearly means that the testator wished the debt to be discharged and the creditor to be got rid of out of the house. And it is for that reason that Mr. Jinnah fought desperately against the introduction of any such extrinsic evidence whatever and has taken his stand upon the technicality that though the clause may be in an unusual form there is nothing really uncertain or ambiguous in it. And here again we may with advantage read the observations of Rigby, L. J. approved by Lord Davey in *Higgins* v. *Dawson* (3). Were I to accede to Mr. Kanga's argument, which I confess, I greatly wish to do and have wished to do since the case opened, I cannot conceive for myself that I should be yielding to what is characterised by those learned Judges as an illegitimate bias, a pre-possession in favour of what I believe to be the testator's intention. And the ground-work of Mr. Kanga's whole argument seems to me to be cut away when we further apply the distinctions drawn by those learned Judges between what is right and what is wrong for a Judge to do in such circumstances. There is really no possibility of any ambiguity about the person to be benefited. The testator directs his trustees to give to the plaintiff, naming him, a definite sum of money. Neither can there be any ambiguity about the property to be given. The property is Rs. 1,500. Nor can there be any real ambiguity about the words "without interest." Whether they are superfluous or whether in some instances they might bear a meaning—a practical meaning I mean—in themselves, they are plain enough. As to the direction to get the legatee to vacate the house, that too is perfectly plain whether or not it is intended as a condition of the legacy.

Now, the law laid down in *Higgins* v. *Dawson* (3) insists peremptorily on Judges refraining where the language of the Will presents no ambiguity from imagining ambiguity in its application to different sets of existing facts, and so initiating an inquiry into those fects. The test is perfectly simple. Had nothing been known of the debt of the plaintiff or had there been no dispute about this Will at all and had this clause been submitted to anybody, whether a man in the street or the most learned Judge, could it be said that either the one or the other would have felt or entertained the very slightest doubt about its meaning? I feel, therefore, that as a Judge I am bound to follow the law laid down for the guidance of Courts in cases of difficulty like this by the greatest Judges of the realm.

I confess I come to this conclusion with the utmost reluctance, because it appears to me that in this particular case at any rate the result will be doing not justice but injustice. I believe that there is no doubt in the mind of the plaintiff any more than in my own that if we were not trammelled by these legal technicalities, if I felt at liberty to go into the facts which Mr. Kanga says he is prepared to prove, and if those facts were proved, then neither I nor anyone else would hesitate to say that the intention of the testator was not to bestow a legacy but to discharge a debt. Nevertheless hard cases notoriously make bad law and my duty on the authorities and the words of the sections I have adverted to, which after all are framed, I presume, upon a wide survey of averages calculated to attain a maximum of justice, is to enforce the rule as I understand it.

I must, therefore, I think, refuse to allow any extrinsic evidence to be gone into here. I must take the terms of the Will, terms which the testator himself chose to use, and give their plain meaning and natural effect to them.

At this point, it is intimated to the Court that after the delivery of this interlocutory judgment, parties would probably settle.

As to the issue of estoppel Mr. Kanga felt unable to carry it any further and I think there is nothing in it. But upon this issue he put in certain letters intending to use them in support of his contention that the defendant could not have reasonably acted otherwise that he did, and, therefore, the plaintiff should bear his own costs. This leaves the question of costs alone open; and before delivering judgment upon it, as the Court was about to rise yesterday afternoon, I suggested to counsel on both sides that possibly they might come to some understanding.

This morning they have agreed upon terms; and there will, therefore, be a decree by consent for the plaintiff for Rs. 1,500; and

defendant to pay half the plaintiff's party and party costs.

Attorneys for the Plaintiff: Messrs. *Nanu Hormusji & Co.*

Attorneys for the Defendant: Messrs. *Jehangir, Mehta and Shomji.*

(s. c. 12 Bom. L. R. 870.)

BOMBAY HIGH COURT.

ORIGINAL CIVIL SUIT NO. 392 OF 1909.

August 11, 1910.

Present:—Mr. Justice Davar.

R. D. SETHNA—PLAINTIFF

versus

THE NATIONAL BANK OF INDIA—DEFENDANTS.

Contract Act (IX of 1872), s. 178—Goods—Shares in Joint Stock Companies—Executor in possession of shares—Misappropriating the shares to his own use—Pledge—Applicability of proviso to s. 178.

One A died and left considerable property. Amongst the property were twenty shares of the Textile Manufacturing Company. By the 10th Clause of his Will, he directed that the residue of his property should be used for *dharmada* directing his trustees to use the same in such a way that his name should be perpetuated for ever.

C, the sole surviving executor under the Will, after obtaining possession of the share certificates, got them transferred to his name under the false pretence of having paid out moneys in connection with certain charities. He, then, pledged them with the defendants. C was subsequently ousted from the management of the estate and a Receiver was appointed by order of the High Court. The Receiver brought a suit against the defendants asking certain reliefs in connection with the said shares:

Held, that shares in Joint Stock Companies are included within the meaning of the word "goods" as used in section 178 of the Indian Contract Act.

C got the shares transferred to his own name with the intention of misappropriating the said shares to his own use and in doing so he was clearly guilty of fraud towards his testator's estate. But C. must be regarded as acting in this matter in two capacities. As the sole surviving executor under the Will of his testator, he was in juridical possession of the share certificates, but it could not be said with any sense of show or reason that in his capacity as pawnor he *had obtained possession* of the shares from the lawful owner and custodian, the executor, *by means of fraud or offence*. Under these circumstances, the proviso to section 178 of the Indian Contract Act had no application to the transaction.

Mr. *Bahadurji*, with Mr. *Desai*, for the Plaintiffs.

Mr. *Shortt*, with Mr. *Jardine* (acting Advocate-General), for the Defendant.

Judgment.—One Ambaram Motichand died on the 12th October 1900. Previous to his death, on the 3rd of October 1900, he made his Will whereby he appointed his father Motichand Howji, the second defendant herein, Chunilal Pitamber, his wife Samoo and his mother's sister Kashi, the executors and executrices thereunder. Probate of that Will was granted to Motichand Howji and Chunilal Pitamber on the 13th of March 1902, the right of the two ladies to apply for probate being reserved. Ambaram left considerable property and amongst such property were twenty shares of the Textile Manufacturing Company.

By the 10th Clause of his Will, he directed that the residue of his property should be used for *dharmada* directing his trustees to use the same in such a way that his name should be perpetuated for ever.

In this case the Court is not concerned with the administration of Ambaram's estate or with the manner in which Ambaram's estate was administered till after the death of Motichand Howji which took place on the 9th of April 1905. On Motichand's death, Chunilal Pitamber, as the sole surviving executor, came into exclusive possession of the whole estate and remained in management thereof till he was ousted by an order of this Court, made in Suit No. 31 of 1909, on the 1st of March of that year, whereby Mr. R. D. Sethna, the plaintiff in this case, was appointed a Receiver of the estate of Ambaram Motichand. This suit No. 31 of 1909, is filed by Mulibai, the only daughter of Ambaram, who challenges the validity of bequest to *dharmada* and claims to be entitled to the residue of the estate. It appears that in that suit grave charges were made against the defendant therein, Chunilal Pitamber, and the charges must have appeared *prima facie* well-founded to have induced Mr. Justice Russell to appoint a Receiver against an executor, depriving him of the possession and management of his testator's estate. Chunilal appealed against the order but the appellate Court confirmed the appointment of the plaintiff as Receiver of Ambaram's estate.

In Mulibai's suit, by an order dated the 15th of April 1909, leave has been granted to the Receiver to file this suit.

In this suit the plaintiff asks for certain reliefs against the National Bank of India, who are the first defendants herein, in connection with twenty shares of the Textile Manufacturing Company which originally be-

longed to the estate of Ambaram Motichand and which were after Motichand Howji's death pledged by Chunilal Pitambar, who is the second defendant in the suit, with the first defendant Bank. Chunilal in September 1909, filed a most contentious written statement in which he raised several points of defence against the plaintiff's suit, giving a history of his dealings with the shares in question and maintaining that the plaintiff was not entitled to the reliefs he claimed.

At the hearing, the second defendant did not appear to contest the suit and it was with great difficulty that his presence was procured before the Court, sometime after this suit had proceeded to a hearing.

Before considering the contentions of the parties, it is necessary to see how the shares in question have been dealt with: Previous to Motichand Howji's death, these twenty shares of the Textile Manufacturing Company were deposited in the Bank of Bombay in the joint names of the executors and were registered in the Company's books in the name of the deceased Ambaram Motichand. Chunilal seems to have drawn out the share certificates from the Bank after Motichand's death and got them transferred to himself in the Company's books after abtaining possession of the share certificates from the Bank of Bombay. It appears from the endorsements at the back of the share certificates that the transfer to his own name was effected on the 13th of December 1905. On the 22nd of September 1908, Chunilal pledged ten out of the twenty shares with the National Bank of India and obtained a loan of Rs. 8,000 on the security thereof. On the 16th of October 1908, he pledged the remaining lot of ten shares with the same Bank and obtained another loan of Rs. 8,000.

The plaintiff in this suit contends that the second defendant "got the shares by fraud and by committing an offence," and he submits that he could not make a valid pledge to the first defendant Bank and that the first defendant Bank had not acquired a legal title to the said shares. He further submits that "his title to the said shares is superior to the equitable title (if any) of the first defendant to the said shares." The plaintiff further contends that the first defendant is not a *bona fide* pawnee for value.

The first defendants in their written statement say that they had no reason whatever for supposing, when they made their advances against the shares that the said shares did not belong to the second defendant Chunilal absolutely. They say they took these shares as security for the loans they made *bona fide* and without notice that any other person or persons whomsoever had any interest in the said shares. They contend that as between Chunilal and themselves, Chunilal was entitled to deal with the shares and make a valid pledge thereof.

It would be convenient in the first instance to deal with the questions of fact as to how Chunilal got the said shares transferred to his own name and whether in doing so he was guilty of fraud or of having committed an offence. His own version, as given in his written statement, is that his co-executor Motichand Howji, a little before his death, suggested to him that these twenty shares should be sold. And in support of that contention he produced a letter, copy translation of which is annexed to his written statement and marked No. 1, purporting to have been sent to him by Motichand Howji. This letter is challenged on behalf of the plaintiff as a forgery and on the evidence before me and having regard to the proved conduct of the second defendant, I have no doubt that it is not Motichand Howji's letter. Chunilal then goes on to say that on the 6th of April 1905, three days before Motichand's death he agreed to sell these twenty shares to one Talaksi Thakersi at the rate of Rs. 675, that he was not able to give delivery of the shares to Talaksi owing to difficulty in removing the shares from the Bank of Bombay consequent on the death of his co-depositor Motichand Howji, that in the meanwhile the shares had risen in value to Rs. 1,000 and that on the 1st of September 1905, he agreed to purchase for himself the said twenty shares from Talaksi Thakersi at the rate of Rs. 1,000 per share, that subsequently he paid Rs. 6,500 to Talaksi Thakersi as his profit in the transaction and obtained a receipt from him, copy translation whereof is annexed to his written statement and marked No. 2. He says that he has given credit to the estate of Ambaram Motichand for Rs. 20,000, the value at which he purchased these shares less Rs. 6,500 which had to be paid to Talaksi. In other words, he contends that the estate of Ambaram Motichand has been paid the value of

these twenty shares at the rate of Rs. 675 at which they were sold to Talaksi. On the evidence before me I find that every statement made by Chunilal in respect of these shares is untrue. The alleged sale to Talaksi Thakersi was really never made and no sum whatever has been paid to him. Talaksi was produced before the Court and has given evidence in the case. He has denied having passed the receipt put forward by Chunilal, who now says this is not the man he referred to in his written statement. Chunilal is not able to point out any other Talaksi Thakersi, and I have no doubt that the man produced before me was the man he intended to indicate as the purchaser. I find that both the alleged letter of Motichand Howji suggesting the sale and the receipt purporting to be passed by Talaksi Thakersi are documents forged by Chunilal for the purposes of this suit. The active measures taken on behalf of Mulibai in impounding these documents and detaining them in Court and the other circumstances surrounding Chunilal's administration of his testator's estate which subsequently came to light, have evidently frightened him into disappearing from this suit. As Mr. Bahadurji was in some difficulty about proving certain things necessary for his case, Chunilal's presence was required and that presence was not procured until he was arrested under a warrant issued by the Court. He had a book containing an account of the administration of Ambaram's estate; in that account he had made fictitious entries showing that he had paid out large sums of moneys for various charities, which he claims to have been authorized to do under the Will. In that book he had also made debit and credit entries with a view to show that the estate had received from him Rs. 20,000, out of which Rs. 6,500 had been paid to Talaksi as his profit in the transaction on the original sale, and that the balance had been paid out in charities. Chunilal has suppressed this book but a copy taken on inspection has been proved before me and I find that all the entries showing credit of certain payments by Chunilal to the estate and by him to Talaksi and to charities are wholly fictitious entries. It is quite clear to my mind that under the false pretence of having paid out moneys in connection with certain charities he has deprived the estate of his testator of those 20 shares which he got transferred to his name, in doing which I find that he was clearly guilty of fraud towards the testator's estate. It is possible that the fraud, of which Chunilal was guilty in having these shares transferred to his own name, may amount to the commission of an offence. For the purposes of this case, it is sufficient to record the following findings on facts, namely, that the twenty shares of the Textile Manufacturing Company, Exhibit D in this suit, originally belonged to the testator Ambaram Motichand, and that Chunilal, as the sole surviving executor under Ambaram's Will, got those shares transferred to his own name with the intention of misappropriating the said shares to his own use and that in doing so he was clearly guilty of fraud towards his testator's estate.

Although the plaintiff has contended in his plaint that the first defendants are not *bona fide* pawnees for value and although the learned counsel for the plaintiff did not specifically abandon that contention at the hearing, it is abundantly clear to my mind that the plaintiff has no grounds whatever for impugning the good faith of the first defendants. Before the dates of the pledging of these shares to the Bank, Chunilal had a current account with them. The Bank had no reason to suspect the honesty of their constituent. It is a branch of their ordinary business to advance loans on shares and scrips of joint stock companies. Chunilal applied to them for a loan just as any other merchant in Bombay might do. The securities he offered were shares which were registered in his own name by the Company issuing them. There was not the smallest reason for presuming or suspecting that Chunilal was acting in any improper manner, and I have not the smallest hesitation in holding that the first defendants in receiving the twenty shares in pledge and advancing moneys on the security thereof acted in good faith and under circumstances which were not such as to raise any presumption or suspicion whatever that the pawnor Chunilal was acting improperly.

On these findings of facts arise questions of law as to whether these twenty shares are validly pledged with the first defendants and whether they are entitled as against the estate of Ambaram to hold the same as

security against the loans they made to their ostensible owner Chunilal Pitamber. Mr. Bahadurji, who has argued the plaintiff's case with great care and much ability, contended in the first instance that the question must be decided under the provisions of section 178 of the Indian Contract Act, that the shares in question in the suit were "goods" within the meaning of that section, that Chunilal was guilty of fraud and having committed offence in getting the shares transferred to his own name and that, therefore, even if the Bank acted in good faith and under circumstances which did not raise a reasonable presumption that the pawnor was acting improperly, the pledge was invalid, the property having been obtained by means of fraud or offence. The learned counsel further contended that even if the transaction was not covered by section 178 of the Indian Contract Act, the equitable title of Ambaram's estate was superior to the equitable title, if any, of the first defendants to the said shares. And in support of that contention he has relied on the case of *The Shropshire Union Railways and Canal Company* v. *The Queen* (1).

These are very interesting questions of law and are not questions free from difficulty. In the first place, it is necessary to consider whether shares in a joint stock company are "goods" within the meaning of section 178 of the Contract Act. The opening section of Chapter VII of the Contract Act, namely, section 76 says: "*In this Chapter* the word goods means and includes every kind of movable property." There is no doubt that under this definition shares in Joint Stock Companies would be "goods." But the qualifying words "In this Chapter" raise a presumption that it was possibly the intention of the legislature to give the word "goods," when used in other parts of the Act, a more restricted meaning. Section 178 comes under Chapter IX and, therefore, the definition given in section 76 does not apply to the word "goods" as used in section 178. It was argued by Mr. Shortt that section 178 was a reproduction from the Indian Factories Act and that shares were not within the contemplation of that section.

Let us turn for one moment and see what is meant to be included in "goods" under the English Law.

In section 62 of the Sales of Goods Act 1893, "goods" are said to "include all chattels personal other than things in action and money." In Benjamin on Sales, 5th Edition, page 173, referring to this definition, it is stated as follows:—"Things in action" include all personal chattels that are not in possession. Stocks, shares in companies, policies of Insurance and debts are, therefore, *not* goods. But I find that in 1886, previous to the enactment of the Sales of Goods Act, in the case of *The Colonial Bank* v. *Whinney* (2), Lord Blackburn says: "There can, I think, be no doubt that shares in a Railway Company, though not goods in ordinary sense of the word, are personal chattels" and at page 440 he observes, "I think it was hardly disputed that in modern times lawyers have accurately or inaccurately used the phrase 'choses in action' as including all personal chattels that are not in possession." It must, however, be remembered that in this case the House of Lords was concerned in giving the meaning to a particular section of the Bankruptcy Act.

In the year 1893, the very year in which the Sale of Goods Act was passed, we find Mr. Justice Kekewich discussing the meaning of the word "goods" in the case of *Evans* v. *Davies* (3). In that case the Court had to consider whether shares in a limited company were "goods" within the meaning of Order XL, Rule 2, of the Supreme Court Rules of 1893 and he answered the question in the affirmative. His Lordship, in the course of his judgment, observes: "Now are shares *goods* which can be sold under that Rule? It was held in *Bartholomew* v. *Freeman* (4) that goods included a horse; and in *Regina* v. *Slade* (5), it is held...that the word included a dog.... In *Coddington* v. *Jacksonville Railway Company* (6) it was held by the Court of Appeal that certain foreign bonds came within the rule and an immediate sale of them was ordered. Accordingly, with these authorities before me, I

(1) (1875) L. R. 7 H. L. 496; 45 L. J. Q. B. 31; 32 L. T. 283; 23 W. R. 709.

(2) (1886) 11 App. Cas. 426; 56 L. J. Ch. 43; 55 L. T. 362; 34 W. R. 705; 3 Morrell. 207.

(3) (1893) 2 Ch. 216; 62 L. J. Ch. 661; 3 R. 360; 68 L. T. 244; 41 W. R. 687.

(4) (1878) 3 C. P. D. 316; 38 L. T. 814; 26 W. R. 743.

(5) (1888) 21 Q. B. D. 433; 57 L. J. M. C. 120; 59 L. T. 640; 37 W. R. 141; 16 Cox C. C. 496; 52 J. P. 599.

(6) (1878) 39 L. T. (N. S.) 12.

have no hesitation in holding that the word 'goods' does include shares."

Turning to the provisions of Indian Contract Act itself, we find, looking at illustration (*a*) to section 150 and illustrations (*a*) and (*b*) to section 154, that a horse is included within the meaning of the word "goods." And looking again at illustration (*a*) to section 163, we find that a cow is also included within the meaning of the word "goods." But for the words "In this Chapter" in the beginning of section 76 of the Indian Contract Act, there would have been no difficulty in holding that shares in limited liability companies were, so far as the Contract Act is concerned, included within the meaning of the word "goods." It is not easy to understand why the definition of goods given in section 76 is confined by the legislature to the Chapter in which that section occurs. After much anxious consideration, I have come to the conclusion, though not without some doubts, that shares in joint stock companies must be held to be included within the meaning of the word "goods", as used in section 178 of the Indian Contract Act, and I am of opinion, therefore, that the transaction in this suit is governed by the provisions of that section. If I am right it is quite clear that if Chunilal Pitamber as the pawnor had obtained these share certificates from their lawful owner or from the person in lawful custody of them by means of an offence or fraud, the first defendants would have no right to withhold the shares from the plaintiff. The question is, were the shares so obtained by Chunilal as to make the last proviso to the section applicable to the transaction under consideration in this suit? I am of opinion that the transaction does not fall within the proviso having regard to the language used therein. Chunilal Pitamber must be regarded as acting in this matter in two capacities and the best test would be to regard him as a separate individual in each of his capacities. Chunilal Pitamber, as the sole surviving executor under the Will of his testator Ambaram Motichand, was the lawful owner of the shares and was a person in lawful custody thereof as contemplated by the proviso to section 178. His possession of those shares was not mere custody but he was in *juridical possession* of these goods, such as is referred to by Sir Lawrence Jenkins in *Seager* v. *Hakma* (7). The shares belonged to his testator. This Court by the grant of probate clothed the executor with power and authority to deal with and dispose of all the property belonging to his testator's estate according to the provision of the Will. The Will clearly contemplates the sale of these shares for the purpose of utilising residue in charitable disbursements. Chunilal, as the sole surviving executor, was entitled at any moment to sell these shares or to dispose of them in any manner he liked. I have found, as a matter of fact, that he got these shares transferred to himself fraudulently with a view to misappropriate the shares themselves or their sale proceeds; and it is also found that sometime considerably after the transfer to himself in 1908 he pledged them with the first defendant Bank. Here we have, therefore, Chunilal the executor and Chunilal the pawnor doing certain acts. Under the proviso to section 178 of the Indian Contract Act, before the Bank's claim to hold the shares as security for their loans is defeated, it must be established that the shares had been obtained by Chunilal the pawnor from their lawful owner and custodian Chunilal the executor by means of an offence or fraud. As I read the proviso, the fraud or offence must be committed by the pawnor against the lawful owner or custodian who in this instance was the executor. Can it be pretended that Chunilal the executor was defrauded of his possession of the shares by Chunilal the pawnor? On the contrary it is perfectly clear that the lawful owner and custodian himself was the guilty party. He actively divested himself of the possession of these shares as executor of the estate and the pawnor had not to resort to any fraud or offence for the purpose of obtaining possession of those shares. The executor himself was the party who was guilty of fraud and it could not be said with any sense of show or reason that Chunilal Pitamber in his capacity as pawnor *had obtained possession* of these shares from the lawful owner and custodian the executor *by means of fraud or offence*.

Under these circumstances it is abundantly clear to my mind that the proviso to section 178 has no application to the transaction in question in the present suit and

(7) 2 Bom. L. R. 406.

that the first defendants, having acted in good faith and under circumstances which were not such as to raise any presumption whatever that the pawnor had been acting improperly, are entitled to retain possession of the shares as security for their loans made to the second defendant.

The only other point that requires to be discussed is whether the estate of Ambaram Motichand has a superior equitable title to that of the first defendants to these shares. When the learned counsel for the plaintiff was reading to me the case of *The Shropshire Union Railways and Canal Coy.* v. *Reg.* (1) in support of the contentions set out in para. 6 of his plaint, I tried to point out to him that the facts in that case were very distinguishable from the facts in the present case. Since the hearing came to a termination and I reserved judgment I have been able to lay my hands on a case in which almost the same disinction between *The Shropshire Union Railways and Canal Coys. case* (1) and this is very tersely pointed out by Mr. Justice Chitty. In *Lolyds Bank Limited* v. *Bullock* (8), Mr. Justice Chitty distinguishes the case of *The Shropshire Union Railways* (1) from the case he was trying, in these words: —

"In support of this argument the decision of the House of Lords in *Shropshire Union Railways and Canal Company* v. *Reg.* (1) was relied on. But that case is distinguishable. As between himself and the equitable owner, the trustee there had no authority whatever to deal with the trust property. Here the testator, the auther of the trust, had confided to Newbrook authority to sell the property and give a receipt for the purchase-money. Newbrook was acting within the scope of his authority. The essential part of the breach of trust was the giving of the receipt without, in fact, receiving the purchase-money, &c. ,&c."

In this case, too, it must be remembered that Ambaram Motichand, the testator, the original owner of the property and the author of the trust created in favour of charity, had confided to his executors the authority to sell the shares forming part of his estate. Chunilal, in selling the shares to himself, may have acted fraudulently, may have committed an offence, but he certainly was acting within the scope of his authority in selling those shares. Supposing instead of selling those shares to himself he had sold the shares outright to a *bona fide* purchaser who had paid proper value for the same and Chunilal had misappropriated the sale proceeds for his own purposes, could it possibly have been contended that the estate of Ambaram had a superior equitable title to that of the purchaser and could the plaintiff, as the Receiver of that estate, have successfully recovered those shares from the purchasers for value? To my mind it makes no difference whether the sale by the executor was to himself in the first instance and then later on the pledge of the same shares by himself to an innocent party. The position is exactly the same. The first defendant Bank stands in the position of a *bona fide* purchaser for value and I hold that as against the Bank the estate of Ambaram has not any superior equitable title to recover the shares without paying what is justly due to the Bank for the loans made to Chunilal on the security of these shares.

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There will be a decree for the plaintiff declaring that the twenty shares of the Textile Manufacturing Company now in possession of the first defendants, Ext, D in this case, formed a portion of the estate of Ambaram Motichand and that the plaintiff is entitled to redeem the said shares by paying to the first defendants Rs. 16,000 and interest due on the two loans of Rs. 8,000 each from the dates of their respective advances. The shares to be redeemed within a month. If not redeemed within that period the first defendants to be declared entitled to apply for a transfer of the shares to themselves or their nominee and take all necessary steps to realise their security. Interest on judgment after the period fixed for redemption to be at 6 per cent. per annum if the first defendants hold the shares for a longer period.

I do not think it is necessary to refer the matter to the Commissioner to take an account of the interest. I have no doubt parties will be able to ascertain the interest due on the loans which is to be calculated at 2 per cent. over the current rate of interest of the Bank of Bombay. The plain-

(8) (1896) 2 Ch. 192 at p. 197; 65 L. J. Ch. 680; 74 L. T. 687; 44 W. R. 633.

tiff will pay all the costs of the first defendants including costs reserved if any.

The second defendant to pay the plaintiff's costs of the suit limited to one day's hearing.

The second defendant also to pay all such costs of the suit as the plaintiff is ordered to pay to the first defendants.

Attorneys for the Plaintiff: Messrs. *Tyabjee Dayabhai & Co.*

Attorneys for the first Defendant: Messrs. *Little & Co.*

(s. c. 12 Bom. L. R. 881.)

BOMBAY HIGH COURT.

ORIGINAL CIVIL SUIT No. 606 OF 1908.

July 22, 1910.

Present:—Mr. Justice Beaman.

GAJANAN VINAYAK—PLAINTIFF

versus

WAMAN SHAMRAO—DEFENDANT.

Limitation Acts (XV of 1877, IX of 1908), s. 10 art. 123—Suit by legatee against executor—Suit for accounts—Trust—Amendment of the law of limitation—Its effect—Limitation law not always law of procedure.

A suit for accounts was brought by the legatee against the executors of a Will, the principal object of which was to be put in possession of a legacy. On behalf of the defendant it was pleaded that the plaintiff was not entitled to have accounts for more than six years before suit:

Held, that a suit of this kind must be restricted to the taking of accounts for six years before the date of suit. The case did not fall within section 10 of the Limitation Act, nor could the plaintiff take the advantage of article 123, Schedule I of the Limitation Act, so as to extend the taking of accounts for a period of twelve years.

If before the amendment of the law of limitation the defendants had acquired the right of immunity to render accounts for more than six years before suit, they could not be deprived of that right by any amendment in the law. of a later date.

The law of limitation is not always a law of procedure.

Mr. *F. S. Talyarkhan*, with Mr. *Setalvad*, for the Plaintiff.

Mr. *Jinnah*, with Mr. *Davar*, for the Defendants.

Judgment.—The only question is whether the plaintiff is entitled to have accounts for more than six years before suit, and the answer to that depends upon whether he comes within the meaning of section 10 of the Limitation Act.

First, it is to be considered whether the addition to section 10 of the Act in force when the suit was brought governs the conduct of this suit. I am referred in that connection to an old decision in *Reg.* v. *Dorabji Balabhai* (1), in which the Judges observe that the law of limitation being a law of procedure regulates all proceedings had under it. That is merely a general statement with reference to what was uppermost in the Judges' mind at the time, a case very different from this. I doubt in the first place whether it is strictly accurate to say that the law of limitation is always a law of procedure, that is to say, a purely adjective law, for, amongst its other consequences, it certainly has the creation of rights by prescription and if those rights have vested in individuals under one law of limitation, I do not suppose that it can be seriously argued that they can be devested by the introduction of a new law of limitation. In this connection I have also been referred to section 6 of the General Clauses Act, 1897, and upon general principles it seems to me that if before the amendment of the law of limitation the defendants had acquired the right of immunity to render accounts for more than six years before suit, they could not be deprived of that right by any amendment in the law of a later date.

Now, I come to the consideration of the main question, which is, whether confining ourselves to section 10 of the old Limitation Act, the plaintiff's case falls within its contemplation, and its provisions, therefore, entitle him to have the accounts opened from the beginning. If the plaintiff's case in every respect conformed with the requirements of section 10, that is to say, if there were admittedly a trust which was for a specific purpose, and if the plaintiff were admittedly following that trust property, then I confess I should have very great difficulty in adopting the view which seems to have prevailed in this Court that by merely framing his suit in the form of a suit for taking accounts he was excluded from the benefit of section 10. For none of the reasoning contained in the judgments of those learned Judges, whose decisions are the other way, convinces me to the contrary, that assuming that there is a trust for specific purpose and the trust property in the hands of the trustee is devoted to the performance of that trust, a suit for accounts at his hands is in one way, and a very necessary way,

(1) 11 B. H. C. R. 117.

following that property. This was the view which commended itself to Wilson, J. in the Calcutta High Court [*Hurro Coomaree Dossee* v. *Tarini Churn Bysack* (2)], a Judge of the highest distinction, and was later on adopted by Maclean, C. J. and two other Judges in *Nistarini Dassi* v. *Nundoo Lal Bose* (3). The reasoning of the later case is precisely that which I suggested during the consideration of the authorities collected in the recent decision of my brother Davar in *Ayesabai* v. *Ebrahim Haji Jacob* (4). As regards the particular decision of Davar, J., I have only to say that, in my opinion, it appears to be unassailably correct; but it also appears to me, notwithstanding Mr. Jinnah's efforts to persuade me to the contrary, that it is distinguishable from the present case. But my brother Davar has collected all the Bombay cases bearing upon this question, and some of those cases seem to go the length of holding that in no circumstances whatever if the suit takes the form of a suit for account can it be brought within the scope of section 10. It is, however, unnecessary for me to examine the reasoning upon which that conclusion is based or to throw any doubt upon it, because after hearing the arguments of the learned counsel for the plaintiff, it seems to me that his case does not in other material points conform with the requirements of section 10. This is a suit by the legatee against the executors of a Will, the principal object of which is to be put in possession of a legacy. It is true that the plaintiff has already received a great portion of that legacy, but he is not satisfied that he has received the whole of it. It was strenuously pressed upon me that in such circumstances an executor is not an express trustee within the meaning of section 10, nor can the plaintiff be said to be following up the trust property in his hands. Section 10 does not contain the words "express trustee," but speaks of a trust for a specific purpose; and so eminent a Judge as Sir Richard Garth in the cases of *Kherodemoney Dossee* v. *Doorgamoney Dossee* (5) and *Greender Chunder Ghose* v. *Mackintosh* (6), quite clearly stated and approved the distinction upon which the defendant relies. I myself think that the defendant's argument upon this head is correct and conclusive. Therefore, the case does not fall within section 10 of the Limitation Act.

Neither can the plaintiff take the advantage of article 123, Schedule I, of the Limitation Act, so as to extend the taking of accounts for a period of twelve years. If he relies on that article at all, he will be clearly time-barred, and the suit will have to be dismissed.

The result, then, is—(though I arrive at that result by a different way) in accord with the general current of the authorities in this Court—that a suit of this kind must be restricted to the taking of accounts for six years before the date of suit.

I, therefore, find that the plaintiff is entitled to take accounts for the six years next before the institution of the suit.

Reference to the Commissioner to take the accounts mentioned in the plaint and the written statement. The period restricted to six years before suit and, of course, thereafter to the end of the account.

The defendant asks me to make the plaintiff pay the costs of this argument. It appears to me that that is an utterly unwarrantable request. The point was not taken in the written statement and was fairly arguable. I shall certainly not make any such order. Costs and further directions reserved.

Attorneys for the Plaintiff: Messrs *Jehangir*, *Mehta* and *Shomji*.

Attorneys for the Defendants: Messrs. *Shamrao Minocheher* and *Hiralal*.

(2) 8 C. 766.
(3) 30 C. 369; 7 C. W. N. 353.
(4) 10 Bom. L. R. 117; 32 B. 364; 3 M. L. T. 379.
(5) 4 C. 455; 3 C. L. R. 315.
(6) 4 C. 897; 4 C. L. R. 193.

(s. c. 35 P. W. R. 1910, Cr.)

PUNJAB CHIEF COURT.

CRIMINAL REVISION No. 861 OF 1909.

December 18, 1909.

Present:—Mr. Justice Williams.

EMPEROR—PROSECUTOR—PETITIONER

versus

Lala SHIB DAS AND ANOTHER—ACCUSED—RESPONDENTS.

Companies Act (VI of 1882), ss. 74, 220 (b)—Regulations—Failure to file balance-sheet—Registrar only competent to prosecute—Power of High Court to interfere in a pending case—Revision (Criminal.)

Under the Regulations framed by the Local Government under section 220 *(b)* of Act VI of 1882, the Registrar is the only officer authorized for instituting and conducting all prosecutions under the Act, speci-

ally where the prosecutions are in connection with breach of the rules relating to submission of balance-sheets and other periodical returns. So a complaint under section 74 of the Indian Companies' Act VI of 1882 for wilful default in filing a balance-sheet, not brought by the Registrar but by a clerk of his office and counter-signed by the Public Prosecutor, is bad in law and not entertainable by a Criminal Court.

Where by any Law or Regulation a certain person is only authorized to complain about a particular offence, the proceedings of a Magistrate based on a complaint relating to that offence, made by any unauthorized person, are *ultra vires* and liable to be set aside on Revision by the High Court at any time during the pendency of the case.

Case reported by Major A. A. Irvine, Sessions Judge, Lahore Division, with his No. 711 of 10th July, 1909.

Facts.—"It is alleged that the above named petitioners and four others (1) The Hon'ble Mr. Harkishen Lal, (2) R. B. Jaikishen Das, (3) Lala Shankar Shah and (4) Doctor Mool Chand are the Directors of the Pioneer Jewellery Company, Limited Lahore, with Lala Shib Das as their Managing Agent. That the above named six Directors, notwithstanding several communications to the Managing Agent, wilfully failed to file the balance-sheet for the year 1907.

A question of jurisdiction having been raised by counsel for the defence, Mr. J. Addison, C. S., Assistant Commissioner, exercising the powers of a Magistrate of the 1st Class in the Lahore District, by order dated 25th March, 1909, decided that he had jurisdiction to dispose of the case."

Grounds.—"This petition for revision and petition No. 43 of 1909 (petitioner Lala Shib Das through Mr. Ganpat Rai) may be decided in one judgment. The only ground of petition No. 43 is that the case was not cognizable by a Criminal Court. In No. 44 that is also the main ground, but others are that there was no proper complaint before the Magistrate; and that there should be an enquiry by the Registrar, and not a wholesale prosecution of Directors.

The Magistrate has not yet gone into the merits, and it is obvious that the matters referred to in the last para. of ground 3, and ground 5 of Petition No. 44 are matters to be determined by whatever Court or person has to adjudicate on the merits.

We find that the complaint is one under section 74 of the Indian Companies Act of 1882: the complaint being brought on behalf of the Crown through Lala Janki Pershad, Clerk to the Registrar of Joint Stock Companies against six persons, two of whom are the present petitioners in the present petitions. The complaint is to the effect that the aforesaid six accused persons are Directors of a certain company, the petitioner Lala Shib Das being the Managing Agent of the said company and that in spite of various communications to the Managing Agent, the Directors have wilfully failed to file a balance-sheet for the year 1907. As I have already said, this Court has at present nothing to do with the merits of the case, and is not concerned with the conduct or responsibility of any one of the six Directors.

The written complaint bears the signatures of the Public Prosecutor and Lala Janki Pershad; the latter of whom has not signed his official designation but who is shown in the heading of the complaint to be Clerk to the Registrar of Joint Stock Companies.

As regards the first point whether a Criminal Court has power to try a case brought on a complaint under section 74 of the Companies Act my opinion is that it has that power. Section 74 prescribes a "penalty" of Rs. 1,000 for the wilful authorising or permitting by a Director or Manager of a "default" in filing a balance-sheet. Now section 252 of the Companies' Act concerns the cognizance of "offences" under the Act and both section 4 of the Criminal Procedure Code and section 3 of the General Clauses Act give practically the same definition of "offence" —it is, any "act or omission made punishable by any law for the time being in force." Three rulings have been cited me for petitioners, *Queen-Empress* v. *Ram Pal*(1); *Queen-Empress* v. *Kutrapa*(2); *A. Grey* v. *North-Western Railway Administration* (3); but all these rulings refer to cases under the Railways Act and in clause 4 of section 113 of the Railways Act special provision has been made for recovery of money *through* a Magistrate "as if it were a fine imposed by the Magistrate." This clearly shows that it is not for a Magistrate to *try* a case under that section; but that his assistance may be obtained to recover the money. It is clearly shown in rulings cited that there is no "offence" under section 113 of the Railways Act, and no "fine" though excess charge and fare may be recovered *as a fine*, *i.e.*, in the same way that a fine *inflicted* by a Magistrate is

(1) 20 A. 95.
(2) 18 B. 449.
(3) 13 P. R. 1891 Cr.

recoverable. Under the Companies Act the case is different. The latter portion of section 252, though it refers to a "penalty" obviously only prescribes summary trial of offences by Presidency Magistrates. In both portions of this section the word "offence" is used; and I cannot agree that because "imprisonment" is referred to in the first portion, that means that only offences punishable with imprisonment are triable by Criminal Courts. The first portion of that section means, in my opinion, that every description of offence under that Act can be tried by a first Class Magistrate, except those which must be tried by a Court of Sessions. It has been argued that the word "penalty" is used in certain sections of the Companies Act; and "offence" in others; and that "offence" is only used in conjunction with "imprisonment"; but, in my opinion, the definition of "offence" in the Criminal Procedure Code and General Clauses Act applies to the Companies' Act. Nowhere in that Act nor in the Regulations made under it can I find any power given to the Registrar to deal executively as to inflicting a "penalty" with cases under section 74; or, in fact to levy any fine or penalty at all *suo moto*. He has not the power given to the Railway under section 113 of the Railways Act. I, therefore, consider that a complaint made under section 74 of the Companies Act is cognizable by a Criminal Court."

"The next point is whether there was a proper complaint before the Magistrate in the present case. I have said that the written complaint is only signed by the Public Prosecutor and the Clerk of the Registrar of Joint Stock Companies. Petitioners' counsel have referred me on this point to section 186 of the Municipal Act, and to *Noor Din* v. *The Municipal Committee Lahore* (4) (which concerns a case under that Act). In order to come to a conclusion whether the complaint in the present case has been properly instituted, it is necessary to see section 220 of the Companies Act, and the Regulations made thereunder by the Local Government. Section 220 (*b*) empowers the Local Government to make regulations with respect to the duties to be performed by "Registrars, Assistant Registrar, Clerks and Servants." Before going into this question I applied to the office of the Registrar for a copy of the Regulations—these have been sent me; and I have been unable to discover any others. The regulations under section 220 (with respect to the duties to be performed by the Registrar) were promulgated in Punjab Government Notification No. 60, dated 22nd August 1883. Regulations 5 and 14 appear to me to apply to the point under discussion. Regulation 5 requires the Registrar to see that all returns are "duly and punctually furnished and the concluding words are that the Registrar shall be deemed the proper officer for instituting and conducting all prosecutions under the Act." Regulation 14 empowers the Registrar "to assign any of the duties prescribed under these rules to an Assistant Registrar where such an officer may be appointed by Government," and allows the Registrar to "distribute the *office work* to the Assistant Registrar; clerks and servants in such manner as he may think fit." I have underlined the words "office work" for the reason that, considered together with Regulation 5, I see nothing empowering the Registrar to delegate the duty of either instituting or conducting prosecutions under the Companies Act (specially those concerned with the non-submission of returns requires to be furnished under the Act) to his clerk. For these reasons I consider that the Magistrate has not had a proper complaint before him."

"I do not propose to say much about the remaining ground for revision that the Registrar should have instituted enquiries and not have directed a wholesale prosecution of six directors. Regulation 13, certainly directs the Registrar to institute "such enquiries and investigations at the offices of registered Companies, or otherwise, as shall be necessary to obtain information or evidence respecting defaults or any infractions of the law, made by such Companies in complying with any of the provisions of the Act." However, the complaint sets forth that the Managing Agent was "communicated with several times' regarding the furnishing of the balance-sheet for 1907, without result; and it is urged by the Public Prosecutor that correspondence took place (to no purpose) before it was decided to institute a complaint. The merits have not yet been gone into; and it still remains to be seen what enquiry was made; and what were the responsibilities of each director (one of whom is said to have been in England); and so forth. But, at present, the complaint must be taken as it

(4) 3 P. R. 1892 Cr.

stands; and I am not prepared to say that what has so far been done is contrary to Regulation 13. If the Registrar has endeavoured to obtain the balance-sheet; and has been unable to get good reasons for its non-submission at due date, I should say that he has done all that he is required to do before instituting a prosecution."

"However, I have arrived at the opinion that there was not a proper complaint before the Magistrate; and, that being my opinion; I accept the two petitions on that ground only and hereby forward the proceedings to the Chief Court with the recommendation that the Magistrate's proceedings be set aside leaving the Registrar, if so advised, to claim to have a fresh trial upon a complaint properly instituted. I understand that the opinion of the Legal Remembrancer was taken before institution of the present complaint; but no opinion has been laid before me; and the only Regulations which I have been able to obtain are those to which I have referred in this judgment."

Order—After hearing the learned Legal Remembrancer I am of opinion that the view taken by the learned Sessions Judge is that under the Local Government's regulations the case required to be instituted by the Registrar and that consequently there was no proper complaint before the Magistrate. It is, of course, true that there is no express enactment resembling section 186 of the Municipal Act and peremptorily forbidding the institution of cases under the Companies Act by any one except the Registrar; but we have a definite injunction of the Local Government (which is competent to issue such an injunction under the terms of section 220(*b*) of that Act) to the effect that the Registrar shall be deemed the proper officer for instituting and conducting all prosecutions under the Act and in accordance with the general canons of interpretation *expressio unius personæ est exclusio alterius*—I, accordingly, hold that the Magistrate's proceedings have so far been *ultra vires* and set them aside.

Revision allowed.

(s. c. 36 P. W. R. 1910 Cr.)

PUNJAB CHIEF COURT.

CRIMINAL APPEAL No. 246 OF 1910.

July 8, 1910.

Present:—Mr. Justice Shah Din and Mr. Justice Chevis.

AMAR DAS—CONVICT—APPELLANT

versus

EMPEROR—PROSECUTOR—RESPONDENT.

Evidence—Accomplice—Corroboration—Murder—Evidence Act (I of 1872), ss. 114, Illustration (b), 133—Discrepancies between the statements of witnesses before the Police and Court.

It is an established principle of Law and practice that no accused can be convicted on the bare testimony of an accomplice unless it has been corroborated by independent reliable evidence in material particulars directly connecting the accused with the commission of the crime. So where material discrepancies occur between the statements of the corroborating witnesses before the Police and their depositions in the Court of inquiry or trial, there is no corroboration and consequently the prosecution must fail.

Appeal from the order of H. A. Rose, Esquire, Sessions Judge, Ambala Division, dated 23rd March, 1910, convicting the appellant.

Lala *Hukam Chand*, for the Appellant.

Mr. *Broadway*, for the Respondent.

Judgment.—The appellant Amar Das has been convicted by the Sessions Judge, Ambala, of having taken part in the double murder of Bawa Harnam Das, *Gharibdasi*, and Jaimal Das, *Jat*, on the night of the 15/16th June, 1909 at the *Dera* of the *Sadhus* at *mauza* Kaliana, *Tahsil* Thanesar, and has been sentenced to death.

The conviction is based upon the evidence of the approver, Thakar Das, a *Gharibdasi*, to whom pardon was given under section 337, Criminal Procedure Code, and who, according to the Sessions Judge, has made a substantially true disclosure of the whole circumstances within his knowledge relative to the murders in question. Thakar Das states that the murders were committed by seven persons, namely, by Amar Das, appellant, Rahim, Dewa Singh, Narain Singh, Chhotu, Sewa Das and Thakar Das himself. In the view that we take of the case, it is unnecessary to set out at any length the evidence of the approver. The question in this case, as in similar cases where the conviction of an accused person is based upon the evidence of an accomplice, is whether the approver's testimony has been corroborated in material particulars so far as the alleged participation of the appellant, Amar Das, in the murders of Harnam Das

and Jaimal Das is concerned. The learned Sessions Judge is of opinion that it has been so corroborated, but after hearing arguments on both sides and examining the record and testing the prosecution evidence by reference to the police-papers, we are constrained to differ from the learned Judge on this point. The Assistant Legal Remembrancer, who appears for the Crown, frankly admits that unless the evidence of Thakar Das is corroborated by independent testimony as to the identity of Amar Das as one of the muderers, he must be acquitted, and it is not denied that to establish such identity the presence of Amar Das at the *Dera* at Kaliana on the night in question must be proved. On this point, the Sessions Judge relies upon the evidence of *Musammat* Anar Devi, widow of Bawa Harnam Das, deceased, who states that she recognized Amar Das, appellant, as one of the seven persons who killed her husband and Jaimal Das on the night of the 15th June. She says that she did not recognize any of the other murderers. The circumstances, under which the alleged identification took place, will be gathered from the following extract from her evidence:—

"On the night of the murders in mid-*Harh* last year at night 10 or 11 P. M." she says, "I was asleep in my *sehn*.....There is only a wall between my house and the *Sadhu's Dera*. I heard sounds of knocking and cries of pain in the *Dera*. I woke and set up and listened. Then I got up on the roof of my house by the ladder. Thence I called out to Jaimal Das several times. I got no reply. I looked through the wall. There was a lantern. I saw three men standing round the cot of Harnam Das, and four standing round that of Jaimal Das. As I looked, seeing me, one man struck the lantern with a *lathi*. That was Amar Das.....When I called out, the murderers began to run and I began to climb the wall to reach the deceased. Amar Das, accused, said "Drag her too and kill her"; but a man in front of her said, "come along, the villagers have come."

In cross-examination she says, "I recognized Amar Das only, no one else."

A reference to the police *zimnis* shows that *Musammat* Anar Devi was examined by the police on the 16th of June at 11 A. M., and in the course of her statement she said, "There was no light of lantern. I identified Amar Das and Sukh Das *sadhus*, going away. Other people (that is to say, the other accused), had gone before I reached the place. I identified both these *sadhus* by their voices." Amar Das said, "*Kam kar do iska bhi.*" Sukh Das, said, "*Nath ao* (run away)."

In the face of this statement before the police, it is difficult to believe the evidence of *Musammat* Anar Devi as given in the Sessions Court. Before the police she said she had identified both Amar Das and Sukh Das by their voices, and that there was no lantern there; before the Sessions Judge she professed to have identified only Amar Das and none else, and stated that Amar Das struck the lantern with the *lathi*. The discrepancy is too material to be lightly passed over, and we cannot, therefore, place much reliance upon her testimony in the Sessions Court.

In connection with the question of the alleged identification of the appellant, the evidence of Lachhman Das is of some importance. This young man, who is a *chela* of Harnam Das, deceased, was examined as a witness for the prosecution by the Committing Magistrate, but as his attendance could not, for some reason, be procured before the Sessions Judge, his statement before the Magistrate has been treated as relevant evidence in the Session's trial under section 33 of the Evidence Act. According to the prosecution, this witness was sleeping on the night of the occurrence in the *chaubara* through which the murderers passed on to where Harnam Das and Jaimal Das were sleeping. He says that after the murder he recognized Amar Das by his voice, as he was going back through the *chaubara*. The *zimnis*, however, show that when Lachhman Das was examined by the police on the 16th of June, he stated that on the night in question he awoke and saw five or six men jumping from the window of the *chaubara*, that one of these men was Sukh Das, whom he identified by his voice, as he was saying *nath ao nath ao* (run away). He did not mention Amar Das before the police at all, and yet before the Committing Magistrate he substitutes him for Sukh Das, and says that he recognized Amar Das by his voice. The fact that both *Musammat* Anar Devi and Lachhman Das, one of them the widow of the deceased and the other his *chela*, single out...Amar Das, appellant, as the one culprit whom they had identified out of the gang of seven murderers coupled with the fact

that Amar Das claims to be the *Gurbhai* of Harnam Das and would as such set up a title to the *gaddi* of Kaliana *Dera*, naturally arouses suspicion as to the truth of what they (*Musammat* Anar Devi and Lachhman Das) say as regards the alleged participation of Amar Das in the murder of Harnam Das; and in view of the discrepancies referred to above, which have not been attempted to be explained away by the learned Assistant Legal Remembrancer, we are not prepared to believe their evidence.

The evidence of Lachhman Das has not been referred to or relied upon by the Sessions Judge, and the only piece of corroborative evidence in support of the approver's testimony which according to him, serves to differentiate the case of Amar Das, appellant, from that of the other accused persons, who have been acquitted by him, is the evidence of *Musammat* Anar Devi as regards the identification of Amar Das at the time of murder. This evidence we are not prepared to believe, and, therefore, the approver's testimony stands uncorroborated as regards the identity of Amar Das just as it has been held by the Sessions Judge to be uncorroborated as regards the other accused person. In accordance with the well-known principle of criminal law on this point, it would, we think, be unsafe to convict Amar Das of the murder of Harnam Das, deceased, on the uncorroborated testimony of the approver; and accordingly we accept this appeal and acquit him.

Appeal accepted.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 1306 OF 1907.

September 21, 1910.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Krishnaswami Aiyar.

DEVULAPALLI KAMESWARA SASTRY AND OTHERS—PLAINTIFFS—APPELLANTS

versus

POLAVARAPU VEERACHARLU—DEFENDANT—RESPONDENT.

Hindu Law—Joint family—Debt—Legal necessity—Marriage expenses of a son — Marriage, obligatory character of—Samskara.

The marriage of a junior member of a co-parcenary body is a family purpose. Where it is reasonably necessary on the part of a prudent manager to borrow money for expenditure on such marriage, the transaction will bind the co-parceners.

A debt borrowed for defraying the expenses of the marriage of a son is recoverable from the family property as having been incurred for a family purpose in case of necessity. *Mahadeva Pandia* v. *Rama Narayana Pandia*, 13 M. L. J. 75; *Saravana Tevan* v. *Muttayi Ammal*, 6 M. H. C. R. 371; *Gharibullah* v. *Khalak Singh*, 25 A. 407 ; 7 C. W. N. 681 ; 5 Bom. L. R. 478 ; 30 I. A. 165 (P. C.); followed.

Govindarazulu Narasimham v. *Devarabhotla Venkatanarasayya*, 27 M. 206, dissented from.

Marriage is a *Samskara* or initiatory ceremony amongst Sudras and as such it ought to be performed in their case.

An entry into the order of house-holder is obligatory on all the twice-born. Marriage is a fixed alternative, that is, compulsory when certain conditions exist, and not an alternative to be chosen according to pleasure. *Govindarazulu Narasimham* v. *Devarabhotla Venkatanarasayya*, 27 M. 206, dissented from.

Second appeal against the decree of the Subordinate Judge's Court of Cocanada, in Appeal Suit No. 146 of 1906, presented against the decree of the Court of the District Munsif of Peddapur, in Original Suit No. 139 of 1906.

Judgment.

Abdur Rahim, J.—I entirely agree in the conclusion reached by my brother Krishnaswami Aiyar in the learned and instructive judgment which he is about to read. I have nothing to add. The decree of the Subordinate Judge will be set aside as regards the 3rd defendant and that of the District Munsif will be restored. There will be no costs.

Krishnaswami Aiyar, J.—This second appeal has been preferred against the decree of the Subordinate Judge disallowing the plaintiffs' claim against the 3rd defendant's share in the mortgaged property. The mortgage was executed by the 1st defendant, the father, and the 2nd defendant, the adult son, while the 3rd defendant a minor was represented by the father, who also signed the document as his guardian. The money was borrowed for the marriage expenses of the 2nd defendant. The defendants have been dealt with as Sudras in this case, and no question has been raised as regards the correctness of that view. It is contended that the Subordinate Judge is wrong in holding that the marriage expenses of the 2nd defendant are not under the Hindu Law a justifiable necessity for the borrowing of money and the execution of the mortgage. The powers of a Hindu manager of family property have been expounded in the judgment of Lord Justice Knight Bruce in *Hunoomanpersaud Panday* v. *Musammat Babooee Munraj Koonweree* (1). At page 423,

(1) 6 M. I. A. 393; 18 W. R. 81 (NOTE.)

his Lordship says: "The power of the manager for an infant heir to charge an estate not his own, is, under the Hindu Law, a limited and qualified power. It can only be exercised rightly in a case of need, or for the benefit of the estate." The need above referred to is afterwards spoken of at page 424 as "a sufficient and reasonably credited necessity." *Bona fide* and reasonable enquiry may be sufficient to validate the charge though the actual necessity is not made out. We may at once dismiss from consideration, so far as the present case is concerned, the justification of benefit to the estate. In the case of the father, the discharge of an antecedent debt is in addition a sufficient ground to justify alienation. As regards the widow, who has succeeded to her husband's estate, her power to charge it so as to bind her reversioners may extend to loans contracted for the performance of religious ceremonies or pilgrimages for the benefit of her husband's soul. As the present is not a case of an antecedent debt, the validity of the mortgage as regards the 3rd defendant's share must be tested with reference to the consideration whether it was a case of need. In *Suraj Bunsi Koer* v. *Sheo Proshad Singh* (2), it was held that the alienation would be valid if it was made by the managing member of the family "for legitimate family purposes." See page 101. The need or "the reasonably credited necessity" spoken of in *Hunooman Persaud's case* (1) has been paraphrased into legitimate family purpose. Necessity, therefore, is not to be understood in the sense of what is absolutely indispensable but what according to the notions of a Hindu family would be regarded as reasonable and proper. Speaking of the cryptic phrase "legal necessity," Golapchandra Sarcar Sastri in his Hindu Law, page 210 observes: "The expression *legal necessity* is very often used, to signify the causes for which, or the circumstances under which, a single member of a joint family, or a like person, having a limited interest in property, is authorised to transfer it so as to pass to the transferee a right to the entire property. It comprises maintenance and support of the family, preservation of the family estate, management of the family business, if any, performance of necessary religious rites such as marriage and the like initiatory ceremonies, exequial rites and *Sraddha* ceremony,—and the payment of debts contracted for the above purposes." In the Tagore Lectures for 1884-85, Bhattacharyya says at page 488: "Legal necessity is of various forms. All the indispensable religious ceremonies, the sacraments, such as marriage and the investiture with the sacred thread, the obsequies, the cremation, the periodical oblations to the manes, the ceremonies customary in the family, the subsistence of the family, the education of the younger members, the payment of the ancestral debts, the giving of presents at particular seasons and on special occasions to the relatives,—these and a thousand other causes of expenditure are constantly cropping up in a fairly prosperous Hindu joint family. All these are, in the strict sense of the word, lawful necessity." In *Babaji Mahaduji* v. *Krishnaji Devji* (3), where a sum of money was borrowed to buy a stock of buffaloes with which to resume the business of a milkman, it was held that the debt was contracted to put the father in the way of earning a maintenance and, therefore, under the pressure of family necessity. Mr. Justice West observes at page 669:—"Family necessity is an expression that must receive a reasonable construction, and the head of the family and those dealing with him must, in the interest of the family itself, be supported in transactions which, though in themselves diminishing the estate, yet prevent or tend to prevent still greater losses. A reasonable latitude, too, must be allowed for the exercise of a manager's judgment, especially in the case of a father, though this must not be extended so as to free the person dealing with him from the need of all precaution, where a minor son has an interest in the property." Judged by these principles, it is first of all difficult to suppose that the marriage of the 2nd defendant was not a legitimate family purpose. I put it to the respondent's Vakil whether he contended that having regard to the age of the 2nd defendant at the time of the marriage, it was not a purpose for which the father could legitimately incur expenditure or contract a loan. He disclaimed any intention of resting his case on that ground. Dismissing, therefore, from consideration any question of propriety based on the ground of age, we are confronted with the broad question whether the father was justified in bor-

(2) 6 I. A. 88; 5 C. 184; 4 C. L. R. 226.

(3) 2 B. 666.

rowing money for the marriage of his son while the income of his property was insufficient to meet the expenditure. In *Mahadeva Pandia* v. *Rama Narayana Pandia* (4), which was a case of partition between uncle and nephews, it was held that the nephews were entitled to deduct from the properties to be divided "the cost of the marriages of two of them as a legitimate charge on the family funds." In *Saravana Tevan* v. *Muttayi Ammal* (5), which was a suit to enforce a mortgage by the manager of the family, it was held that the loan incurred to defray the expenses of the marriage of a co-parcener was for a family purpose and showed a reasonable necessity to justify the alienation. See pages 382, 383 and 384. In *Gharibullah* v. *Khalak Singh* (6), the Privy Council spoke of a loan contracted for the marriage of a junior member as for a family purpose and as a case of necessity and upheld the alienation as binding upon the family. The gift of a small portion of family property by the father or by the widowed mother at the time of a daughter's marriage without the consent of the sons which has been upheld as valid cannot be justified on the ground of necessity in a strict sense, *Ramasami Ayyar* v. *Vengidusami Ayyar* (7) and *Kudutamma* v. *Narasimhacharyulu* (8). These cases seem to be sufficient authority for holding that in cases the debt is contracted for a family purpose (and the marriage of a junior member of a co-parcenery is a family purpose) and it is reasonably necessary on the part of a prudent manager to borrow the money for such expenditure, the transaction will bind the co-parceners. But the Subordinate Judge in the Court below and the learned Vakil for the respondent have laid great stress on the decision in *Govindarazulu Narasimham* v. *Devarabhotla Venkatanarasayya* (9), where the learned Chief Justice and Mr. Justice Moore refused to uphold a sale of family lands by the father to defray the marriage expenses of one of his sons on the ground that there was no moral or religious obligation to get a son married. That case, no doubt, which purports to follow some observations of Mr. Justice Muthusami Aiyar in *Ponnappa Pillai* v. *Pappuvayyangar* (10), supports the respondent's contention. The parties to that case were Brahmins. It was held that as failure to perform marriage did not entail a forfeiture of caste, it was not a necessary ceremony or *Samskara* in the case of a Brahmin and the expenditure incurred for the performance of such a ceremony was in consequence no justification for the incurring of a debt. None of the cases to which I have referred appears to have been cited. There is no reference to them in the judgment. The decision itself has been very ably criticised and dissented from by Mr. Justice Chandavarkar with the concurrence of Knight, J., in *Sundrabai Javji Dagda Pardeshi* v. *Shivnarayana Ridkarna* (11). But for the fact that the defendants in the present case are Sudras to whom part of the reasoning in that case has no application, I should have felt inclined to ask the Full Bench to reconsider the decision in *Govindarazulu Narasimham* v. *Devarabhotla Venkatanarasayya* (9). That case proceeds upon the view of Mr. Justice Muthusami Aiyar that pl. 29 of Chapter I, section 1 of the *Mitakshara*, is confined to such ceremonies as if unperformed would entail a forfeiture of caste or status and upon the assumption that marriage in the case of a male amongst Brahmins is not included in the initiatory ceremonies (*Samskara*). Reliance is also placed upon a text of Narada (quoted and interpreted in the Smrithi Chandrika), Chaptor XIII, pl. 33 and 34. Before examining this decision further, it is necessary to point out that amongst Sudras marriage is an initiatory ceremony or *Samskara* and perhaps the most important of all the *Samskaras* performed for them. In commenting on the 2nd hemistich of verse 10 of the *Acharadhyaya of Yagnavalkya* rendered by Mandlik thus "their (of the twice-born) ceremonies from conception to the funeral are performed with *Mantras*," the great Commentator Apararka observes "that for the Sudra the *Samskaras* are without *Mantras*." He adds on the authority of the Brahmapurana:— "But the Sudra shall have the marriage *Samskara* alone. By the use of the word 'alone', either the absence of the *Mantras* or of the previous *Samskaras* is meant. Then

(4) 13 M. L. J. 75
(5) 6 M. H. C. R. 371.
(6) 25 A. 407; 7 C. W. N. 681; 5 Bom. L. R. 478; 30 I. A. 165 (P. C.).
(7) 22 M. 113.
(8) 17 M. L. J. 528.
(9) 27 M. 206.
(10) 4 M. 1.
(11) 32 B. 81; 9 Bom. L. R. 1366; 3 M. L. T. 44.

there is the alternative for them notwithstanding the injunction." Commenting on the effect of the *Samskaras* dealt with in the first half of verse 13 of Yagnavalkya rendered by Mandlik thus:—"In this manner, the sin produced from the seed and the womb is destroyed" (Mandlik page 161), Apararka says this is intended to apply to the four castes, not merely to the twice-born. In the *Samskara* Mayukha of Nilakanta, the great Bombay authority, the author commenting on the second half of verse 10 of Yagnavalkya already quoted observes:—"By reason of the statement that to them (the twice-born) the ceremonies (from conception to death) are with *Mantras*, it is to be inferred that to the Sudra they are without *Mantras*. Amongst them as he had no study of the *Vedas* he has not the ceremonies which are incident to it like the *Upanayana* and the *Vedavratas*." The *Samskara* Bhaskara which is a work of authority on initiatory ceremonies says in leaf 2 (Bombay Sanskit Edition, Venkateswara Press):—"The sixteen *Samskaras* beginning with *Garbadhanam* are for all. They are accompanied by *Mantras* only for the twice-born." In the *Samskara* Ratnamala, Volume 39, Anandasrama Series, the author commenting on the same sloka of Yagnavalkya observes:—"It is to be inferred that to the Sudra the ceremonies from *Garbadhanam* to the last rites are without *Mantras*." He adds:—"Yama says after stating the *Samskara*, 'but the Sudra should have the *Samskaras* done thus without *Mantra*. Among them those (*Samskaras*) have no application like *Upanayana* and *Kandavratas* which are incident to Vedic study as he has no Vedic study' &c....." Banerjee in his Tagore Lectures, First Edition, page 31, speaks of marriage as the only sacrament for women and Sudras. See also West and Buhler, page 1064, Note (*b*) citing Colebrook's Digest. The foregoing texts are sufficient authority for the position that marriage is a *Samskara* or initiatory ceremony amongst Sudras and as such it ought to be performed in their case. What I have said so far is sufficient for the disposal of this case. But as the decision in *Govindarazulu Narasimham* v. *Davarbhotla Venkatanaearayya* (9) deals with an issue of great importance as regards the position of the marriage ceremony in the case of the Hindus, it is necessary to examine the principles on which the obligatory character of the marriage ceremony rests. There are two paths laid down for the Hindu in the sacred texts, (See Mahadeva Sastri's *Bhagavat Gita* with Sankara's Commentary page 2). One is the path of work or attachment to the things of this world and the other the path of non-attachment or renunciation. The four *asramas* or stages of life are prescribed for the regenerate classes or at all events for the Brahmin. The journey from stage to stage in regular order of succession is contemplated as progress along the path of wordly work. And every Hindu of the twice-born classes has to pass from each stage to the next and until he developes complete non-attachment in the last, the stage of the ascetic, when he prepares himself for final liberation. It is true that it is laid down in the Surtis (see the text of *Jabala Upanishad*), Volume 29, *Anandasrama Series*, pages 242 and 243, that if he has conquered his passions and cultivated the feeling of non-attachment, he may pass direct without going through the intermediate stages to the *Asrama* of the Sanyasin (See Medhadhithi's Commentaries on Verse 36 of Manu Chapter VI and also the *Mitakshara* on Verses 56 and 57 of the *Prayaschittadhyaya* of *Yagnavalkya*, page 309 of the Sanskrit Edition). But except for him who has thus qualified for entry direct that into other *Asramas* than that of house-holder, the stage of house-holder is practically compulsory. The twice-born Hindu is not to be a student as long as he chooses. He may remain a *Naishtika Brahmachari* devoted to life-long studentship under strict conditions. *Slokas* 49 and 50 of *Yagnavalkya*, *Acharadhyaya*, have been translated as follows by Mandlik: "The *Naishtika Brahmacharin* is to live near the *Acharya*; in his absence near his son or his wife, or his fire. In this manner the *Brahmacharin* using his body, and subduing his senses, attains the world of *Brahma*, and is not born again." I translate the commentary of the *Mitakshara*, on these verses as follows:—In this manner, *i. e.*, in the manner stated, *Naishtika i. e.*, one who conducts himself till death, he shall live all his life near his preceptor. He shall not be his own master after the period of receiving instruction in the *Veda*. In his absence, near his son; in the absence of the latter near his wife, in her absence near the fire, disciplining his body in the manner stated, his senses being controlled, the *Brahmachari*

attains the world of *Brahma*, *i.e.*, achieves deathlessness. Never is he born here again." Apararka in his Commentary on the same verses at pages 71 and 72 of Volume 46 of the *Anandasrama* Series enters into a more elaborate explanation of the two classes of *Brahmacharis*, *Upakurvana* and *Naishtika*, the former being one who passes to the stage of *Grahastha* in the ordinary course of life and the latter being one who stays with his preceptor for life under rigid rules of self-discipline. In Chapter II of *Manu*, Verses 243 to 249 deal with the *Naishtika Brahmachari*. It is enough to quote the first of those verses in order to indicate that the life of the *Naishtika* is a life of discipline under the teacher for life to qualify for liberation. Verse 243 (Buhler's translation) says:—"But if a student desires to pass his whole life in the teacher's house, he must diligently serve him, until he is freed from this body". But to the *Upakurvana* or a student who remunerates his teacher to pass on with his leave to the next stage of life, Manu has the following injunction. Chapter III Verse 2 says: "A student who has studied in due order the three *Vedas*, or two, or even one only, without breaking the rules of studentship, *shall* enter the order of house-holders". Verse 4 says: "Having bathed, with the permission of his teacher, and performed according to the rule the *Samavarthanam* (the rite on returning home), a twice-born man shall marry a wife of equal caste who is endowed with auspicious bodily marks". The house-holder's entry into the next stage of *Vanaprastha* or the hermit in the forest is thus enjoined. *Manu*, Chapter VI, Verse (1) says:—"A twice-born *Snataka*, who has thus lived according to the law in the order of house-holders, may, taking a firm resolution and keeping his organs in subjection, dwell in the forest, duly (observing the rules given below)". The following *Slokas* relate to the entry into the fourth stage, namely, that of the ascetic, Chapter VI, Verses 33, 34, 36 and 37:—"But having thus passed the third part of (a man's natural term of) life in the forest, he may live as an ascetic during the fourth part of his existence, after abandoning all attachment to wordly objects. He, who after passing from order to order, after offering sacrifices and subduing his senses, becomes tired with (giving) alms and offerings of food, an ascetic gains bliss after death. Having studied the *Vedas* in accordance with the rule, having begot sons according to the sacred law, and having offered sacrifices according to his ability, he may direct his mind to (the attainment of) final liberation. A twice-born man who seeks final liberation, without having studied the *Vedas*, without having begotten sons, and without having offered sacrifices, sinks downwards." The obligatory character of marriage or entry into the order of house-holder is thus propounded by Manu with great emphasis. Verses 51 and 52 of *Yagnavalkya*, *Acharadhyaya* and also Verses 45, 56 and 57 of the *Prayaschittadhaya*, (see pages 167, 249 and 250 of Mandlik) enforce the same view. Both the Commentators of Manu and the Commentators of *Yagnavalkya* have come to the conclusion, after a full discussion of Sruti and Smriti texts, that the stage of house-holder is obligatory on all the twice-born. But to those who have pursued the path of non-attachment, *Naishtika Brahmacharya* or perpetual studentship or entry from studentship into the stage of the hermit or ascetic direct is open. Some indeed have maintained that there is no warrant for the *asramas* of hermit and ascetic and that the stage of house-holder is the only one in which a man is at liberty to pass his life. The text of *Gautama*, Sacred Books of the East Vol. II, Verse 36 at page 193, supports that view—"But the venerable teacher (prescribes) one order only, because the order of house-holders is explicitly prescribed (in the *Vedas*)." And, in Verse I, he expresses it as the opinion of "some" that "he (who has studied the *Veda*) may make his choice (which) among the orders (he is going to enter)." *Gautama's* view is, however, rejected by Medhathiti and Vignaneswara. But that rejection is not to be understood as a sanction to each man to follow which order he likes or to be in no order at all. Marriage is *a Vyavasthitha Vikalpa* or fixed alternative, *i. e.*, compulsory when certain conditions exist (see *Jaiminiya Nyayamala* Chapter 12, Pada 4, Adhikarna 7) and not an *Aichchika Vikalpa* or alternative to be chosen according to pleasure (*Jaiminiya Nyayamala*, Chapter 12, Pada 3, Adhikarna 4). Except to the man who pursues the path of non-attachment, to all others the order of a house-holder is a necessary stage in the journey of life A person is not justified in being in none of the *Asrams*. *Daksha* (Manmathanath Dutt's

translation page 434) says :—"A twice-born person should not live even for a day without following any order. If he lives without following an order, he is required to perform a penitential rite." See the Sanskrit text in Volume 48, *Anandasrama* Series, page 72. *Apararka* (*Anandasrama* Series, Volume 46) relies on the same text of *Daksha*. He further adds on the authority of a text whose author is not named, "a man is not fit for *Karma*, O, King, without a wife whether he is a Brahman, Kshathria, Vaisya or Sudra. The wife is the chief factor for men in the attainment of *Dharma*, *Artha* and *Kama*", which are three out of the four ends of life, the last being final liberation. The stage of the house-holder is extolled by Gautama in Verse 3 of Chapter III, page 190, Sacred Books of the East, Vol II. "The house-holder is the source of these, (the four orders) because the others do not produce offspring." Manu expresses the same view. He says in *Sloka* 78, Chapter III: "Because men of the three (other) orders are daily supported by the house-holder with gifts of sacred knowledge and food, therefore, (the order of) house-holders is the most excellent order." In Chapter VI again he returns to the same theme. Verse 87 runs: "The student, the house-holder, the hermit, and the ascetic, these (constitute) four separate orders, which all spring from (the order of) house-holders". Verse 88: "But all (or) even (any of) these orders, assumed successively in accordance with the Institutes (of the sacred law), lead the Brahmana who acts by the preceding (rules) to the highest state." Verse 89: "And in accordance with the precepts of the *Veda* and of the *Smriti*, the house-keeper is declared to be superior to all of them; for he supports the other three" (Buhler's translation.)

There is again a text of the *Yajurveda* which is referred to by the commentators on *Manu* and *Yagnavalkya* and which is to the following effect.—That a person is born with three debts, one of which is to the *pitris* and that debt is discharged by the begetting of offspring. Manu refers to the same rule in Chapter VI Verses 35 and 94. Verse 94 says: "A twice-born man who, with collected mind, follows the ten-fold law and has paid his (three) debts, may, after learning the Vedanta according to the prescribed rule, become an ascetic." Both Medhathiti and Vignaneswara quote the Vedic text in their commentaries on Manu and Yagnavalkya to enforce the view that the stage of house-holder is compulsory to all who have not attained to the level of non-attachment which fits them for perpetual studentship or the stages of hermit and ascetic.

Passing now to the grounds of the decision in *Govindarazulu Narasimham* v. *Devarabhotla Venkatanarasayya* (9), the first that invites our attention is the statement "nowhere is marriage in the case of a male included in the initiatory ceremonies." Having regard to the numerous statements in authoritative works on the *Samskaras* that marriage is an essential *Samskara*, it is perfectly plain the learned pleaders who argued the case failed to draw the attention of the learned Judges to such texts. Mr. Mayne says: "A Hindu marriage is the performance of a religious duty," Hindu Law, page 108. Banerjee says in his Tagore Lectures, First Edition, page 30:—"It is regarded as one of the ten *Samskaras* necessary for regeneration of men of the twice-born classes." West and Buhler say [page 873 note (*f*)]:—"Marriage is a *Samskara* that is strongly enjoined." The *Samskara* Mayukha, the *Samskara* Bhaskara and the *Samskara* Ratnamala, all of them authoritative treatises on the *Samskaras* but none of which has yet been translated into English, deal exhaustively with the *Samskaras*. Marriage is there shown by them to be among the most important. See the *Samskara* Mayukha, leaf 6, *Samskara* Bhaskara leaf 2, and the *Samskara* Ratnamala pages 2—5, *Anandasrama* Series, Volume 39. These works show that according to *Gautama*, the *Samskaras* are forty of which marriage is one. According to Angiras, they are twenty-five including marriage. According to Asvalayana and others they are sixteen and marriage is among the number. The Samskara Ratnamal quotes the sages in full and points out at page 6 the fruit of the several *Samskaras*. As regards marriage, "the fruit of the *Samskara* is stated to be the discharge of the debts to the Gods and the *Pitris*." The learned Chief Justice in *Govindarazulu Narasimham* v. *Devarabhotla Venkatanarasayya* (9), refers to the opinion of Colebrooke at page 301 of Volume II of Jagannadha's Digest and also to the note in Stokes, H. L. Books, at page 398, and observes: "We cannot find that Mr. Colebrooke

had any sufficient authority for including marriage among the ceremonies necessary to perfect the class of a twice-born man." This statement would, no doubt, be correct if it was intended to mean that in order to become a twice-born person, marriage is not a necessary condition. But Mr. Colebrooke does not say, and it is not necessary for the purpose of establishing the obligatory character of marriage to say it, that marriage is a necessary condition to make a person twice-born. All that he says is that marriage is among the obligatory *Samskaras*. The eight ceremonies or *Samskaras*, he refers to, are also those that are prescribed for girls as made without *Mantras*. See leaf 2, *Samskara* Bhaskara. He includes marriage as an additional *Samskara* on the authority of Jagannadha himself who speaks of ten *Samskaras* at page 295 of the Digest. There is also another reason for separating marriage from the *Samskaras* that precede it, for as pointed out at page 300 of the Digest, it is not a *Samskara* which a father does for the sons as he does in the case of the preceding *Samskaras* but one in which the son himself participates as the active agent. Stress has been laid on the text of *Narada* in Chapter XIII. Verse 34 is as follows: "Or, no paternal wealth being left, the initiatory ceremonies must be invariably performed for their brothers by those previously initiated contributing the required funds from their own portions." The Smriti Chandrika, no doubt, in pl. 41 of Chapter IV quotes this verse as prescribing the rule in case there is no patrimony and adds the comment in pl. 42, "that the ceremonies contemplated by this text commence in *Jatakarma* and end in *Upanayana*." The marriage of an unmarried brother is certainly not a duty cast on the married brothers when there is no patrimony. And the limitation of *Narada's* text in the particular case of no patrimony to the ceremonies that end with *Upanayana* does not justify the inference that the author of the *Smriti Chandarika* regarded marriage as a *Samskara* which was not obligatory. Dr. Jolly's note, which is perfectly correct with reference to the comment of the *Smriti Chandrika*, is perhaps appended by mistake to Verse 33 instead of Verse 34. There is no note under Verse 34 and it may be Dr. Jolly's observation is not applicable to the case put in Verse 33 of Narada. But, however, this may be, there can be no doubt that the *Smriti Chandrika* is no authority for the position that marriage is not an obligatory *Samskara*. There remains one important matter to be noticed. I have not been able to find on what authority Mr. Justice Muthusami Aiyar based his observations in *Ponnappa Pillai* v. *Pappuvayyangar* (10), that the phrase "the like" in p. 29, *Mitakshara*, Chapter I, Section I, refers only to such ceremonies as if unperformed would entail a forfeiture of caste. The discussion in the *Mitakshara* from pl. 17 to 29 is with reference to the question whether property arises by birth or by partition. As usual with the author he first propounds the problem, see pl. 17. He states the argument of the opponent strengthening it by apt quotations in pl. 18—22. In pl. 23—26 he states his argument in answer to the opponent's view and in pl. 27 his conclusion, namely, that property is by birth. Some texts apparently inconsistent with this view are explained away as referring to particular exceptions. Pl. 27 after stating the conclusion explains the text showing that the father has greater power than the mere holder of a joint interest as applicable to movables. Another text, which deals with a single member's power over immovables, is explained as confined to exceptional cases. There is no reference in pl. 28 to the single member being the manager. But the text, however, is generally cited as dealing with the powers of a manager. The explanation of that text in p. 29 (Colebrooke's translation) is as follows: "While the sons and grandsons are minors, and incapable of giving their consent to a gift and the like, or while brothers are so and continue unseparated, even one person, if capable, may conclude a gift, hypothecation, or sale of immovable property, if a calamity affecting the whole family require it, or the support of the family render it necessary, or indispensable duties, such as the obsequies of the father or the like, make it unavoidable." The words in the *Mitakshara* which have been rendered into English by Colebrooke by the clause "or indispensable duties such as the obsequies of the father or the like make unavoidable" are simply *Avashyam Kartaryeshu Pitri shradha dishu*. They simply mean "father's *shradas*, etc., which have to be necessarily done." It will be noticed that Mr. Colebrooke has by using the words "indispensable" and "unavoidable", added to the stringency of the

condition under which an alienation is permissible. The word '*Adi*', which is translated "or the like", means beginning with and merely indicates that the father's ceremony which is named is one out of a group of ceremonies. There is no implication that forfeiture of caste is a consequence of a failure to perform the obsequies and that a similar consequence flows from a failure to perform other ceremonies which are grouped together with the obsequies of the father. If we dismiss this idea then of forfeiture of caste as the penalty which must characterise the class of ceremonies for which the immovable property of the family may be alienated by the manager, there is nothing in pl. 29 of the *Mitakshara* which prevents our holding that a debt borrowed for defraying the expenses of the marriage of the son is recoverable from the family property as having been incurred for a family purpose in a case of necessity. The importance of the marriage ceremony in the case of every Hindu, subject to the exceptions already noticed, is so well recognised by the *Mitakshara* that in the commentary at page 416 on *Sloka* 289 of *Yagnavalkya*, Vignaneswara observes: "Harita says a person, who is in no *Asrama* (after leaving studentship) for a year, shall perform *Prajapatya Krichra* and enter the (next) *Asrama*. After the second year, the penance of *Athi Krichra*; after the third, *Krichrathi Krichra*; beyond that *Chandrayana*. This is in case (the *Asrama*) is not available. But if available ordinarily the purifications prescribed for *Upapathakas* should be ordered according as the abstention was intentional or not." It is unnecessary for our present purpose to explain these expiatory rites. The above passage from the *Mitakshara* is decisive of the obligatory character of the marriage ceremony. This passage is quoted in leaf 199 of the *Samskara* Bhaskara with approval. I have, therefore, no hesitation in holding that the marriage of the 2nd defendant for which the loan was contracted by the 1st defendant and the mortgage executed was a proper family purpose and the 3rd defendant's interest in the mortgaged property is consequently liable for the mortgage debt. I would set aside the decree of the Subordinate Judge as regards the 3rd defendant and restore that of the District Munsif. I make no order as to costs.

Appeal allowed.

(s. c. 4 S. L. R. 52.)

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 155 OF 1909.

April 21, 1910.

Present:—Mr. Hayward, J. C., and Mr. Crouch, A. J. C.

MAHOMED HASHIM HAJI NAZARALI AND OTHERS—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Practice—Criminal Procedure Code (Act V of 1898), s. 253—Discharge—Dismissal of complaint—Dismissal of second complaint arising out of the same facts—Renewal of previous complaint—Judicial discretion.

The petitioners were prosecuted by A. for robbery of his mare under cover of levying from him a debt due to him. The complaint was dismissed under section 253, Criminal Procedure Code. Subsequently, the petitioners were prosecuted by A for cheating him by refusing to hand over to him his mare and a receipt for the debt. This prosecution also failed and then A prosecuted the petitioners for the robbery of his mare under cover of levying from him the debt. The Magistrate ordered process to issue on this renewed complaint:

Held, that the Magistrate failed to exercise sound judicial discretion in proceeding with the renewed complaint and that the proceedings should be quashed

Application for revision against the order of the Sub-Divisional Magistrate Nara (Mr. Hanson).

Mr. *Lalchand Hasomal*, for the Applicants.

Mr. *Teckchand Udhawdas*, for the Crown.

Judgment.—The applicants were prosecuted by opponent for robbery of his mare under cover of levying from him a debt due to them. The matter was the subject of a preliminary enquiry and a regular trial ending in discharge under section 253, Criminal Procedure Code.

The applicants were subsequently prosecuted by opponent for cheating him by refusing to hand over to him his mare and a receipt for the debt in pursuance of an alleged agreement which resulted in the discharge under section 253, Criminal Procedure Code.

The applicants on failure of this subsequent prosecution have again been prosecuted by opponent for the robbery of his mare under cover of levying from him the debt. The applicants accordingly seek revision of the order of the Sub-Divisional Magistrate for process to issue against them on this renewed complaint. Subsequently it is said the matter has been transferred for trial before the *Mukhtyarkar* and First Class Magistrate, Mirpur Khas.

No doubt, the Sub-Divisional Magistrate had jurisdiction to entertain this renewed complaint, but he failed, in our opinion, to exercise sound judicial discretion in proceeding with it on the facts above set forth. We accordingly set aside his order for process to issue and direct further proceedings before the *Mukhtyarkar* and First Class Magistrate, Mirpur Khas, to be stayed as though the renewed complaint had been dismissed under section 203, Criminal Procedure Code.

Order set aside.

(s. c. 4 S. L. R. 53.)

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 26 of 1910.

April 21, 1910.

Present:—Mr. Hayward, J. C., and Mr. Crouch, A. J. C.

GULU TIRITH—APPLICANT

versus

CHATUNMAL MENGHOMAL.

OPPOSITE PARTY.

Criminal Procedure Code (*Act V of* 1898), *s.* 253—*Dismissal of complaint—Revival—Delay in renewing complaint—Judicial Discretion.*

Although a Magistrate has jurisdiction to entertain a complaint after it has once been wrongly dismissed under section 253, Criminal Procedure Code, the appropriate remedy for complaints wrongly dismissed is vested solely in the higher grades of Magistrates and the Sessions Judges under section 437, Criminal Procedure Code.

After the examination of the complainant and of one witness, the complainant withdrew his remaining witnesses, and allowed his complaint to be dismissed under section 253, Criminal Procedure Code. After the lapse of five months, the complainant again filed a renewed complaint on the same facts. The Magistrate thereupon issued process against the accused:

Held, that the Magistrate had failed to exercise a sound discretion in proceeding with the complaint and that the proceedings should be quashed.

Application for revision against the order of the Resident Magistrate, Mirpur Khas (Mr. Bulchand Alumal).

Mr *Lalchand Hasomal*, for the Applicant.

Mr. *Teckchand Udhawdas*, for the Crown.

Judgment..—The applicant seeks revision of the order of the Resident Magistrate, Mirpur Khas, issuing process against him on the opponent's complaint of criminal breach of trust renewed five months after the dismissal of a similar complaint by the First Class Magistrate, Mirpur Khas under section 253, Criminal Procedure Code.

No doubt, the Resident Magistrate, Mirpur Khas, had jurisdiction to entertain the renewed complaint, but he failed, in our opinion, to exercise sound judicial discretion in proceeding with it. It appears that the opponent withdrew the remaining three witnesses after the examination of one witness and himself on the former complaint and permitted five months to elapse before filing the renewed complaint. This conduct was, in our opinion, sufficient ground for declining under section 203, Criminal Procedure Code, to proceed with the renewed complaint.

We think it desirable also to observe that the appropriate remedy for complaints wrongly dismissed is vested solely in the higher grades of Magistrates under section 437, Criminal Procedure Code.

We accordingly set aside the order of the Resident Magistrate, Mirpur Khas, for the issue of process and direct the further proceedings which are said to be now pending before the 2nd Class Magistrate, Pithoro, to be stayed as though the renewed complaint had been dismissed under section 203, Criminal Procedure Code.

Order set aside.

(s. c. 4 S. L. R. 55.)

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEALS NOS. 8 AND 9 OF 1910

April 22, 1910.

Present:—Mr. Hayward, J. C. and Mr. Crouch, A. J. C.

EMPEROR—

versus

VIRUMAL BEGRAJ AND OTHERS—

ACCUSED.

Penal Code (*Act XLV of* 1860), *ss.* 71, 124 *A*, 153*A*—*Distinct offences—Distinct passages contained in one pamphlet—Conviction under both sections—Advertisement of* Swadeshi *goods—Sanction to prosecute, essentials of—Criminal Procedure Code* (*Act V of* 1898), *s.* 196—*Omission to specify sections in order—Punishment.*

Advertisement of *Swadeshi* shop goods can be no justification whatever for the co-conspirators publishing a pamphlet calculated to excite disaffection against Government and to promote feelings of hatred between the Indian and European Subjects of His Majesty.

The offence of attempting to promote feelings of hatred between the Indian and European classes of Subjects of His Majesty is distinct from, and not a necessary ingredient in, the offence of attempting to

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excite disaffection against the Government established by law in British India.

It is not necessary for the charges to specify the distinct passages in a pamphlet which are alleged to constitute the offence of attempting to promote feelings of hatred and the distinct passages which are alleged to constitute the offence of attempting to excite disaffection. It is sufficient for the charges to allege generally that the pamphlet constitutes an attempt to promote feelings of hatred and also to excite disaffection.

Emperor v. *Tribhovandas*, 33 B. 77 at pp. 82 and 85; 1 Ind. Cas. 641; 10 Bom. L. R. 80!; 8 Cr. L. J. 272, followed.

The two offences, though committed by means of the same pamphlet, are as distinct as two libels on the different persons contained in one book. They do not come within the provisions of section 71, Indian Penal Code.

Emperor v. *Bal Gangadhar Tilak*, 10 Bom. L. R. 848 at p. 903; 8 Cr.L.J. 281; *Emperor* v. *Ganesh Damodar Savarkar*, 12 Bom. L. R. 105 at pp. 106, 115 and 117; 34 B. 394; 5 Ind. Cas. 854, followed.

All that is required for a sanction to prosecute by Government is a complaint of facts within the meaning of section 190 (1) (*a*), Criminal Procedure Code, and an order for making that complaint under section 196, Criminal Procedure Code. So long as the matter of complaint is made sufficiently clear in the order, no specification of the particular section of the Penal Code appears to be required by section 196.

Punishments for offences, under sections 124A and 153A of the Penal Code, should be deterrent, especially where a peculiarly mischievous conspiracy is proved and an obnoxious pamphlet appears to have been specially prepared to catch the attention and poison the immature minds of students and others of an impressionable temperament.

Appeals against the decision of the Sessions Judge, Sukkur-Larkana, (F. K. Boyd, Esquire.)

Mr. *Raymond*, for the Accused No. 1.

Mr. *Dipchand*, for the Accused Nos. 2 and 3.

Mr. *Teckchand*, aided by Mr. *Lalchand Chuhermal*, for the Crown.

Judgment.—The appellants Virumal, Chetumal and Gordhanlal appeal against the decisions of the Sessions Judge, Sukkur-Larkana, convicting and sentencing them to terms of transportation and to fines under sections 124-A and 153-A Indian Penal Code, for having been respectively the printer, publisher and writer of a pamphlet called *Swadeshi Halchal* and thereby having attempted to excite disaffection against the Government established by law in British India and to promote feelings of hatred between different classes of subjects of His Majesty.

Mr. Raymond for the appellant Virumal has not been able to deny that the pamphlet is seditious, but has urged that Virumal could not be held guilty of an attempt to excite disaffection as he was ignorant of the

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contents of the pamphlet till it had issued from his press and had no vicious intentiou; that Virumal could not be held guilty of an attempt to excite disaffection as there was no clear proof that the pamphlet was actually offered for sale or sold; that in any case Virumal could not be convicted and sentenced separately for the attempt to promote feelings of hatred as that offence was included in the offence of attempt to excite disaffection and, moreover, was not specifically mentioned in the sanction for the prosecution; and that in any case Virumal had done his best by promptly stopping the sale to prevent evil effects from the offences and was entitled to a material reduction of sentence on this account and in view of the acknowledged loyalty and freedom from sedition of the Province of Sind.

Mr. Dipchand for the appellants, Chetumal and Gordhanlal, has not been able to press his denial that the pamphlet is seditious, but has urged that neither Chetumal nor Gordhanlal could be held guilty of an attempt to excite disaffection as they did not appreciate the real nature of the contents of the pamphlet, believing them merely to be innocent advertisements of the *Swadeshi* goods of their shops and so had no vicious intention; that neither Chetumal nor Gordhanlal could be held guilty of an attempt to excite disaffection as there was no clear proof that the pamphlet was actually offered for sale or sold; that in any case neither Chetumal nor Gordhanlal could be convicted and sentenced separately for the attempt to promote feelings of hatred as that offence was included in the offence of attempt to excite disaffection and, moreover, was not specifically mentioned in the sanction for the prosecution; and that in any case Chetumal had done his best by promptly stopping the sale to prevent evil effects from the offences, while Gordhanlal was young and inexperienced and both Chetumal and Gordhanlal were entitled to material reductions of sentences on these accounts and in view of the acknowledged loyalty and freedom from sedition of the Province of Sind.

We have read the translation of the *Swadeshi Halchal* and have no hesitation in holding that the pamphlet is deliberately calculated both to excite disaffection against the Government established by law in British India and to promote feelings of hatred between the Indian and European subjects of His Majesty We have, therefore, to consider whether Viru

mal, Chetumal and Gordhanlal have rebutted the natural presumption of vicious intention arising against them under section 114, Indian Evidence Act, from the preparation and offering for sale or selling of the pamphlet. It has been argued at length that Virumal never read the pamphlet till after it had issued from his press. It is urged that he was far too busy with other matters and that it was only while waiting in enforced idleness at Rohri station on his way to Hyderabad that he first found leisure to peruse its contents and learn their objectionable nature and that his honest intention is shown by his promptly stopping the sale at Hyderabad and thereafter rendering every assistance in the subsequent enquiries on behalf of Government. It is seriously argued that Chetumal was ignorant of Arabic Sindhi, the writing in which the pamphlet was printed and that both he and the writer Gordhanlal honestly intended the pamphlet merely to be an advertisement of the *Swadeshi* goods of their shops. We have carefully considered the evidence and are wholly unable to accept these contentions. We have no doubt that Virumal, Chetumal, and Gordhanlal were co-conspirators for the preparation and publication of the pamphlet at the Provincial Conference at Hyderabad with the vicious intention of exciting disaffection against Government and promoting feelings of hatred between the Indian and European subjects of His Majesty. Virumal is proved by the Assistant Manager of his own press to have had the manuscript in his own possession from the 15th to 20th March. Its objectionable nature could be detected in five minutes. The whole pamphlet could be read in an hour. Virumal accepted it for printing on the 20th March and it was being printed at his press up to the 8th April. Virumal is said to have accepted it for printing only on condition that his ordinary duty of proof correcting should be done entirely by the writer Gordhanlal. It is difficult to understand how Virumal could practically have left all the various processes of proof correcting to the writer Gordhanlal. At all events he appears to have undertaken the correction of some proofs, for he was asked to "print out the other proofs after carefully examining them" in a letter from Gordhanlal and again Chetumal is asked to "warn him to go through them carefully," in another letter from Gordhanlal. It is also remarkable that the order was treated as private and not entered in the job work book. A clumsy attempt was subsequently made to insert an entry so as to make it appear ordinary outside job work. Virumal may have been particularly busy both in and outside his press about this time, but it is impossible to believe even if this were so that he could have remained in ignorance of the nature and contents of this pamphlet which was admittedly being printed for publication at an assembly in which he was so deeply interested as the Provincial Conference. Virumal's subsequent conduct, moreover, does not appear to us to have been that of an honest man who had suddenly discovered that he had inadvertently been led into printing an objectionable pamphlet. It is not suggested that he ever expressed the slightest irritation at the deception practised on him by Chetumal and Gordhanlal. He has not ventured to offer what would have been the best evidence of his cutraged feelings upon this sudden discovery on this 9th April, namely, the evidence of his pleader Bhojsing with whom he is alleged to have been talking at the time at the Rohri station. He enquired that same night from Chetumal's man how many copies of the pamphlet had been sold and "authoritatively" prohibited further sales by Chetumal's man at the stall kept by Chetumal at the exhibition then in progress with the Provincial Conference at Hyderabad. He telegraphed next day to his Assistant Manager to postpone delivery of the rest of the copies of the pamphlet to Chetumal's shop at Sukkur and also sent a post card stating not "that he had suddenly discovered" but "that Bhojsing had said" the pamphlet was objectionable and prohibiting delivery of the usual copy of the pamphlet to the Collector. He did not until the 18th April, after another copy had already found its way into the Collector's Office, forward the usual copy of the pamphlet to the Collector. He then stated in the covering letter that only 10 or 15 copies had been sold and that he had asked the author to modify some few passages with which he did "not agree" and which "appeared undesirable," when reading the pamphlet at Hyderabad. He certainly answered subsequent references as to the name and particulars of the pamphlet and permitted an inspection of the copies of the pamphlet lying at his press but be could

hardly have avoided doing so. He also surrendered farther copies of unbound parts of the pamphlet said to have been overlooked in the search by the police, but they were chiefly useful for his subsequent defence of no publication. He finally pleaded not that the pamphlet was objectionable and that he had been grossly deceived into printing it by Chetumal and Gordhanlal, but that it was free from objection and he sought to establish the plea by evidence—rightly rejected, in our opinion, as irrelevant—that other people had issued similar publications. Virumal's subsequent conduct as here considered appears to us not that of an honest printer grossly deceived by two unprincipled villains but rather the conduct of a guilty conspirator warned by expert advice and strenuously seeking to save himself from the grasp of the law. Chetumal and Gordhanlal were without doubt aware all along of the nature and contents of the pamphlet. Chetumal arranged for its printing and undertook its sale and Gordhanlal was the writer. The documents found in the searches of their shops and houses showed they were in constant communication about the preparation of the pamphlet. It is impossible to treat seriously Chetumal's contention that he did not know its contents and nature owing to ignorance of Arabic. Sindhi. Chetumal is alleged to have told the Assistant Manager of the press that it was a translation of a Devnagri Hindi work in his possession and the documents found in the searches show constant correspondence between Chetumal and Gordhanlal in Devnagri character. It is also impossible to treat seriously Chetumal and Gordhanlal's contention that they intended the pamphlet merely to be an innocent advertisement of their *Swadeshi* shop goods. The pamphlet itself does not admit of such a construction and even if it did, advertisement of *Swadeshi* shop goods could be no justification whatever for the co-conspirators publishing a pamphlet calculated to excite disaffection against Government and to promote feelings of hatred between the Indian and European subjects of His Majesty.

We have had under our consideration the question whether the conspirator's acts would not be punishable not merely as abetment but as completed attempts to excite disaffection and promote feelings of hatred even though falling short of actual publication of the pamphlet. We do not, however, consider it necessary to discuss this question in detail because we find ample evidence on the record of actual publication of the pamphlet at Hyderabad. There does not appear to be sufficient reason for disbelieving the evidence of the *Daftardar's* Head *Munshi* Nichusing that he actually bought a copy of the pamphlet at Chetumal's stall in the Exhibition at Hyderabad. He was corroborated by an Officer in a responsible position, the Collector's *Daftardar* Sadhusing and the matter was known from an early stage of the investigation to Mr. Manley the Assistant Superintendent of Police. The particular copy of the pamphlet was not, it is true, produced at the trial, but it was alleged to have been handed over to the Collector, Mr. Lawrence, and such an allegation could hardly have been made if it had been liable to immediate reputation by calling Mr. Lawrence. Nor does there appear sufficient reason for discarding the evidence of Dharamsing, the Editor of the *Khair Khah*, to the effect that he also had actually bought a copy of the pamphlet at Chetumal's stall in the Exhibition and showed it to Abdul Wahab, the Editor of the *Alhaq*, in the presence of Baharsing a pleader of the Sukkur Bar in the course of a conversation on the institution of these proceedings. It is true that the matter was not mentioned till a late stage of the trial and that Dharamsing, Abdul Wahab and Baharsing have all been shown to have been subjected from time to time to severe criticism by Virumal as Editor of the *Sindhi*. But the matter had been published shortly after the conversation in an article of the 2nd October in the *Alhaq* and the copy of the pamphlet was produced at the trial and the manner in which the attendance of Dharamsing, Abdul Wahab and Baharsing had been secured was fully explained by the Assistant Superintendent of Police, Mr. Manley. There was besides no special reason so early as the 2nd October to fabricate evidence of publication because Virumal had long before admitted the sale of 10 or 15 copies in his letter to the Collector. It has been argued that Virumal's intention to withdraw this admission had already become obvious from the contents of his bail applications. But they merely contained assertions that he had "stopped the circulation" by sale or otherwise on finding objection was taken to certain

passages. Not even at the trial did Virumal deny that the pamphlet was exposed for sale at Chetumal's stall. He merely alleged that the statement of Chetumal's man that some copies had actually been sold before prohibition of further sale had subsequently been discovered on a reference to Chetumal to be incorrect. At the trial Chetumal also denied there had been any actual sales and an extract from his accounts was put in evidence in support of the denial showing what other books had actually been sold at his stall at the Exhibition. Several witnesses were also called to say they had not seen the pamphlet on sale at the Exhibition or the Provincial Conference. This negative evidence is, however, not of much value and is largely discounted by the fact that only 155 copies were found in the search of Chetumal's shop whereas 175 or 180 copies were alleged to have been delivered by the Assistant Manager of the press. Determined efforts were made to show that no sales could have taken place because nearly all the 1,000 copies alleged to have been printed could be accounted for from among the documents produced at the trial. But it did not appear after a full consideration that the data available pointed to any conclusive result. On the other hand, the probability is that the copies of the pamphlet were exposed for sale and actually sold at the Exhibition. It was for the very purpose that they were printed according to the Assistant Manager of the press and Virumal with a copy in his hand went without hesitation to stop further sales at Chetumal's stall at the Exhibition immediately on his arrival for the Provincial Conference at Hyderabad.

We have now to consider the technical objections raised to the separate convictions and sentences passed upon the three conspirators on the charge of attempting to promote feelings of hatred between different classes of subjects of His Majesty. It has been argued that this charge does not comprise a distinct offence, but is included in the charge of attempting to excite disaffection against the Government established by law in British India. It appears, however, to us that the charge does comprise a distinct offence. It has not been stated specifically in the charge, but it is clear from the pamphlet that the different classes meant are the Indian and European classes of subjects of His Majesty. The offence of attempting to promote feelings of hatred between these classes is without doubt distinct from, and not a necessary ingredient in, the offence of attempting to excite disaffection against the Government established by law in British India. It is not necessary for the charges to specify the distinct passages in the pamphlet which are alleged to constitute the offence of attempting to promote feelings of hatred and the distinct passages which are alleged to constitute the offence of attempting to excite disaffection. It is sufficient for the charges to allege generally that the pamphlet constitutes an attempt to promote feelings of hatred and also to excite disaffection, as held by the Bombay High Court in the case of *Emperor* v. *Tribhovandas* (1). The two offences, though committed by means of the same pamphlet, are as distinct as two libels on two different persons contained in one book. They do not come within the provisions of section 71, Indian Penal Code. This view is confirmed by two cases decided by the Bombay High Court, *Emperor* v. *Bal Gangadhar Tilak* (2) and *Emperor* v. *Ganesh Damodar Savarkar* (3). It has been further argued that in any case this charge does not come within the order of the prosecution under section 196, Criminal Procedure Code, as that order does not specify the particular section of the Penal Code. It appears to us, however, that all that is required is a complaint of facts within the meaning of section 190 (1) (*a*), Criminal Procedure Code, and an order for making that complaint under section 196, Criminal Procedure Code. So long as the matter of complaint is made sufficiently clear in the order, no specification of the particular section of the Penal Code appears to be required by section 196, Criminal Procedure Code. That is a matter for the Magistrate or Court.

We have finally to consider the sentences inflicted on the three conspirators. It has been urged that they are unduly severe in view of Virumal and Chetumal having promptly stopped the sale of the pamphlet and in view of Gordhanlal's youth and inexperience and in view generally of precedents and the acknowledged loyalty and freedom from sedition of the Province of Sind. We have already discussed the conduct of Virumal

(1) 33 B. 77 at pp. 82, 85; 1 Ind. Cas. 641; 10 Bom. L. R. 801; 8 Cr. L. J. 272.

(2) 10 Bom. L. R. 848 at p. 903; 8 Cr. L. J. 281.

(3) 12 Bom. L. R. 105 at pp. 106, 115, 117; 34 B. 394; 5 Ind. Cas. 854.

with regard to the stopping of the sale and indicated our opinion that his conduct was prompted not by genuine regret at having been inadvertently led into printing an objectionable pamphlet but by the much less praiseworthy motive of saving himself from the grasp of the law. We cannot hold the conduct of Chetumal worthy of greater respect. He appears, indeed, to have consented to stop the sale but not without indications of reluctance, for he demanded delivery of the remaining copies from the Assistant Manager of the press even after the sale had been stopped at Hyderabad,—and the copies already delivered were found still among other articles exposed for sale in his shop at Sukkur when searched at a considerably later date by Mr. Manley, the Assistant Superintendent of Police. We have noted the comparative youth and inexperience of Gordhanlal, but at the same time have been unable to avoid recognizing the diligence with which he pursued his ill-chosen path and his capacity to do wrong. We have also referred to the precedents and have found punishments varying from a few months simple to three years' rigorous imprisonment with substantial fine, but we have not found that these punishments have proved effective in deterring others from like offences. We are in these circumstances unable to hold that the sentences inflicted on the three conspirators are unduly severe.

Their conspiracy was, in our opinion, peculiarly mischievous. The obnoxious pamphlet appears to have been specially prepared to catch the attention and poison the immature minds of students and others of an impressionable temperament likely to attend the Provincial Conference at Hyderabad. It was a deliberate attempt calculated to bring disunion into the homes of loyal families of this Province. The subsequent conduct of Virumal and Chetumal in stopping the sale and the youth and inexperience of Gordhanlal have, in our opinion, received the full consideration which they merit in the reduced sentences of three years' transportation and Rs. 1,000 fine in the case of the two former and of five years' transportation and Rs. 500 fine in the case of the latter for offences which would otherwise not have been too severely rewarded with double those sentences. It is essential that the punishments should be deterrent and experience has shown that the scale hitherto adopted has not proved deterrent. There is no solid ground for treating such offences with a greater degree of lenience than other crimes for which the Penal Code has prescribed similar punishments. Stress has been laid by the learned pleaders, who have so ably conducted the appeals, on the acknowledged loyalty and freedom from sedition of this Province. That loyalty and freedom were, in our opinion, best protected by showing from the outset that all attempts at corruption will be met with uncompromising repression by the Courts of Sind. We accordingly confirm the convictions and sentences and dismiss the appeals.

Appeals dismissed.

(s. c. 4 S. L. R. 65.)

SIND JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 21 OF 1908.

April 29, 1910.

Present:—Mr. Hayward, J. C., and Mr. Leggatt, A. J. C.

HASRAJ HIRJI—PLAINTIFF—APPELLANT

versus

THE KARACHI MUNICIPALITY—DEFENDANT—RESPONDENT.

Bombay District Municipal Act (III of 1901), s. 54 (1) (c)—Location of refuse carts—Nuisance—Duty of cleansing streets—Tort—Injunction, suit for.

The location of a refuse cart near a residential house is a nuisance.

The provision of refuse carts is essential for cleansing public streets. It is, therefore, an obligatory duty, necessarily deducible from the obligatory duty of cleansing public streets, laid upon the Karachi Municipality by section 54 (1) (*c*) of the Bombay District Municipal Act.

No action in tort will lie in respect of the exercise with judgment and caution of powers conferred by the Legislature.

Appeal against the decision of the Additional Judicial Commissioner, (H. N. Crouch, Esquire).

Mr. *Lalchand Hassomal*, for the Appellant.

Mr *Harchandrai Vishindas*, for the Respondents.

Judgment.—The appellant appeals against the decree of the Additional Judicial Commissioner dismissing his suit for an injunction restraining the Karachi Municipality from placing a refuse cart near his house.

JAFFAR FADU *v.* EMPEROR.

Mr. Lalchand on behalf of the appellant has urged that the refuse cart has been found to be a nuisance and that the injunction ought to have been granted as the provision of the refuse cart does not come within the obligatory duty of cleansing public streets laid upon the Karachi Municipality by section 54 (1) (*c*) of the Bombay District Municipal Act, III of 1901.

Mr. Harchandrai on behalf of the Karachi Municipality has urged that the refuse cart ought not to have been held to be a nuisance and that in any case its provision is an obligatory duty necessarily deducible from the obligatory duty of cleansing public streets laid upon the Karachi Municipality by section 54 (1) (*c*) of the Bombay District Municipal Act, III of 1901.

We concur upon a consideration of the evidence with the learned Additional Judicial Commissioner's findings of fact that the refuse cart is necessarily a nuisance, but was probably specially seasoned for the benefit of the medical witnesses and is ordinarily managed and has been located near appellant's house with due judgment and caution by the Karachi Municipality. We also concur upon a consideration of the evidence with the learned Additional Judicial Commissioner's finding of fact that the provision of refuse carts is essential for the cleansing of the public streets. The provision is, therefore, an obligatory duty necessarily deducible from the obligatory duty of cleansing the public streets laid upon the Karachi Municipality by section 54 (1) (*c*) of the Bombay District Municipal Act, III of 1901. But it is an established proposition of law that no action in tort will lie in respect of the exercise with judgment and caution of powers conferred by the Legislature (Pollock's Law of Torts, 6th Edition, page 128). Therefore, we confirm the decree of the learned Additional Judicial Commissioner and dismiss this appeal with costs.

Appeal dismissed.

(s. c. 4 S. L. R. 67)

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 16 OF 1910.

May 2, 1910.

Present:—Mr. Crouch, A. J. C.

JAFFAR FADU—ACCUSED

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), *s.* 499, *Exceptions* 1, 9 *—Defamation—Justification—Qualified privilege—Good faith—Reasonable grounds—Publication in newspapers —Vague apprehensions.*

Exceptions 1 and 9 to section 499, Indian Penal Code, codify those portions of the law of libel and slander treated in English text-books under the heads of justification and qualified privilege.

It is a good defence in criminal cases that the words complained of are, in fact, true and that it was for the public benefit that the matters charged should be published, even though the actual motive of publication was malevolence.

The expression "imputation on the character" in exception 9 cannot be taken to imply that allegations of definite acts are excluded. The exception covers not only such allegations of fact as could be proved true, but also expressions of opinion and personal inferences.

Exception 9 for all practical purposes of defence covers exception 1 and the latter would only be relied on when for some purpose other than that of obtaining an acquittal, an accused person desires to prove the absolute truth of his words.

In order to be entitled to the benefit of exception 9, the accused must show that he in good faith made the imputations in self-defence or for the public good.

In good faith, an essential ingredient is honesty of purpose. The accused must, *firstly*, honestly believe his imputation to be true, and, *secondly*, he must honestly make it from a sense of duty either to himself or to the public. He must not exaggerate, or say unnecessary things, nor must he make the communication to an unnecessary number of persons. He must not make his duty the cover for spreading the libel. The actual words used, the manner in which the words are published, the persons to whom they are communicated, must all be limited to the reasonable requirements of the occasion. The question for enquiry is whether the accused had reasonable grounds for believing the imputations to be true and for believing that it was necessary for his safety to give wide publicity to them.

The accused was called upon by the Panjibhai Jamayat, of which body he was a member at one time, to show cause why he should not be ex-communicated. In reply, he published a letter in the local papers in which he characterised the Panjibhai Jamayat as a dangerous society giving every encouragement to murder and assassination and that the object of the notice to him was to incite and arouse the intolerance and murderous feelings of the ignorant, deluded and fanatic members of the society to the necessary pitch for the express object of taking his life:

Held, that the accused could not claim exemption under the exceptions 1 and 9, even though he was under

a vague apprehension that some ignorant fanatic might be suddenly moved by the idea that it was his duty to murder him. There was nothing to connect the whole community with such fanatics and the publication in the papers was quite unnecessary.

Appeal against the decision of the City Magistrate (E. Sands, Esquire), convicting the accused under section 500, Indian Penal Code, and sentencing him to a fine of Rs. 400.

Mr. *Harchandrai*, for the Accused.

Mr. *Tekchand*, for the Crown.

Judgment.—Appellant has been convicted of defaming Hussani Mukhi Allahrakhio, as a member of the committee of the Panjibhai Jamayat of the Khoja community, by publishing a certain letter in the *Phoenix* of 12th December 1905. The complaint was filed by Hussani on behalf of himself and on behalf of other members of the committee.

Appellant is a member of the well-known Khoja family, several members of which have held office under Aga Khan. For several years previous to the date of the complaint he had not attended the *Khoja Khana*, or paid homage to His Highness on the occasion of the latter's visits to Karachi, but the Jamayat dues, payable by him as a member of the community, had, up to October 1906, (witness No. 5 line 3), been paid on his behalf by his brother Basrio who holds the position of '*Waras*.' He had also attended marriage and death ceremonies (witness No. 3 line 40). He seems, therefore, to have been regarded as technically member of the community up to 1902, at any rate, he had not decided to definitely and openly secede (see Ex. S.), and even up to the beginning of December 1906, no steps had been taken either by himself or by the Jamayat, which would operate as a bar to his claiming and enjoying any privileges open to members of the orthodox community.

Though since 1876, there had been two clear parties among the Khojas, the loyal orthodox party on the one hand, and the Pirais, or those who withheld the payment of all customary dues, and paid no homage to His Highness, on the other hand; social intercourse had been maintained between the two, they had one burial ground (witness No. 3 lines 60-70) and secession was more or less a matter of not paying the customary share of income to the Jamayat funds.

In 1905, however, the Panjibhai Jamayat passed a resolution that no deceased person should be buried in the Khoja burial ground, unless a pass granting permission were issued by the Mukhi or Kamria. The apparent object of this was to exclude all Pirais from the use of the burial ground (witness No. 3, lines 142-152), and this action made it necessary for the Pirais to secure a separate cemetery; this they did naming the place the "Hussani Bagh." At about the same time the Pirais adopted the name of Tenasheris and seem to have definitely renounced all faith in Aga Khan as an Imam or Head (witness No. 3 lines 200-210, witness No. 4 line 10). It is easily understood that after this the Jamayat determined to stop all intercourse between the two factions, and the resolution of 12th July 1906, was passed. At the opening ceremony of the "Hussani Bagh" on the 15th October (Ex. F.) Jaffer Fudoo was present, and his attendance may be said to have definitely indicated his adherence to the Tenasheris, or at any rate his secession from the Panjibhai. Early in November he joined in the funeral procession of a Tenasheri (Ex. G).

This conduct of the appellant was made the subject of formal complaints to the officers of the Panjibhai Jamayat by some of its members (Exs. F. G. and J.) and Jaffer was called on, by letter dated 4th December 1906, (Ex. C), to show cause why he should not, thenceforth, be regarded as no longer a member of the Jamayat, and be debarred from its privileges. In reply, he forwarded and published in the *Phoenix* and also in a vernacular newspaper, the letter which forms the subject of the complaint.

In this letter, the appellant made the following clear allegations:—

(1) The notice of 4th December was absolutely unnecessary and uncalled for.

(2) The Panjibhai Jamayat is "a dangerous society giving every encouragement to murder and assassination."

(3) The offences of openly associating with Tenasheris attending at the opening ceremony of the Hussani Bagh, and of failing to do homage to Aga Khan, had been committed by most of the leading, and enlightened members of the Jamayat.

(4) The real object of the notice "is to incite" and arouse the intolerance and murderous feelings of "the ignorant deluded and fanatic members of your society to the necessary pitch for, and for the express object of, taking my life."

That these imputations are defamatory is self-evident. At the trial, accused pleaded the truth of all the allegations, and that they were made "to protect himself." On appeal Mr. Harchandrai has made it quite clear that his client stated with full deliberation, and still persists that the Panjibhai Jamayat are, at least, assassins, and that in sending him the notice, and subsequently ex-communicating him their real intention was to stir up fanatical feelings against him, and so compass his death. He further contends that by giving wide publication to his letter, the appellant had made it so evident that suspicion would attach to the leaders of the Jamayat, had he been murdered, that they had been afraid to accomplish their object. Such publication had been necessary in self-defence, for nothing less than the strong stimulus of fear would induce the leaders of the Jamayat to abstain from secret instigation to murder. The defence rely on exceptions 1 and 9 to section 499 and before going into the evidence tendered in support of the imputations made it will be desirable to ascertain as clearly as we can what the defence must prove to entitle them to acquittal.

Exceptions 1 and 9 codify those portions of the law of libel and slander treated in English text books under the heads of justification and qualified privilege. It is a good defence in criminal cases that the words complained of are in fact true, and that it was for the public benefit that the matters charged should be published, even though the actual motive of publication was malevolence. The defence is dealt with by exception 1. But there are occasions on which a person is under a legal, moral or social duty to make a communication to some particular person or persons who has a corresponding interest or duty to receive it; such occasions are privileged, and anything said *bona fide* in the proper course of making the communication is also privileged, even though not true in fact. Most privileged communications are made relative to the character of a person, rather than to actual instances of conduct, but the use of the expression "imputation on the character" in exception 9 cannot, I think, be taken to imply that allegations of definite acts are excluded. The defence of qualified privilege in English Law certainly extends to such allegations, and the expression appears to have been adopted so as to cover not only such allegations of fact as could be proved true, but also expressions of opinion and personal inferences. Exception 9 for all practical purposes of defence covers exception 1, and the latter would ordinarily be relied on only when for some purpose other than that of obtaining an acquittal an accused person desired to prove the absolute truth of his words. Little or no practical importance can be attached to the distinction that there may be malice, where justification is pleaded and established but there must be none where only qualified privilege is relied on; for once it is established that a person was under a duty to make a particular communication, his act cannot become criminal through the bare fact of his taking an immoral delight in doing it. In the present case appellant, posing as a champion of religious liberty, has boldly asserted the actual truth of his defamatory words, but the attempt to prove their truth has failed so signally that we need only consider the defence under exception 9.

In order to be entitled to the benefit of that exception, appellant must show that he in good faith made the imputations in self-defence, or for the public good. Before we draw the issues it will be necessary to analyse the expression "good faith."

In "good faith," an essential ingredient is honesty of purpose. The accused must, *firstly*, honestly believe his imputation to be true, and *secondly*, he must honestly make it from a sense of duty, either to himself, or to the public. He must not exaggerate, or say unnecessary things; nor must he make the communication to an unnecessary number of persons. He must not make his duty the cover for spreading the libel. The actual words used, the manner in which the words are published, the persons to whom they are communicated must all be limited to the reasonable requirements of the occasion.

But further under Indian Law, nothing is said to be done or believed in good faith which is done or believed without due care and attention. If we assume, as we must do in the absence of any plea or evidence to the contrary, that the appellant is an ordinary reasonable person, whose mental processes work like those of an ordinary person, we shall find that the inquiry whether or not the appellant believed the imputations "with due care and attention," and exercised "due care

and attention" in publishing them in a newspaper, is really an inquiry whether or not he had reasonable grounds for believing the imputations to be true, and for believing that it was necessary for his safety to give wide publicity to them.

The issues, then, will be as follows:—

1 Did appellant honestly believe the imputations made to be true, and had he reasonable grounds for so believing.

2 Did appellant honestly believe that it was necessary for his self-defence, or that it was for the public good, that he should publish the imputations in a public newspaper, and had he reasonable grounds for so believing.

The burden of proving both issues is on the appellant and each part of each issue must be found in the affirmative to justify an acquittal.

In justification of serious imputations against the leaders of the Panjibhai Jamayat, appellant has referred to the ancient history of the *Shia Ismailis*, has proved several incidents that have occurred in Karachi and Bombay and relies on certain personal experiences. A full and lucid analysis of these incidents and experiences has been given in the judgment of the lower Court, and nothing has been said in argument, nor can I find anything on record to lead me to suppose that this analysis is not a perfectly fair one. Let us see how far the facts actually within the knowledge of appellant, at the time when he received the notice of 4th December, justified him in drawing the conclusions which he published to the world in the form of absolute assertions.

He knew from his reading that in the 11th century the leader of a fanatical branch of the secret Moslem sect of the *Ismailis* had in the rock fortress of Alamut in Persia founded a political society whose methods were marked by a special feature—the secret assassination of all enemies. He knew that in 1876 Lallan Aladino had seceded from his allegiance to His Highness, had been ex-communicated and soon afterwards had been murderously assaulted by members of the Panjibhai party; that one of the assailants had about 1893 taken upon himself to act as *Waras* in place of his deceased uncle (Exhibit No. 3, lines 282-285, and about 1902, 26 years after the assault, been formally appointed to the post by His Highness (witness No. 5, lines 65-75). He knew that the same Lallan had in 1879 been murdered by an orthodox Kuchi Khoja under circumstances which gave reasonable ground for supposing that some of the then leaders of the Jamayat had a hand in it. He knew that in 1896 Nasaralishah, a *Sayad*, who had incurred the bitter enmity of the Panjibhai community had been murdered in Karachi, and that in 1901, in Bombay, 4 Khojas, who had seceded and been served with notices similar to that received by appellant himself, had been murdered by fanatical members of the orthodox party. He knew also that he had received anonymous threatening letters, and had been at one time shadowed by a suspicious character.

All this was quite enough to inspire genuine alarm in the appellant, but, in my opinion, it is obvious that the above facts afforded no reasonable ground for believing that the present Panjibhai Jamayat was a society that gave encouragement to murder and assassination, and that the real object of sending the notice was to cause appellant's death.

I have no doubt that Mr. Jaffer Fudoo was really alarmed by the receipt of the notice. He was called on either to surrender, and publicly acknowledge his allegiance to His Highness, or to announce his definite secession. In at least five cases secession had been followed by murder, and it is probable that any Khoja who secedes runs considerable risk. Such risk is common to all those who, in this country, belong to and secede from a religious community which includes a large number of ignorant and fanatical adherents. But there is a vast difference between the bare possibility that some fanatic might take it into his head to try and murder the appellant, and the deliberate encouragement of his assassination by the leaders of the community. There is nothing to connect the two except the vague apprehension of appellant himself. It cannot seriously be contended that they are linked together by a chain of cause and effect, or one of logical reasoning.

It is probable that appellant suspected that in every case where there had been a fanatical murder, the heads of the community had secretly approved it. He was probably convinced that the present leaders of the Jamayat in issuing the notice of 4th December knew that he ran serious risk in making the

public declaration of secession which they expected to follow on it. But had he been able to overcome his alarm and allow reason to have its full sway, he would have distinguished more clearly between cause and effect. By attendance at the opening ceremony of the Hussaini Bagh in defiance of the resolution of the 12th July 1906 (Exhibit E), he had committed an act from which he must have anticipated two results: *firstly*, a hostile feeling, taking the form of intense resentment, among the more fanatical members of the orthodox party, and, *secondly*, his ex communication. The receipt of the notice brought home to him very convincingly that both results were in process of happening, and he permitted his mental irritation to find an outlet in accusing those immediately responsible for the second result of instigating the worst crime in which the anticipated resentment of the community could possibly express itself.

In referring to appellant's letter above, I have divided the allegations under four heads. I have already disposed of the second and fourth. The first and third require very brief treatment. Having regard to the customs of this country, the notice of the 4th December was natural and inevitable result of appellant's own conduct. Rahimtullah (witness No. 5) has proved that it is usual to ex-communicate any person who commits a gross breach of the Jamayat rules. If appellant was still a member of the community he fully merited ex-communication; if he were not, association with him would be a serious offence in any Panjibhai. The Jamayat had a right to call on him to definitely state his position. Was he. a Panjibhai or was he a Tenasheri? Had he already seceded, and his secession been as definite and as notorious as he would now have the Court believe, the threatened ex-communication would have meant nothing to him, or to any one else. The tone and contents of his reply are alone sufficient to show that ex-communication was to him a most substantial and alarming fact.

There has been no attempt to show that any leading and enlightened members of the Panjibhai Jamayat had committed the serious caste offences detailed under the third head.

I hold that appellant had no reasonable grounds for believing that the imputations made were true. I further hold that he did not honestly believe the imputations as made to be true. The letter expresses in an exaggerated form what he feared might perhaps be partially true.

It follows that the finding on the second issue must also be in the negative. Appellant could not honestly believe that it was necessary for his self-defence or for the public good to publish serious imputations which he did not honestly believe to be true. Nor had he, in my opinion, reasonable ground for supposing that, under any circumstances, the publication in a newspaper was necessary. His real danger is that some ignorant fanatic may be suddenly moved by the idea that it is his duty to murder him. Against such danger the police can afford no adequate protection. But by making it certain that if he be murdered, suspicion will attach to specified persons, he makes all such persons interested to see that he is not murdered and I am convinced that what moved appellant to write the letter was not an honest belief that the imputations were true, but a genuine and by no means ill-founded conviction that by making the imputations he impressed all the leaders of the community into the service of his protection. But the device, though ingenious, is not a legitimate one. A man may effectively insure his household goods against theft by warning all his neighbours that, if anything be stolen, he will forthwith charge them with the theft. Thus stimulated, they will probably be on the alert to give warning of danger. But the fact that he will by such means get extra security does not justify a man in writing to the newspapers that his neighbours are a gang of thieves and have conspired to break into his house. The law refuses to regard such procedure as reasonably necessary for self-defence.

In my opinion, the publication of the letter in the *Phœnix* was calculated to greatly enhance any danger to which appellant may be exposed. The fanatical resentment against seceders is intimately associated with religious loyalty to H. H. Aga Khan and nothing is more likely to arouse it than a public insult to him. In his letter the appellant quite frankly refers to "the person on whose behalf you are really acting," and if appellant is, at the present moment in any danger I should be inclined to ascribe it far more to the publication of this unwise letter than

to his secession. Appellant has probably created danger for himself by the very means employed as a safeguard against it.

I am quite unable to see that appellant had any reasonable ground for believing that it was for the public good to publish his letter in the *Phœnix*. Mr. Harchandrai waxed eloquent about religious liberty, but he altogether failed to make it clear how the cause of religious liberty had been in any way forwarded.

The conviction must be upheld.

The fine is not excessive.

Appeal dismissed.

(s. c. 4 S. L. R. 77.)

SIND JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 137 OF 1909.

May 11, 1910.

Present:—Mr. Hayward, J. C.

HALIMA WIFE OF SULLEMAN—PLAINTIFF

versus

ASIBAI WIDOW OF HAJI IBRAHIM HAJI AHMED AND OTHERS—DEFENDANTS.

Hindu Law—Kutchi Memons—Law prevailing in Gujarat—Widow—Nature of her estate in movables—Right of daughter to restrain waste of movable property.

The Kutchi Memons are governed in matters of succession and inheritance by the Hindu Law obtaining in the Gujarat Division of the Bombay Presidency.

The widow of a Kutchi Memon has an absolute estate in the movable property inherited from her husband.

Pranjivandas v. *Devkuvarbai*, 1 B. H. C. R. 130; *Bachar* v. *Lakshmi*, 1 B. H. C. R. 56; *Lakshmibai* v. *Gunpat*, 4 B. H. C. R. p. 163; *Lalchand* v. *Gumtibai*, 8 Bom. H. C. R. 156; *Tuljaram* v. *Mathuradas*, 5 B. 670; *Sakrabai* v. *Maganlal*, 26 B. 220; 3 Bom. L. R. 738, *Chamanlal* v. *Ganesh*, 23 B. 457; 6 Bom. L. R. 460, followed.

This absolute estate does not, however, include the power of willing away the property at death. *Thakoor Deyhee* v. *Rai Balukram*, 11 M. I. A. p. 139 at p. 175; 2 Ind. Jur. (N. S.) 106; 10 W. R. (P. C.) 3; *Bhugwandeen* v. *Myna Baee*, 11 M. I. A. 487 at p. 511; 9 W. R. (P. C.) 23; *Godadhar Bhat* v. *Chandrabhagabai*, 17 B. 630, relied upon.

The daughter of a deceased Kutchi Memon cannot sue for an injunction restraining his widow from committing waste of the sale proceeds of the trade business of the deceased.

Mr. *Rupchand*, for the Plaintiffs.

Mr. *Harchandrai*, for the Defendant No. 1

Mr. *Wadhumal*, for the Defendant No. 2

Mr. *Hirdaram*, for the Defendant No. 3

Judgment.—The plaintiff sues defendants *inter alia* for an injunction restraining them from committing waste of the sale proceeds of the trade business of a deceased Kutchi Memon. The plaintiff alleges that she is the daughter and reversionary heir and that defendant No. 1 is the widow and immediate heir and that defendant No. 2 has been entrusted by defendant No. 3 with the sale proceeds of the trade business of the deceased Kutchi Memon.

The defendants plead *inter alia* that the widow and immediate heir has full power to dispose of the sale proceeds of the trade business and raise the issue whether the widow had an absolute estate in the property in suit left by the deceased Kutchi Memon.

The parties belong to the community of Memons said to be descended from Hindu Lohanas of Tatta in Sind who were converted in the middle of the 15th century to Mohamedanism and migrated to Cutch and thence spread to Bombay (*Sind Gazetteer* 1907. Vol. A. p. 177). They are, admittedly, governed in matters of succession and inheritance by Hindu Law as decided in a number of cases by the Bombay High Court —*Mohamed Sidik* v. *Haji Ahmed*(1), in *In re Haroon Mohamed* (2), *Bai Baiji* v. *Bai Santok* (3) and *Haji Nur Mohamed* v. *Macleod* (4). It has, however, been argued that reference must be made to the Hindu Law applicable in the 15th century to Hindu Lohanas in Sind on the authority of the remarks of Sargent, C. J. in the case of *Ahmedbhoy* v. *Cassumbhoy* (5). But no endeavour has been made to show that the Hindu Law in these matters of the 15th century as carried by the Memons from Sind was different or has followed a different course from the Hindu Law observed generally in the Bombay Presidency. It has also been argued that the *Mayukha* and not the *Mitakshara* must be followed as the Hindu Law applicable to Sind. But no serious endeavour has been made to show by concrete examples that the *Mayukha* is generally followed by Hindus in Sind. Nor are there any conclusive authorities. Nothing was decided in the cases of *Pirdhan* v. *Kana* and *Murlidhar* v. *Nagru* (6). Mr. Dayaram Gidumal appears to have been guided mainly by his personal opinion in favour of the

(1) 10 B. 1 at pp. 10 to 13.
(2) 14 B. 189 at p. 193.
(3) 20 B. 53 at p. 57.
(4) 9 Bom. L. R. 274 at pp. 282 to 284,
(5) 13 B. 534 at pp. 540, 541.
(6) 1 S. D. S. S. C. 37 and 484.

Mayukha in the case of *Gurudinosing* v. *Harising* (7). That opinion appears also to have been the ground of the decision in the case of *Lachmibai* (8). The subject was merely discussed in the case of *Chinku* v. *Utamchand* (9). Moreover, the parties are Kutchi Memons and presumably bound by the Hindu Law obtaining in the Gujarat division of the Bombay Presidency (Mayne's Hindu Law para. 48).

The question, therefore, is what is the nature of the estate in movables inherited from her husband by a Hindu widow in Gujarat. Hitherto, it has been generally accepted to be an absolute estate on the authority of the decisions of Sir Mathew Sausse in 1859 and of Forbes, Erskine and Westropp, JJ. in 1863 in the cases of *Pranjivandas* v. *Devkuvarbai* (10) and *Bechar* v. *Lakshmi* (11) and the subsequent dicta of Sir Michael Westropp in the cases of *Lakshmibai* v. *Gunpat* (12), *Lalchand* v. *Gumtibai* (13) and *Tuljaram* v. *Mathuradas* (14). This absolute estate was, however, held not to include the power of willing away the property at death in deference to the decisions of the Privy Council in the cases of *Thakoor Deyhee* v. *Rai Balukram* (15) and *Bhugwandeen* v. *Myna Baee* (16) as appears in the decision of Sir Charles Sargent in the Full Bench case of *Godadhar Bhat* v. *Chandrabhagabai* (17). The language of these authorities is couched in general terms applying not only to Gujarat governed by the *Mayukha* but also to the *Mahratta* country governed mainly by the *Mitakshara*, and the law thus laid down appears to have been accepted more recently by Sir Lawrence Jenkins in the Full Bench case of *Sakrabai* v. *Maganlal* (18) and in the case of *Chamanlal* v. *Ganesh* (19)—in the former case with the concurrence of Sir Narayan Chandavarkar—as the settled law of the Bombay Presidency. Doubt has now been cast on the subject by the Divisional Bench of Russel, Acting C. J. and Heaton J. in the case of *Pandharinath* v. *Govind* (20), somewhat severely criticized, however, by Beaman, J. in the case of *Gunpatrao* v. *Vamanrao* (21). That doubt appears mainly based on absence of express texts either in the *Mayukha* or *Mitakshara*, but, in view of the recognised force of usage (Mayne's Hindu Law para. 41) and the strong current of previous decisions by eminent Judges, there is good ground for hesitating to accept the latest decision of the Divisional Bench as finally reversing what has hitherto been accepted as the settled law and for awaiting a conclusive determination by the Full Bench of the Bombay High Court or by the Privy Council. In this state of the authorities, it appears safer to hold that the defendant widow has an absolute estate in the movable property inherited from her husband exclusive only of the power of willing it away at her death and to refuse the injunction sought for restraining her in the disposal of that property during her life, following what has hitherto been accepted as the settled law of the Bombay Presidency.

This suit is accordingly dismissed with costs.

Suit dismissed.

(7) Appeal No. 65 of 1888 of the Shikarpur District Court.
(8) Misc. No. 34 of 1899 of the Karachi District Court.
(9) 2 S. L. R. 59 at p. 63. (10) 1 B. H. C. R. 130.
(11) 1 B. H. C. R. 56.
(12) 4 B. H. C. R. 163.
(13) 8 B. H. C. R. 156.
(14) 5 B. 670.
(15) 11 M. I. A. 139 at p. 175; 2 Ind. Jur. (N. S.) 166; 10 W. R. (P.C.) 3.
(16) 11 M. I. A. 487 at 511; 9 P. W. R. (P. C.) 23.
(17) 17 B. 690.
(18) 26 B. 220; 3 Bom. L. R. 738.
(19) 28 B. 457; 6 Bom. L. R. 460.
(20) 32 B. 59; 9 Bom. L. R. 1305.
(21) 10 Bom. L. R. 210.

(S. C. 4 S. L. R. 80.)

SIND JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION APPLICATION No. 69 OF 1909.

May 13, 1910.

Present:—Mr. Hayward, J. C. and Mr. Leggatt, A. J. C.

BAWA CHATAGIR—APPLICANT

versus

MATANOMAL DEWANMAL AND OTHERS—OPPONENTS.

Specific Relief Act (I of 1877), s. 9—Evidence of title—Evidence as to nature of possession—Estoppel—Deed acknowledging possession as servant—Revision—Exclusion of evidence—Protracted proceedings.

In a suit for possession under section 9 of the Specific Relief Act, the Court is entitled to go into the question of title in order to ascertain the nature of possession disturbed.

The admission of the execution of a deed acknowledging possession as a servant does not estop the executant from denying his possession as servant and

proving his possession as owner, when he did not obtain possession by that deed

Where proceedings for summary possession have been unusually protracted, the High Court will not interfere in revision merely because the Court has committed material irregularity by excluding evidence as to nature of possession. The parties have effective means for settling their disputes by a regular suit.

Application for revision against the order of the Additional Judicial Commissioner, (H. N. Crouch, Esquire), dated 25th August 1909. *See* 4 Ind. Cas. 359.

Mr. *Wadhumal Udhawram*, for the Applicant.

Mr. *Hirdaram Mewaram*, for the Opponents Nos. 1, 3, 4 and 5.

Judgment.—The applicant seeks revision of the decree of the Additional Judicial Commissioner dismissing his possessory suit under section 9 of the Specific Relief Act.

Mr. Wadhumal on behalf of the applicant has urged that the Additional Judicial Commissioner went into the question of title and refused to take all the evidence on the nature of the possession disturbed and thus acted with material irregularity in the exercise of his jurisdiction within the meaning of section 115, Civil Procedure Code.

Mr. Hirdaram for the respondents has replied that questions of title can be discussed in order to ascertain the nature of the possession and that the admissions of the other side estopped them from proving juridical possession by virtue of section 116, Evidence Act.

It appears to us that the learned Additional Judicial Commissioner rightly went into the question of title to ascertain the nature of the possession alleged to have been disturbed. The main dispute was whether the possession was that of a servant which would be mere custody (Pollock on Tort page 353) or that of an owner which would be juridical possession within the meaning of section 9 of the Specific Relief Act (Collett's Specific Relief Act, 4th Edition, pages 76 and 77). But it does not appear to us that the learned Additional Judicial Commissioner was justified in refusing to take evidence of the nature of the possession. The plaintiff, no doubt, admitted execution of a deed in 1901 acknowledging possession as a servant and made some other admissions in the deposition as to limited right of control, but he did not admit obtaining possession by that deed and his whole deposit was a strenuous denial of its validity and allegation of previous and subsequent acts of ownership. The plaintiff's admissions were, therefore, insufficient to estop his denying his possession as servant and proving his possession as owner by reason of the provisions of section 116, Indian Evidence Act.

It appears to us, however, that though this exclusion of evidence would amount to a material irregularity in the exercise of jurisdiction there are good reasons in this case for declining to exercise our revisionary powers. The proceedings though for summary possession have been unusually protracted. The proceedings were instituted on the 3rd April, 1908, stayed for arbitration on the 29th September 1908, proceeded with owing to default of parties in arbitration on the 26th February 1909, and not finally ended till 25th August 1909. To admit further prolongation in May 1910 would be to allow abuse of the summary process of the Court. The parties have besides other effective means by ordinary suit for settling their disputes. The objection that the burden of proof will be different has little weight in view of the admitted execution of the deed of 1901 and the parties can, therefore, without practical prejudice be left to their remedy by regular suit in Court.

We accordingly reject this application, but order each party to bear his own costs.

Application rejected.

(s. c. 4 S. L. R. 82.)

SIND JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 16 OF 1909.

May 30, 1910.

Present:—Mr. Hayward, J. C., and Mr. Crouch, A. J. C.

Diwan SAHIJRAM TAHILRAM—APPELLANT

versus

GAGUMAL DHARMDAS—RESPONDENT.

Res judicata—*Suit on first mortgage without mentioning second mortgage—Subsequent suit on the second mortgage—Civil Procedure Code (Act XIV of* 1882), *s.* 13, *Exp. II—Transfer of Property Act (IV of* 1882), *s.* 85.

The plaintiff held two mortgages of the same property from the defendant. He sued for sale of the property on the first mortgage but did not choose to mention the second mortgage. After obtaining a decree, he sued for sale of the same property on the second mortgage:

Held, that the suit, so far as it related to recovery of money from the mortgaged property, was barred by the principle of *res judicata*.

SAHIJRAM v. GAGUMAL.

Sri Gopal v. *Pirthi Singh*, 24 A. 499; 4 Bom. L. R. 827; 6 C. W. N. 889; 29 I. A. 118 (P. C.); *Nathu Krishnama* v. *Annangara*, 30 M. 353; 17 M. L. J. 301; 2 M. L. T. 330, relied upon.

Appeal against the decision of the District Judge, Hyderabad, (E. H. E. Leggatt, Esquire).

Mr. *Rupchand Bilaram*, for the Appellant.

Mr. *Gopaldas Jhamatmal*, for the Respondent.

Judgment.

Crouch, A. J. C.—The plaintiff in this suit is mortgagee under two separate deeds. In a former suit, he sought to enforce his first mortgage only, and he obtained a decree. The decree itself is not exhibited, but it is admitted that it was an ordinary mortgage decree and that the second mortgage was not mentioned in it; and we, therefore, presume that there was an order for sale of the whole property unconditionally, and for payment out of the proceeds to the plaintiff of his debt with interest and costs, and for payment of the balance to defendant. There has been no sale.

In this suit, he seeks to enforce his second mortgage by sale of the property.

The first Court held the suit barred under section 13, old Civil Procedure Code. The only issue raised and decided in the lower appellate Court was:—

Is the suit barred owing to plaintiff's omission to include this mortgage in his previous suit?

The Court held that the suit was barred under section 13.

The form of the issue is clearly bad. For, if the suit is barred at all, it is barred because the mortgage was, by implication, included in the previous suit.

In this suit the questions in issue are:—

1 Is plaintiff entitled to recover the amount claimed?

2 Is plaintiff entitled to bring the mortgaged property to sale, and appropriate the proceeds to his mortgage claim?

And the issue in this appeal is—Were these matters directly and substantially in issue in the former suit, and heard and finally decided in such suit?

It is unfortunate that the record does not exhibit the pleadings, issues or decree in the former suit, but we may presume that the following matters were in issue, expressly or impliedly in the former suit, and were decided:

1 That plaintiff was entitled to recover a certain specified amount.

2 That he was entitled to bring the property to sale.

3 That he was entitled to have his debt discharged out of the proceeds.

4 That the defendant was entitled to the balance.

Now, it is beyond dispute that separate suits lie on separate contracts. The two mortgage deeds, so far as each contains a covenant to pay a separate amount, certainly constitute two different causes of action. The question whether or not plaintiff is entitled to recover the amount claimed in this suit was not in issue in the former suit and there can be no *res judicata*.

But it is admitted that the suit as for a personal decree is time-barred, and consequently, the suit is barred under section 13 if the second issue is *res judicata*.

Plaintiff, in the previous suit, asked for an unconditional sale, that is to say, a sale of the whole property not subject to his second mortgage, and the decree ordered such sale. The Court had full power to do this, for all interests were represented. The question whether plaintiff had or had not the right to bring the property to sale must have been in issue in that suit, within the meaning of Explanation I of section 13. That question was heard and decided in plaintiff's favour. It appears, therefore, clear that the Court is barred from trying it again.

That this is really so is indicated by a consideration of the case from other points of view. The whole right, title and interest of plaintiff in the property, whether as first or as second mortgagee as well as all the right, title and interest of the defendant, are under a decretal order for sale. Plaintiff is now asking the Court for something which the Court has already granted him; neither plaintiff nor defendant has any interest in the property to sell which is not already subject to the order for sale. The Court cannot sell the property twice over.

Again, plaintiff whether as first mortgagee or as second mortgagee has no longer any rights over the property; they are merged in his rights as judgment-creditor. He might possibly have kept his interest as second mortgagee separate and distinct, but he chose to have it included in the order for sale. He has no longer any

free interest to which a power of sale could attach nor is it any use to sue defendant for a sale, for defendant's competency to submit to a sale has been exhausted by the first decree. His whole duty *qua* mortgagor has been already exacted; his liability has been merged in that of a judgment-debtor.

It may be urged that plaintiff is asking for no more than a sale subject to the first decree. This can mean one of two things only. Either he wants the property to be sold after the first decree has been executed, that is after the property has been once sold, a thing impossible of execution or he wants an order for sale conditioned on the first decree being discharged otherwise than by sale; in that case, he is asking for something to which he may never be entitled, and to which he is at present certainly not entitled, and the Court cannot entertain the prayer.

Plaintiff is, no doubt, really seeking a declaration of lien on the balance of the proceeds of sale after satisfying the first mortgage debt. But the question what are the rights of plaintiff and defendant respectively in the proceeds of that sale has been heard and decided in the previous suit. It is posssible that in execution, plaintiff may still have it open to him to have his lien *qua* second mortgagee declared; on this point we can offer no opinion. But it is clear that, so far, there is a decree definitely deciding that defendant is entitled to the balance after satisfying the first mortgage and the only way by which plaintiff can get at it is by attachment. The proceeds of sale will include the amount realised by plaintiff's interest as second mortgagee. The Court has given a final decision as to the disposal of all the proceeds; it cannot entertain a fresh suit to decide the parties' rights as to a portion of them.

Hayward, J. C.—The plaintiff sued for sale of the property on his first mortgage and did not choose to mention his second mortgage. The plaintiff was, however, bound to bring into that suit the second mortgage whether under the general principles of English law (Strahan's Equity Article 135, page 317) or under section 85 of the Transfer of Property Act now absorbed in Order XXXIV, Rule 1 of the first Schedule of the present Civil Procedure Code. The plaintiff was, accordingly, barred from suing a second time for sale of the property on his second mortgage by Explanation II of section 13 corresponding to Explanation IV of section 11 of the present Civil Procedure Code in accordance with the Privy Council ruling in *Sri Gopal* v. *Pirthi Singh* (1) as applied by the Madras High Court in *Nathu Krishnama* v. *Annangara* (2), though he might as observed in the latter case be entitled to recover his money in execution of the previous decree under section 97 (lastly) of the Transfer of Property Act now absorbed in Order XXXIV, Rule 13 (1) (lastly) of the first Schedule of the present Civil Procedure Code.

We concur, therefore, with the decision of the lower Courts that the second suit was barred and dismiss the appeal with costs.

Appeal dismissed.

(1) 24 A. 499; 4 Bom. L. R. 827; 6 C. W. N. 889; 29 I. A. 118 (P. C.).

(2) 30 M. 353; 17 M. L. J. 301; 2 M. L. T. 330.

(s. c. 4 S. L. R. 86.)

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION NO. 42 OF 1910.

CRIMINAL REPORT NO. 69 OF 1910.

May 30, 1910.

Present:—Mr. Hayward, J. C. and Mr. Crouch, A. J. C.

HOOSEINI ALLAHRAKHIO—COMPLAINANT

versus

JAFFAR FADU—ACCUSED.

Practice—Enhancement of sentence—Application by private complainant supported by District Magistrate's report—Defamatory statement likely to cause breach of the peace—Delay—Substantive sentence of imprisonment.

Although it is contrary to ordinary practice to proceed in an application for enhancement of sentence by a private complainant, the High Court will take action on such an application where it is supported by a report from the District Magistrate.

A fine of Rs. 400 is wholly inadequate for the gravity of an offence of defamation calculated to cause a breach of the public peace. But where about two years had elapsed since the date of publication, the publication can hardly be supposed any longer seriously to threaten the maintenance of public order.

The Court enhanced the fine but refrained from inflicting a substantive sentence of imprisonment.

Application by the complainant for enhancement of the sentence passed by the City Magistrate, Karachi (E. Sands, Esquire). The District Magistrate Karachi also supported the application for enhancement.

Mr. *Wadhumal*, for the Complainant.
Mr. *Harchandrai*, for the Accused.
Mr. *Tekchand*, for the Crown.

Judgment.—This is an application by the complainant, Secretary of the Khoja Panjibhai community, for enhancement of the sentence of Rs. 400 fine for defamation passed on the accused proprietor of the *Phœnix* and *Praja Mitra* newspapers under section 500, Indian Penal Code, by the City Magistrate, Karachi.

We have had the matter fully argued before us, for, though it is contrary to our ordinary practice to proceed on an application for enhancement by a private complainant, this application is supported by a report from the District Magistrate, Karachi.

It appears that the accused Jaffer Fadu was called upon by private notice to show cause why he should not be ex-communicated from the Khoja Panjibhai community. His reply was a violent attack published in his two newspapers, the *Phœnix* and the *Praja Mitra*, declaring that ex-communication was merely the prelude to the murder and assassination of seceders to the Khoja Pirai community. This publication has been held on appeal not only to have been wholly unjustifiable either for protection or for the public good, but also to have been calculated greatly to enhance the fanatical resentment of the Khoja Panjibhai community against seceders to the Khoja Pirai community.

We entirely concur in this view and consider the fine of Rs. 400 inflicted on the accused wholly inadequate for the gravity of an offence seriously calculated to cause a breach of the public peace. We observe, however, that the publication was made so long ago as the 12th December 1906, and that the Criminal Proceedings which were instituted on the 30th April 1907, dragged on owing to administrative defects since removed till the 31st January 1910. The publication can hardly be supposed any longer seriously to threaten the maintenance of public order. We, therefore, think that the interests of justice will be sufficiently met by enhancing the sentence to Rs. 1,000 fine and in default six months' simple imprisonment. We refrain after this lapse of time from inflicting a substantive sentence of imprisonment.

Sentence enhanced.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 559 OF 1910.

September 26, 1910.

Present:—Mr. Justice Karamat Husain.

IBRAHIM KHAN AND ANOTHER—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 447—Trespass—Criminal force not an essential element—Criminal Procedure Code (Act V of 1898), s. 522—Dispossession must be accompanied by Criminal force.

No action can be taken under section 522 of the Code of Criminal Procedure unless the dispossession of the property was attended with Criminal force.

Churaman v. *Ram Lal*, 25 A. 341; A. W. N. (1903) 41, followed.

In criminal trespass, criminal force may be used as a matter of fact, but the use of criminal force is not an essential of the offence.

Application for revision by Ibrahim Khan and another.

Mr. *Satya Chandra Mukerji*, for the Applicants.

Mr. R. Malcomson, Assistant Government Advocate, for the Crown.

Judgment.—In this case Ibrahim Khan and Nasir Khan have been convicted under section 447, Indian Penal Code, and action has been taken under section 522, Criminal Procedure Code, and the possession of the grove has been directed to be delivered to Sharif Ahmad, the complainant. The applicants come here in revision and the point argued by their learned Vakil is that in the absence of a clear finding that the applicants in obtaining possession of the grove in question were guilty of using criminal force, as defined in section 350, Indian Penal Code, no action could be taken under section 522, Criminal Procedure Code. In support of this reliance is placed upon the case of *Churcman* v. *Ram Lal* (1), which lays down that action cannot be taken under section 522, Criminal Procedure Code, unless the offence is attended with criminal force. In criminal trespass, criminal force may be used as a matter of fact, but the use of criminal force is not an essential of the offence. In the case before me there is no finding that the offence of criminal trespass was attended with Criminal force. I am, therefore, of opinion that the order under section 522, Criminal Procedure Code, is not right. I allow the application so far that I set aside the portion of the

(1) 25 A. 341; A. W. N. (1903) 41.

order of the Magistrate directing possession to be delivered to Sharif Ahmad. I may note that section 532 in the order of the Magistrate is mentioned instead of section 522 but that is an over-sight.

Application allowed.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 387 OF 1910.

August 12, 1910.

Present:—Mr. Justice Karamat Husain.

TIL KANCHAN GIR—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 499, Ex. (9), 500—Defamation—Party to suit—Privilege—Good faith—Criminal Procedure Code (Act V of 1898), s. 198—Person aggrieved—Master cannot sue for defamation of servant.

Plaintiff to a suit is not privileged under exception 9 to section 499 of the Indian Penal Code unless the allegations made in the plaint were made in good faith.

Ishri Prashad Singh v. *Umrao Singh*, 22 A. 134, distinguished.

A plaintiff in a rent suit made the following allegation in his plaint:—"In 1310 *F.* the plaintiff gave evidence in defence of Sub-Inspector, Gur Narain Lal. In consequence of this, defendant (M) became exceedingly annoyed with the plaintiff and the servants of the defendant began to oppress the plaintiff in all manner of ways.....and by threats of confining him and of having him disgraced by beating, realized this amount from him."

On the basis of the above allegation M made a complaint under section 500 of the Indian Penal Code:

Held, that the allegation defamed not M. but his servants and action for defamation could not be sustained at the instance of M.

Beauchamp v. *Moore*, 26 M. 43; 12 M. L. J. 413, referred to.

Application for revision by Til Kanchan Gir.

Mr. *M. L. Agarwala* (with Mr. *Parmeshwar Dyal*, for Mr. *Surendro Nath Sen*,) for the Applicant.

Mr. *Durga Charan Banerji*, for the Opposite Party.

Judgment.—The facts are these. The applicant instituted a su under section 59 of the Agra Tenancy Act for a declaration that his rent was payable at the original rate only; and that he was not bound to pay the rent at the enhanced rate. In his plaint, he in para. 5 made the following allegations: "In 1310 *Fasli* the plaintiff gave evidence in defence of Sub-Inspector Gur Narain Lal. In consequence of this defendant (Mr. Mackinnon) became exceedingly annoyed with the plaintiff and the servants of the defendant began to oppress the plaintiff in all manner of ways and in place of Rs. 9 rent for *mauza* Bhagwanpur entered in the receipt for 1310, Rs. 39-12 and for 1311 to 1313 Rs. 25-7 and for 1314 and 1315, Rs. 42-2 and by threats of confining him and of having him disgraced by being beaten, realised this amount from him" On the basis of the above allegations, Mr. Mackinnon lodged a complaint against the applicant. The Magistrate (1st class) convicted the applicant under section 500, Indian Penal Code, and sentenced him to pay a fine of Rs. 250. On appeal the conviction and sentence were upheld by the learned Sessions Judge. He in his judgment of the 2nd of April 1910 observes: "The *first* point taken in appeal is that the words are not defamatory inasmuch as the actions alleged are ascribed not to Mr. F. Mackinnon but to his servants but these actions are, on a natural construction of the words, attributed to the anger of Mr. F. Mackinnon and the collection of enhanced rents must be his action. The natural construction of the words is that the servants acted under their master's orders and they were so understood by the prosecution witnesses who are the leading *zemindars* of that part of the country."

"*Secondly*, it is alleged that the 9th exception applies."

The applicant comes here in revision. The first point argued before me is that the statements are privileged under Exception 9 to section 499, Indian Penal Code, and in support of this contention, reliance is placed upon *Isri Prashad Singh* v. *Umrao Singh* (1). In my opinion, the case before me is not governed by that ruling inasmuch as the element of good faith is certainly wanting.

When the plaintiff made the allegations complained of, he could not be said to have been labouring under the notion that the acts done by the servants of Mr. Mackinnon were the results of any action on the part of Mr. Mackinnon.

The second contention is that having regard to the expressions used, Mr. Mackinnon cannot be regarded a "person aggrieved" within the meaning of section 198 of the Criminal Procedure Code.

In support of this contention the learned counsel for the applicant relies on *Beauchamp* v. *Moore* (2). I have read para. 5 of the

(1) 22 A. 134.

(2) 26 M. 43; 12 M. L. J. 413.

plaint. It is alleged to contain the defamatory statements. I have no doubt that those acts are alleged to have been done by the servants of Mr. Mackinnon and not by him or at his instance. The presumption that Mr. Mackinnon must have been at the bottom of those acts and the applicant must have intended to have defamed him has no force. Unless the applicant in very express and unequivocal terms is proved to have defamed Mr. Mackinnon, the latter is not entitled to start Criminal proceedings against him.

The result is that I quash the conviction and order that the fine, if paid, be refunded.

Conviction quashed.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 496 OF 1910.

September 24, 1910.

Present:—Mr. Justice Karamat Husain.

BANSI DHAR—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Northern India Ferries Act (XVII of 1878), ss. 4, 26—Change in course of river—No limit fixed by Government—Conviction—Illegal.

Where there has been a change in the course of a river and there has been no specification of limits under section 4 of the Ferries Act subsequent to the change, a conviction under section 26 of the Act for working a Ferry within the previously prohibited limits cannot be sustained.

Maharaj Mundle v. *Gokul Singh*, 37 C. 543; 12 C. L. J. 21; 6 Ind. Cas. 98, referred to.

Application for revision by Bansidhar.

Mr. *Peare Lal Banerji*, (with him Mr. *Iswar Saran*), for the Applicant.

The Assistant Government Advocate, for the Crown.

Judgment.—In this case the applicant Bansidhar has been convicted under section 26 of the Northern India Ferries Act (XVII of 1878) and sentenced to pay a fine of Rs. 40 or in default to one month's simple imprisonment. He applies to this Court in revision. The facts are these. Gokul Prasad is the lessee of the tolls of the Government Ferry at Bridghat for the year 1909-10. He charged Bhairo Mullah and Bansidhar with working a ferry within one mile of the Government Ferry. The Magistrate who tried the case remarks in his judgment: "The stream is continually cutting land towards Bridghat. Every year it cuts away several yards. The distance between the private ferry and the Government ferry has considerably decreased since the last decision of Syed Aijaz Ali, Deputy Magistrate. The limits fixed by the Local Government were published in the *North Western Provinces and Oudh Government Gazette* dated 12th February 1883. They were *chakra* up stream 1 mile and *chak madari* down stream $1\frac{1}{2}$ mile. The course of the river has entirely changed and *chak madari* is no longer in existence. The position of the *ghat* is also changed. The distance between the private ferry which is up stream and the place where *chak madari* existed which is down stream is now less than $1\frac{1}{2}$ mile. Both *chakra* and *chak madari* (the spot where it existed) are down stream from the Government ferry".

The learned Vakil for the applicant on the basis of the above finding contends that his client could not be prosecuted and he relies on the proviso to section 4 of the Northern India Ferries Act (XVII of 1878) which runs as follows: Provided also that when any alteration in the course or in the limits of a public ferry is rendered necessary by changes in the river, such alteration may be made by an order under his hand by the Commissioner of the division in which such ferry is situate or by such other officer as the local Government may from time to time appoint by name or in virtue of his office in this behalf. He also relies on the case of *Maharaj Mundle* v. *Gokul Singh* (1), which with reference to the Bengal Ferries Act (I of 1885), lays down: "When the limits of a public ferry have not been declared by the Local Government under section 6 of the Bengal Ferries Act, 1885, a conviction under sections 16 and 28 thereof for maintaining a private ferry without sanction to or from any point within 2 miles of the public ferry is bad."

The facts as found by the Magistrate conclusively show that there has been a change in the course of the river and the limits fixed by the notification in the *Government Gazette* of the 17th February 1883 do not exist where they were and there is nothing to show that any subsequent specification of the limits of Bridghat ferry have been made.

Under the circumstances, the prosecution

(1) 37 C. 543; 12 C. L. J. 21; 6 Ind. Cas. 98.

of Bansidhar for working a ferry within a mile of the Government ferry cannot be sustained. I set aside the order of the Magistrate and direct that the fine, if paid, be refunded to the applicant.

Order set aside.

(s. c. 26 P. L. R. 1910.)

PUNJAB CHIEF COURT.

CIVIL REVISION NO. 2412 OF 1908.

December 21, 1909.

Present:—Mr. Justice Shah Din.

HARJI MAL—PETITIONER

versus

RECEIVER OF THE INSOLVENT DEBTOR'S ESTATE—RESPONDENT.

Civil Procedure Code (Act XIV of 1882), ss. 356, 358—Insolvency—Discharge of insolvent—Order not expressly made—Appeal—Revision.

An insolvent applied to the Insolvent Estate's Court, Delhi, for an order to the Receiver to pay him the surplus in his hands. The application was rejected and the order was confirmed on appeal:

Held, following *Hukam Chand* v. *H. P. Robinson*, 43 P. R. 1894, that it must be assumed that the Court did pass an order of discharge under section 355 of the Civil Procedure Code, 1882, as soon as the conditions laid down in that section had been complied with, that section 358 would, therefore, apply and under section 356 the petitioner was entitled to receive the surplus in the hands of the Receiver:

Held, also, that the Divisional Judge was right in holding that no appeal lay to him from the order of Insolvent Estates Court, but as the order appealed against was obviously wrong, it must be set aside on revision.

Petition, under section 70 (1) (*a*) of Act XVIII of 1884 as amended by Act XXV of 1899, for revision of the order of the Divisional Judge, Delhi Division, dated the 27th August, 1908, confirming that of the Judge, Insolvent Court, Delhi, dated the 21st April 1908, rejecting application of petitioner to be paid the assets in the respondent's hands.

Lala *Tek Chand*, for the Petitioner.

Judgment.—The petitioner's original application, dated the 31st March 1908, was really one filed by him under section 356, Civil Procedure Code of 1882, though it is claimed therein that under section 358, the petitioner was absolved from further liability in respect of the scheduled debts, and no reference is made to section 356. In accordance with the view taken by this Court in *Hukam Chand* v. *H. P. Robinson* (1) (see remarks at page 126, first para.), I hold that it must be assumed in this case that the Divisional Judge did pass an order of discharge under section 255, Civil Procedure Code, 1882, as soon as the conditions laid down in that section had been complied with, and those conditions certainly were complied with as appears from the report of the Receiver on the record, more than 12 years before the application under consideration was made. Section 358 would, therefore, seem to apply to this case, and under 356 the petitioner is entitled to receive the surplus in the hands of the Receiver.

The Divisional Judge is right in holding that no appeal lay to him in this case from the order of the first Court, but as that order is obviously wrong, I set it aside on the revision side and direct that the amount claimed be delivered to the petitioner.

Petition accepted.

(1) 43 P. R. 1894.

(s. c. 27 P. L. R. 1910.)

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL NO. 997 OF 1903.

November 27, 1909.

Present:—Sir Arthur Reid, Kt., Chief Judge, and Mr. Justice Robertson.

HARNAM SINGH—PLAINTIFF—APPELLANT

versus

HARNAM SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act XIV of 1882), ss. 510, 521—Arbitration—Arbitrator becoming incapable of acting—Order superseding arbitrator—Award, objection against—Decree in accordance with award—Appeal—Revision—Objection for the first time on appeal or revision.

On an arbitrator becoming incapable of acting, the Court ordered a new arbitrator to be appointed in his place. On the award being delivered, objections were preferred by the plaintiff which were disallowed and a decree in accordance with the award was passed. It was not objected that section 510 of the Civil Procedure Code, under which the lower Court acted, was not applicable to the case. The plaintiff contended that the decree was wrong and must be set aside on appeal, or at any rate on revision:

Held, that the contention was not valid. It was too late to raise the objection that section 510 was not applicable to the case. No appeal lay and the Court would not exercise revisional jurisdiction in the case even if the revision lay.

Further appeal from the order of the Divisional Judge, Ferozepore, dated the 19th October 1907, affirming the order of the Munsif, 2nd Class, Ferozepore, dated the 30th November 1900, dismissing plaintiff's suit.

MALO *v.* EMPEROR.

Lala *Durga Das*, for the Appellant.

Pandit *Ram Bhaj Datt*, for the Respondents.

Judgment.—The concluding paragraph of the judgment of Kensington, J., in *Hans Raj* v. *Ganga Ram* (1) is directly in point.

The paragraph runs as follows:—

"The argument for the appellants may be summarised by saying that it is urged that the District Judge should have decided on the objections to the award as raised before him, that the arbitrator's misconduct was established under section 521 (*a*), Civil Procedure Code. The reply to this is that the District Judge found in fact that there was no misconduct and with the decree based on this finding we have no authority to interfere either by way of appeal or revision."

The case before us is the converse of that before the Full Bench.

The lower appellate Court referred the case to an arbitrator, found that the latter had become incapable of acting within the terms of section 510 of the Code, superseded him, appointed a new arbitrator, overruled the objections taken under section 521 to the new arbitrator's award and passed a decree in accordance with that award.

As pointed out by the learned Judge who referred this case to a Division Bench, the appellant did not urge, when objecting to the award, the objection—that section 510 under which the lower appellate Court acted was not applicable, and it is, in our opinion, too late to raise that objection at this stage of the case on appeal.

In any case we see no reason for interference in revision, even if we were inclined to the opinion that revision lay on this ground with the decree based on the new arbitrator's award, and no appeal lies from the decree so based.

The appeal fails and is dismissed with costs.

Appeal dismissed.

(1) 88 P. R. 1902 (F. B.); 119 P. L. R. 1902.

(s. c. 28 P. L. R. 1910.)

PUNJAB CHIEF COURT.

CRIMINAL REVISION No. 1341 OF 1909.

February 19, 1910.

Present:—Mr. Justice Williams.

Musammat MALO AND OTHERS—CONVICTS—PETITIONERS

versus

EMPEROR—COMPLAINANT—RESPONDENT.

Punjab Municipal Act (*XX of* 1891), *s.* 204—*Brothel house, removal of—Discretion of Magistrate—Exercise of discretion by his predecessor—Complaint not addresse to Magistrate.*

The discretion of a Magistrate, for the time being in charge of a District, which he is entitled to exercise under section 204 of the Municipal Act, is not necessarily fettered by the manner in which his predecessors have in the past exercised that discretion.

A petition presented to the District Magistrate, an acted upon by him is a complaint within the meaning of section 204 of the Punjab Municipal Act, though it may not be addressed to him.

Petition under section 439 of the Criminal Procedure Code, for revision of the order of the District Magistrate, Ludhiana District, dated the 11th September 1909, convicting the petitioners.

Mr. *Fazal Elahi*, for the Petitioners.

The Hon'ble Mr. *Shadi Lal*, for the Respondent.

Judgment.—I cannot interfere in this case, for I do not think that the discretion of the Magistrate for the time being in charge of a district, which he is entitled to exercise under section 204 of the Municipal Act, is necessarily fettered by the manner in which his predecessors have in the past exercised that discretion. Otherwise a perfectly absurd finality would be attached to executive orders. No doubt also in cases like the present one, public opinion differs very much from time to time, and the Magistrate would certainly act judiciously in not exercising his discretion in a manner very violently contrary to public opinion.

It seems to me, therefore, that the fact that the previous District Magistrate thought it unnecessary to put a stop to brothels in the *Aqab* Lucha Bazar, does not of itself compel his successors to follow that course. The point has been taken as to whether the petition of 19th July 1909, which is in form a petition to the Lieutenant-Governor, although handed to the District Magistrate, can be regarded as a complaint, and I hold that as the petitioners acquiesced in the District Magistrate disposing of the petition himself as District Magistrate, it can be so regarded

In these circumstances the application must be rejected and I order accordingly.

Application rejected.

(s. c. 29 P. L. R. 1910.)

PUNJAB CHIEF COURT.

CIVIL REVISION No. 1832 OF 1909.

February 8, 1910.

Present:—Mr. Justice Johnstone.

Musammat RAM KUAR AND OTHERS—PLAINTIFFS—PETITIONERS

versus

Seth MULTANI CHAND—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), Sch. I, O. IX R. 8, Sch II, R. 8—Arbitration—Application by arbitrator for extension of period allowed for making award—Dismissal for default.

The arbitrator applied for extension of period allowed for making the award. The plaintiff failed to attend Court on the date fixed in the case and the Court dismissed the suit:

Held, that the action of the Court was harsh; when a case is under arbitration, a Court should not hastily dismiss the suit for non-appearance in Court of the plaintiff. Much less should this be done when the arbitrator has made an application for extension of time for filing award.

Held, also, that when an arbitrator asks for extension of time and there is no reason to suspect that, being in collusion with the either party, he is wilfully delaying matters or that in any other way there is bad faith in his conduct, the Court should always grant reasonable extension.

Petition under section 70 (*a*) of Act XVIII of 1854 as amended by Act XXV of 1899, for revision of the order of the Munsif, 2nd Class, Multan, dated the 17th July 1909, rejecting the application for re-admission of case dismissed for default of plaintiff's appearance.

Mr. *Nand Lal*, for the Petitioners.

Judgment.—In my opinion the action of the Court was harsh. When a case is under arbitration. I do not think a Court should hastily dismiss the suit for non-appearance in Court of a plaintiff. Much less should this be done, when the arbitrator has made an application for extension of time for filing award. The plaintiff probably knew such application was being made and so not unnaturally concluded that no proceedings would be had on the day fixed. Lastly, when an arbitrator asks for extension of time and there is no reason to suspect that, being in collusion with either party, he is wilfully delaying matters, or that in any other way

there is bad faith in his conduct, the Court should always grant reasonable extension.

I allow the revision and setting aside the order of the lower Court, I direct that Court to summon the parties and the arbitrator and to ask the latter whether he intends to file an award and when. If he names some reasonable period, the Court should extend the time accordingly.

Application accepted.

(s. c. 31 P. L. R. 1910.)

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 1178 OF 1909.

February 23, 1910.

Present:—Mr. Justice Johnstone.

Malik KARIM BAKSH AND OTHERS—DEFENDANTS—APPELLANTS

versus

JATTU RAM—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act XIV of 1882), s. 43—Civil Procedure Code (Act V of 1908), Order II, R. 2 (3)—Cause of action—Splitting claim—Mortgagee entitled to arrear of kasur *and possession on breach of condition of mortgage—Suit for* kasur *filed and decreed—Subsequent suit for possession barred.*

Where under the conditions of a mortgage on the mortgagor making default in the payment of *kasur*, the mortgagees were entitled to both possession of the mortgaged land and arrears of *kasur* and they sued for arrears of *kasur* only:

Held, that a subsequent suit for possession of the mortgaged land was barred under section 43 of the Civil Procedure Code, 1882, or Order II, Rule 2 (3) of the Code, V of 1908. *Ganga Ram* v. *Abdul Rahman* 28 P. R. 1907; *Kundan Mal* v. *Allah Dad Khan*, 19 P. R. 1910, 36 P. W. R. 1910; 5 Ind. Cas. 891, followed. *Roman* v. *Wazira*, 79 P. R. 1886 was overruled in effect, though not expressly, by *Ganga Ram* v. *Abdul Rahman*, 28 P. R. of 1907; 93 P. L. R. 1908.

Miscellaneous appeal from the order of the Divisional Judge, Multan Division, dated the 25th February 1909, reversing that of the District Judge, Muzaffargarh District, dated the 26th December 1907, dismissing plaintiff's claim, and remanding the case under Order XLI, Rule 23, Civil Procedure Code, 1908.

Bhagat *Gobind Das*, for the Appellants.

Mr. *Nand Lal*, for the Respondent.

Judgment.—In this case the mortgage in favour of plaintiff's father, which bears date 11th August 1890, was a mortgage without possession, the mortgagor undertaking to pay Rs. 16 each 6th month (Rs. 32 *per annum*) as *kasur*, and on non-payment plaintiff's father was to be entitled to possession, after which *kasur* would be deemed equal to profits. A suit was brought and

decree got for arrears of *kasur* up to *Sambat* 1954 inclusive. Now plaintiff sues for possession and *kasur* for the 6 years *Sambat* 1957 to *Sambat* 1962 inclusive, conceding that the claim for *kasur* for *Sambat* 1955 and *Sambat* 1956 would be time barred. The suit was first dismissed as time barred, but this order was set aside by the Divisional Court and the case was remanded. Then *Ganga Ram* v. *Abdul Rahman* (1) having come out, the plea of bar by section 43, old Civil Procedure Code, (Order II, Rule 2, new Civil Procedure Code), was raised and the first Court accepted the plea and again dismissed the suit. The learned Divisional Judge has distinguished *Ganga Ram* v. *Abdul Rahman* (1), and, following *Raman* v. *Wazira* (2) has set aside the dismissal and again remanded for re-trial.

I have heard arguments and have consulted the authorities, and, in my opinion, this appeal must succeed. In my opinion the ruling, *Ganga Ram* v. *Abdul Rahman* (1), read with the section concerned, though in that case the relief that might have been asked for, but was not in the first suit, was not possession but recovery of the principal debt, is quite clear. It is true it does not overrule *Raman* v. *Wazira* (2) expressly, but there can be no doubt it does so in effect; and according to the reasoning in the later ruling the point taken in the earlier one that the second suit is on another and fresh breach of contract is clearly beside the mark. According to *Ganga Ram* v. *Abdul Rahman* (1), and the section, when plaintiff in the case of 1886 sued for the interest due and omitted to sue for possession, which he could have sued for, he lost his right to sue for possession altogether, so that virtually the mortgage became extinct. In these circumstances it seems to be absurd to talk of a fresh breach of a contract, when that contract had ceased to exist.

Kundan Mal v. *Allah Dad Khan* (3) is another ruling very much in point. It follows *Ganga Ram* v. *Abdul Rahman* (1), in principle, and it also discusses the question whether, when suit for principal is barred, suit for interest lies, and it answers the question in the negative.

It seems to me here that, inasmuch as on default of payment of *kasur* plaintiff had the right to sue for possession and also for *kasur* but sued only for *kasur*, he omitted to sue for one of the reliefs available to him on that same cause of action on which his suit was then based, and thus section 43 or Order II, Rule 2 (3), fully applies and bars the present suit for that other relief.

Had defendant after the first decree begun to pay *kasur*, it might have been argued that there was a new tacit contract of mortgage; but defendant clearly never paid *kasur* at all.

I am also of opinion that the case is not one of those in which the rule that no one is bound to enforce a forfeiture applies This has not been argued before me and I need not discuss it.

For these reasons, I accept the appeal and set aside the order of the learned Divisional Judge and dismiss plaintiff's suit with costs throughout.

Appeal accepted.

(1) 28 P. R. 1907; 93 P. L. R. 1908.
(2) 79 P. R. 1886.
(3) 19 P. R. 1910; 36 P. W. R. 1910; 5 Ind. Cas. 821.

(s. c. 32 P. L. R. 1910.)

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 1356 OF 1905.

April 3, 1907.

Present:—Mr. Justice Robertson and Mr. Justice Tensington.

FATTEH DIN AND TWO OTHERS—PLAINTIFFS—APPELLANTS

versus

RAM RAKHA AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Succession—Daughters—Collaterals—Naru Rajputs *of Hoshiarpur District*:

According to the custom among *Naru Rajputs* of Hoshiarpur district, daughters exclude from inheritance all collaterals other than descendants of a common great-grandfather.

In a suit for redemption of a mortgage by the collaterals of the mortgagor after the latter's death, the daughter of the deceased, claiming to succeed by right of inheritance, is entitled to be made a party and to contest the collaterals' right to sue.

Further appeal from the decree of the Divisional Judge, Hoshiarpur Division, dated the 23rd October 1905, affirming the order of the District Judge, Hoshiarpur, dated the 28th April 1905, dismissing plaintiff's suit.

Mr. *Muhammad Shafi*, for the Appellant.

Mr. *Shadi Lal*, for the Respondent.

Judgment.—The main question involved in this appeal is, whether we should follow the ruling in *Ranjhi Khan* v. *Musammat Kamun* (1), in accordance with which the

(1) 179 P. R. 1889.

D. A. R., B. A., LL. B., High Court, Kashmir

lower Courts have dismissed plaintiff's claim. After hearing arguments we can see no reason why that ruling should not be taken as conclusive of the point that among *Narn Rajputs* of Hoshiarpur daughters exclude from inheritance all collaterals other than descendants of a common great-grandfather, as by the explicit entry in the *Riwaj-i-am* of the District. The previous orders of this Court, dated 6th September 1888 and 12th June 1889, merely decided that plaintiffs were heirs of Imam Din, but not necessarily his immediate heirs, the suit has, therefore, in our opinion, been rightly dismissed on the facts disclosed.

As a minor point it is urged on behalf of the plaintiff-appellant that the daughter here concerned, namely, *Musammat* Jhandi, should not have been made a defendant in the case, and that her name should be now struck out, leaving her to sue for the inheritance from her father Imam Din if so advised. We cannot allow this contention.

The suit was, no doubt, instituted by the collaterals as one for redemption against a mortgagee from the last holder, ignoring *Musammat* Jhandi, but the latter was within her rights in asking to be made a defendant and in resisting the claim on the basis of her position as heir to Imam Din, after his widow's death. The case has been fought out on the question of competition between the daughter and the collaterals, the first issue having been correctly drawn on this point. The plaintiffs cannot now evade the issue, merely because they desired to frame their suit as one against the mortgagee alone.

The appeal is accordingly dismissed with costs.

Appeal dismissed.

(s. c. 33 P. L. R. 1910.)

PUNJAB CHIEF COURT.

CRIMINAL REVISION No. 804 OF 1909.

January 12, 1910.

Present:—Mr. Justice Shah Din.

RASUL KHAN—CONVICT—PETITIONER

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 498—Woman absconding to accused of her own accord—Sentence.

Where the accused is convicted of an offence under section 498 of the Indian Penal Code and it appears that the woman not being on good terms with her husband went to accused of her own accord, a sentence of one year's rigorous imprisonment is too severe.

Petition, under section 439 of the Criminal Procedure Code, for revision of the order of the Additional Sessions Judge, Shahpur, dated the 28th June 1909, affirming that of the Magistrate, 1st Class, Mianwali, dated the 8th June 1909, convicting the petitioner.

Mr. *Nand Lal*, for the Petitioner.

Judgment.—The evidence produced by the prosecution satisfies me that the petitioner at any rate concealed or detained the complainant's wife *Musammat* Pishtani, with the intent specified in section 498, Indian Penal Code, and I hold that he has been rightly convicted under that section.

As, however, the woman does not appear to me to have been on good terms with her husband, the complainant, and probably went of her own accord to live with the petitioner, a lenient view of the petitioner's guilt should, I think, have been taken.

A sentence of one year's rigorous imprisonment is, under the circumstances, too severe.

I, therefore, accept the revision and reduce the sentence to the amount of imprisonment already undergone.

The petitioner will be released from jail at once.

Petition accepted.

(s. c. 34 P. L. R. 1910.)

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 492 OF 1909.

February 12, 1910.

Present:—Mr. Justice Rattigan.

SHANKAR DAS AND OTHERS—PLAINTIFFS—APPELLANTS

versus

NARAIN DAS AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), Sch. I, O. XLI, R. 17—Appeal—Dismissal for default—Case called out and dismissed before rising of Court—Sufficient cause for absence of party—Party not to suffer on account of absence of pleader.

Where an appeal was called at an early part of the day and dismissed for default of the appellant and his pleader not appearing to conduct the appeal, the Chief Court set aside the order of dismissal and observed that the lower appellate Court should have given a further opportunity, during the course of its sitting, of showing whether or not he was present, in person or by pleader, before it rose for the day. *Subhan Shah* v. *Karm Khan*, 113 P. R. 1876, referred to.

MUHAMMAD BAKHSH *v.* FAIZ BAKHSH.

The pleader's absence in a case need not be satisfactorily explained if the appellant can give a reasonable excuse for his own absence.

Further appeal from the order of the District Judge, Jhang, dated the 1st October 1908, confirming the order of the Munsif of the 1st Class, Jhang, dated the 30th day of April 1908, dismissing the plaintiffs' claim.

Mr. *Gulu Ram*, for the Appellants.

Mr. *Nanak Chand*, for the Respondents.

Judgment.—In my opinion it was a most monstrous proceeding for the District Judge, (*Pandit* Joti Prasad), to dismiss an appeal for default because when it was called on at 7-30 A. M., neither appellant nor his pleader happened to be present. I presume the Court began its sittings at 6 A. M., and it should have given the appellant a further opportunity during the course of its sitting of showing whether or not he was present, in person or by pleader, before it rose for the day. It was a scandalous abuse of its powers to summarily throw out the appeal, because no one appeared to support it at the early hour of 7-30 A. M., when it called on. Apart from this, appellant gives very good reasons to explain the cause of his involuntary absence, and I am surprised to find that the District Judge stubbornly refuses to re-admit the appeal which he so unjustifiably dismissed in default. The mere fact that the appellant had engaged a pleader and that the pleader's absence has not been satisfactorily explained is immaterial, if the appellant can give a reasonable excuse for his own absence *Subhan Shah* v. *Karm Khan* (1). I accept the petition and direct the District Judge to restore the appeal to his file and to dispose of it in accordance with law. Costs up to date will abide the event.

I trust the District Judge will, in future, refrain from such hasty and injudicious action as he took in this case and that he will not dismiss cases in default until reasonable opportunity has been given to the parties to prove their presence on the day fixed for the hearing.

Petition accepted.

(1) 113 P. R. 1876.

(s. c. 35 P. L. R. 1910.)

PUNJAB CHIEF COURT.

CIVIL REVISION No. 1519 OF 1909.

February 17, 1910.

Present:—Mr. Justice Johnstone.

MUHAMMAD BAKHSH—PLAINTIFF—PETITIONER

versus

FAIZ BAKHSH AND OTHERS—DEFENDANTS—RESPONDENTS.

Landlord and Tenant—Ejectment—Cause of action—Denial of landlord's title—Punjab Courts Act (XVIII of 1884), s. 70 (1) (a)—Revision—Civil cases—Material irregularity—Lower Appellate Court ignoring vital facts.

Where it appeared that the lower appellate Court had ignored vital facts in deciding an appeal, the Chief Court admitted revision against the decree passed on appeal by the lower appellate Court.

The denial of landlord's title by the tenant is a sufficient cause of action for his ejectment.

Petition under section 70 (*a*) of Act XVIII of 1884, as amended by Act XXV of 1899, for revision of the order of the Divisional Judge, Ambala Division, dated the 25th February 1909, confirming that of the Munsif, 1st Class, Ludhiana, dated the 29th November 1907, dismissing plaintiff's claim.

Sheikh *Umar Bakhsh*, for the Petitioner.

Mr. *Harris*, for the Respondents.

Judgment.—This was a suit for possession of a site in the town of Ludhiana, for possession of certain houses subject to payment of price Rs. 49 and for rent for 2 years Re. 0-7-6. The first Court dismissed the suit, and the lower appellate Court, after two remands, upheld the decision. Plaintiff applied here for revision and I admitted the petition because, after a perusal of the somewhat intricate judgments of the Courts below, I arrived at the impression that the lower appellate Court had ignored vital facts.

Though the facts are intricate, there appeared on discussion before me to be not very much difference regarding them. It is admitted that defendant No. 2 is lessee of the houses. She claims to be owner of the ground; but plaintiff says he is. Plaintiff's allegation is supported by what seems to me quite good evidence in the deed of 15th May 1877, under which 8 persons, of whom Rahim Bakhsh, with Suleman, father of plaintiff, as *shikmi sharik*, was one, purchased the whole property, *i. e.*, the property in suit and other property, land and houses, from the widow of one Megh Singh, follow-

ed by the three deeds of 24th February 1881, whereby plaintiff bought out his co-sharers. Again, in the lease of 5th June 1862 by Megh Singh's widow to 32 tenants, Kala, defendant's father, is one; and defendant No. 1 seems never to have had any title but that of lessee. Defendant No. 3 is descendant and heir of one Kalu Mal, but Kalu Mal's purchase from the aforesaid eight vendees of 1877 is dated 1883, two years after the property now in suit passed entirely to plaintiff. The real fact is that Kalu Mal's purchase was of another part of the property bought by the 8 in 1877 and has no concern with the property in suit. Thus the title as owner of defendant No. 2 through defendant No. 1, is defective; and I have no hesitation in finding that plaintiff is owner of both houses and site in suit, and defendant No. 2 only lessee.

But defendant No. 2 has denied plaintiff's title, and this is all the world over sufficient cause of action for ejectment. I allow the revision, set aside the judgments and decrees of the lower Courts and remand the case for decision on issue 3 and in the matter of rent; that is, the first Court must value the materials and decide what rent is due, if any, and give plaintiff a decree for possession of land and houses in suit subject to payment of value of materials of houses diminished by the rent due to plaintiff.

Costs of plaintiff in this Court to be paid by Mr. Harris's client.

Petition accepted.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL No. 833 OF 1910,
August 11, 1910.
Present:—Mr Justice Chamier.
KALIAN—PLAINTIFF—APPELLANT
versus
CHHEDU SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Agra Tenancy Act (II of 1901), s. 22—Male lineal descendant—Adopted son—Hindu Law.

A son duly adopted according to the Hindu Law must be treated as a male lineal descendant within the meaning of section 22 of the Agra Tenancy Act, 1901.

Nandan Tewari v. *Raj Kishore Rai*, S. D. No. 5 of 1904, approved of; *Bhura* v. *Shahab-ud-Din*, 5 A. L. J. 77; A. W. N. (1908) 37; 30 A. 128, referred to; *Wir Bhan* v. *Suba*, 40 P. R. 1894; *Fatteh Muhammad* v. *Musammat Jiwan*, 43 P. R. 1895, distinguished.

Second appeal from the decision of the Subordinate Judge of Aligarh, dated the 20th of July, 1910.

Mr. *Gulzari Lal*, for the Appellant,

Judgment.—The only question in this appeal is whether an adopted son is a "male lineal descendant in the male-line of descent" within the meaning of section 22 (*a*) of the N. W. P. Tenancy Act. The Board of Revenue in the case of *Nandan Tewari* v. *Rajkishore Rai* (1), have definitely decided the question in the affirmative. The learned Vakil, for the appellant has referred me to two cases decided by the Punjab Chief Court upon section 59 of the Punjab Tenancy Act No. XVI of 1887. In the first of these cases, *Wir Bhan* v. *Suba* (2), no question as to the right of an adopted son to succeed arose. Sir Meredyth Plowden expressed a doubt whether an adopted son could be regarded as a male lineal descendant within the meaning of section 59. In the second case *Fatteh Muhammed* v. *Musammat Jiwan* (3), it was held by the Full Bench that a mere customary adoption, whether by a Hindu or by a Muhammadan, gives no right of succession under section 59 of the Punjab Tenancy Act. It appears that there is in the Punjab a common custom under which an heir is "appointed" and this is called a "customary adoption." The learned Judges are careful to point out the difference between the so called customary adoption and a true adoption under the Hindu Law. It seems that in the case of a customary adoption there is no element of affiliation, and the learned Judges were careful to say that they did not intend to decide that a son adopted according to the Hindu Law is not a male lineal descendant within the meaning of section 59 of the Punjab Tenancy Act. In the present case, we have to deal with a true adoption under the Hindu Law. I was referred to the case of *Bhura* v *Shahab-ud-din* (4), as an authority for the proposition that both the Hindu and Muhammadan Law were abrogated by section 22 of the Agra Tenancy Act to cases to which that section applies. The decision does not go to that length, and certainly does not touch the present question. I see no reason whatever for differing from

(1) S. D. No. 5 of 1904.
(2) 40 P. R. 1894.
(3) 43 P. R. 1895.
(4) 5 A. L. J. 77; A. W. N. (1903) 37; 30 A. 123.

the decision of the Board of Revenue. It appears to me that a son duly adopted according to the Hindu Law must be treated as a male lineal descendant within the meaning of section 22. I, therefore, dismiss this appeal.

Appeal dismissed.

(s. c. 36 P. L. R. 1910.)

PUNJAB CHIEF COURT.

CRIMINAL APPEAL No. 549 OF 1909.

February 15, 1910.

Present:—Mr. Justice Chevis.

WASAWA SINGH—CONVICT—APPELLANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 233—Charges, joinder of—Penal Code (Act XLV of 1860), s. 411—Stolen property—Possession of property stolen from several persons at different times—Charge, defect in—Appeal.

Unless it appears that articles for the possession of which the accused is charged under section 411, Indian Penal Code, came in his possession on different occasions, the trial is not irregular on account of the fact that the articles were stolen from several persons at different times.

Johan Subarna v. *Emperor*, 10 C. W. N. 520; 2 C. L. J. 618; 3 Cr. L. J. 111; *Nanda Kumar Sirkar* v. *Emperor*, 11 C. W. N. 1128; 6 Cr. L. J. 321; *Ali Mahomed* v. *Emperor*, 13 C. W. N. 418; 9 Cr. L. J. 277; 1 Ind. Cas. 335 and *Srish Chandra Mukerjee* v. *Emperor*, 13 C. W. N. 1067; 4 Ind. Cas. 16; 10 Cr. L. J. 469, referred to.

When it is not shown that the accused is prejudiced on account of a defect in the charge, the Court of appeal will not interfere with the conviction.

Appeal from the order of the Sessions Judge, Lahore Division, dated the 1st December 1909, convicting the appellant.

Judgment.—The appellant has been convicted under section 411, Indian Penal Code, with respect to—

(1) A *deg* said to have been stolen from Allah Bakhsh;

(2) A Sewing machine and 2 unfinished coats said to have been stolen from Kamar Din; and

(3) A 2 foot rule, coat, waistcoat, shirt, *pagri*, *pattis*, gloves and 2 boxes said to have been stolen from Abdul Majid.

The first objection raised on his behalf is that there should have been three separate trials and *Johan Subarna* v. *Emperor* (1), *Nanda Kumar Sarkar* v. *Emperor* (2), *Ali Mahomed* v. *Emperor* (3), *Srish Chandra*

(1) 10 C. W. N. 520; 2 C. L. J. 618; 3 Cr. L. J. 111.
(2) 11 C. W. N. 1128; 6 Cr. L. J. 321.
(3) 13 C. W. N. 418; 9 Cr. L. J. 277; 1 Ind. Cas. 335.

Mukerjee v. *Emperor* (4), are quoted. The first two and fourth of those were cases in which the accused was charged with separate acts of cheating, the third was a case in which the accused had been convicted of two separate offences of dishonestly receiving stolen property. But in the present case the prosecution do not allege two separate offences at all and there is nothing in the prosecution evidence to show that the various articles above mentioned came into appellant's possession on different occasions. Hence the above cases are distinguishable.

The next objection is that the wording of the charge is bad. The charge is "that you, on or about 18th April 1909, at Lahore, were found in possession of 2 boxes and some clothes, etc., which property you knew or had reason to believe to be stolen." It is urged that there is no such offence as "being in possession," the offence defined in the Code being one of dishonest receipt or dishonest retention. This is correct, but I cannot agree with the further plea that the appellant was prejudiced and did not know what charge he had to meet. He was represented by two counsel at his trial, one being the counsel who represents him in this Court, and no objection whatever was then raised as to the wording of the charge.

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(4) 13 C. W. N. 1067; 4 Ind. Cas. 16; 10 Cr. L. J. 469.

(s. c. 39 P. L. R. 1910.)

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 1342 OF 1907.

January 31, 1910.

Present:—Sir Arthur Reid, Kt., Chief Judge, and Mr. Justice Johnstone.

BALA BAKHSH AND ANOTHER—DEFENDANTS—APPELLANTS

versus

LOHRI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Estoppel - Mortgage—Prior and subsequent mortgages—Sale of part of mortgaged property to mortgagee—Redemption of previous mortgage—Prior mortgagee not setting up his purchase as defence—Right of subsequent mortgagee to possession.

Where the sub-mortgagees purchase the shares of some of the heirs of the mortgagor in the property mortgaged and all the heirs sue for redemption of the mortgage and pending the suit for redemption, the pro-

perty is mortgaged with third parties and out of the consideration for this latter mortgage the sub-mortgagees are paid up and redemption of the previous mortgage is allowed, the sub-mortgagees are estopped from setting up their purchase from some of the heirs of the mortgagor against claim for possession made by the subsequent mortgagees. Their acceptance of the whole mortgage money constitutes an admission that the redeemed land had not been sold to them.

Further appeal from the decree of the Divisional Judge, Delhi Division, dated the 17th October 1907, reversing the order of the District Judge, Gurgaon, dated the 16th July 1907, dismissing plaintiffs' claim.

Mr. *Shadi Lal*, for the Appellant.

Mr. *Muhammad Shafi*, for Respondents Nos. 1 and 2.

Judgment.—Bhura or Bhor defendant No. 10 and now respondent was not served with notice of this date. He had been in jail and was released on acquittal. As he was not represented and did not appear in the lower appellate Court, we decided to proceed with the hearing. The following are the admitted facts. *Musammat* Bhago owned a *khata* of 84 *bighas* 8 *biswas* in *Patti* $12\frac{1}{2}$ *biswas*. She mortgaged this to Holasi and Man Singh for Rs. 107.

In 1890, after the death of *Musammat* Bhago who was succeeded by the defendants Nos. 1 to 10, this *khata* was included by the Revenue authorities in the *Shamilat Khata* of the $12\frac{1}{2}$ *biswas Patti*.

In 1892 Holasi and Man Singh sub-mortgaged to the appellants for Rs. 600. In 1893-5 the appellants purchased from five of the defendants Nos. 1—10 including Bhura, their "proprietary land" with shares in the *Shamilat*.

In October 1905, the defendants Nos. 1—10 sued for redemption of the mortgage to Holasi and Man Singh and the appellants who were in possession pleaded the mortgage for Rs. 600 to them.

During the pendency of the suit, the then plaintiffs mortgaged *Musammat* Bhago's *khata* to the respondents Lohri and Bhola for Rs. 1,000.

In March 1906, the then plaintiffs obtained a decree for redemption on payment of Rs. 600 and this sum out of the mortgage consideration of Rs. 1,000 was deposited in Court and was taken out by the appellants.

Lohri and Bhola then filed the present suit for possession as mortgagees for Rs. 1,000.

The heirs of *Musammat* Bhago confessed judgment but the appellants pleaded that they became proprietors in the *Patti* by purchase, that they were necessary parties to any mortgage of the land by specific numbers by the other proprietors; and that the plaintiffs were not entitled to possession of specific numbers but could obtain possession of a share only and could subsequently sue for partition.

On the facts stated the appellants were, in our opinion, barred from setting up this defence.

If the sale to them by the five heirs of *Musammat* Bhago included their shares of her land, the mortgage of those shares merged in the sale and the mortgage was split, the appellants being entitled on redemption to a share only of the mortgage money proportionate to the shares not sold to them.

Their acceptance of the whole mortgage money constituted an admission that *Musammat* Bhago's land had not been sold to them and they cannot now set up title as purchaser to any part of that land which was, moreover, in our opinion, not the *Shamilat* of the land held by the heirs of *Musammat* Bhago in their own right apart from inheritance to her.

For these reasons the defence set up by the appellants fails, and the plaintiff respondents are entitled to possession of the land in suit. In our view of the facts and the law, it is unnecessary to consider the authorities cited on either side.

The appeal fails and is dismissed with costs.

Appeal dismissed.

(s. c. 40 P. L. R. 1910.)

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 878 OF 1909.

February 9, 1910.

Present:—Mr. Justice Johnstone.

PALA—PLAINTIFF—APPELLANT

versus

BEANT SINGH—DEFENDANT—RESPONDENT.

Pleadings—Burden of proof—Plaintiff must succeed or fail on his own allegations.

The plaintiff, vendor, sued for a part of the consideration of the sale, alleging that the defendant had orally agreed to pay the amount in cash which was fictitiously entered in the sale-deed, as due to certain creditors of his and to be paid by the vendee, to prove "necessity". In his oral statement the plaintiff said that the amount was entered fictitiously to defeat pre-emptors. The claim was allowed by the original Court but was rejected on appeal:

Held, that the claim was rightly rejected, for the plaintiff must succeed or fail on his own allegations.

Further appeal from the order of the Divisional Judge, Jullundur Division, dated the 9th day of June 1909, reversing that of the District Judge, Jullundur, dated the 19th November 1908, decreeing plaintiff's claim.

Rai Sahib Pandit *Sheo Narain*, for the Appellant.

Rai Bahadur Bakhshi *Sohan Lal*, for the Respondent.

Judgment.—This appeal was admitted in connection with the question of onus.

The deed in suit is one of sale of Rs. 3,000 out of this sum Rs. 1,000 is made up of five items, of which the first four Rs. 900 in all are said to be sums due to third persons by the vendor plaintiff and now to be paid off by vendee defendant. Plaintiff sued for this Rs. 100, and for another sum of Rs. 12-8 which we need not trouble about. In his plaint I observe that he stated that these four items were fictitious and were entered to prove "necessity" and the idea was that the amount Rs. 900 was to be paid to plaintiff in cash. Defendant vendee pleaded that the items were genuine and that he had paid them off. On this view of the case it would certainly be for defendant to prove these payments for they were to be made after the execution and registration of the deed, and their entry in the deed and plaintiff's admission at registration do not imply any admission that they were actually paid.

It appears to me, then, that the lower appellate Court was wrong as to *onus* but nevertheless plaintiff cannot succeed as to these items. A plaintiff's case must succeed or fail on his own allegations and I find that in his oral statement below he said that these four items were entered fictitiously to *defeat pre-emptors*. This is quite different from the statement in the plaint, and really means that this Rs. 900 never passed and never was meant to pass. In these circumstances, how could plaintiff claim the amount?

But defendant's counsel admits that plaintiff must have the fifth item Rs. 100.

I allow the appeal and give plaintiff a decree for Rs. 100; but as he has lost his case in effect I direct that he do pay defendant's costs.

Appeal accepted.

(s. c. 46 P. L. R. 1910.)

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 40 OF 1909.

February 2, 1910.

Present:—Mr. Justice Johnstone.

INAYAT ALI SHAH—PLAINTIFF—APPELLANT

versus

WILAYAT SHAH AND OTHERS—DEFENDANTS—RESPONDENTS.

Succession—Agreement that land would go to a shrine on the death of persons who were parties to the agreement—Gift in favour of shrine by one of the parties—Suit to question the gift by another party.

When the parties to the present suit and others had agreed in a previous case that on the death of the persons who were parties to the agreement the land in dispute would go to a shrine:

Held, that a gift of her share by one of the parties, a female, in favour of one of the managers of the shrine, was not liable to be questioned by a person, who was also a party to the agreement and claimed a right to the land as an heir of the donor.

Further appeal from the order of the Divisional Judge, Lahore, dated the 10th December 1908, reversing that of the Sub-Judge, 1st Class, Lahore, dated the 20th July 1908, decreeing plaintiff's claim.

Mr. *Shadi Lal*, and Chaudhri *Nabi Bakhsh*, for the Appellant.

Maulvi *Fazal-ud-din*, for the Respondents.

Judgment.—The facts appear fairly well in the judgments of the Courts below and need not be repeated at length here. The parties are persons interested in the shrine of *Hazrat* Mian Mir. On 19th May 1904, an agreement was entered into, both plaintiff and defendant No. 1, Walayat Shah, being parties, and, in my opinion, on the basis of this agreement, which fully binds defendant No. 1, the suit must succeed. The learned Divisional Judge seems to me to have wholly misunderstood, or at least to have strangely mis-applied, this document. In brief the intention of the agreement was to benefit the shrine. The eleven persons concerned agreed that, if any of them, men or women, should die without issue (*lawald*), the property held by the deceased should go to the shrine. This implied a renunciation of collateral succession. It follows that under the agreement, when *Musammat* Umdan Bibi, donor in the present case, should die, her property would go to the shrine, her husband's heir Wilayat Shah, defendant No. 1, waiving his claim to it; and from this it follows that when the lady accelerated the succession of

the shrine by *giving* the property to it in her life-time, Wilayat Shah has no *locus standi* to object, as the property would never come to him any how. The Divisional Judge takes it that by executing the agreement Wilayat Shah meant that *he* would inherit in the ordinary way from a childless collateral and *then*, if he himself died without issue, the propeity would go to the shrine; but I cannot take this view. I think he and the others meant that in such a case as *Musammat* Umdan Bibi's the property on her death would go to the shrine.

M. Fazal-ud-din *raises* the question whether Wilayat Shah was not a minor at time of execution of agreement: this is based on a rather confused endorsement by the Sub-Registrar. On the face of the document Wilayat Shah is said to be 21, and if the Sub-Registrar had discovered him to be under 18, he would not merely have written in an obscure way his description as *na-baligh*. Further, the point is new and cannot be enquired into at this stage.

Then, Mr. Fazal-ud-din argues that *la-wald* in the agreement does not mean only without descendants but without *heirs*. I overrule this.

Lastly, he contends that the agreement lays it down that property is to go to the shrine where as *Musammat* Umdan Bibi has gifted her land to plaintiff, a very small co-sharer in the management of the shirne and not to the shrine or the body of managers of it. No doubt this a point, and perhaps the body of managers have an action against plaintiff for joint possession with him, but this point was never raised in the Court below, and I much doubt if it can be raised in defence of this claim.

For these reasons I accept the appeal and give plaintiff the decree, he has asked for, with costs throughout. The other points discussed by the Courts below do not arise in the case.

Appeal accepted.

(s. c. 47 P. L. R. 1910.)

PUNJAB CHIEF COURT.

CIVIL REVISION NO. 2283 OF 1909.

March 21, 1910.

Present:—Mr. Justice Rattigan.

DIAL SINGH—DEFENDANT—PETITIONER

versus

ALLAH DITTA AND OTHERS—PLAINTIFF AND DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11—Res judicata—Finally decided—Ex parte decree—Decree executed—Fraud—Minor's right to relief on the ground of fraud by fresh suit not allowed—Limitation Act (IX of 1908), Sch. I, art. 95—Limitation—Suit to set aside decree on the ground of fraud.

In 1900, an *ex parte* decree for possession of land was passed against the defendants, who were minors and were represented by their cousins as guardians *ad litem*. The decree was executed and mutation of names was effected in 1902. In 1904 a decree for produce was passed against the defendants.

In the present suit, filed in 1907, the defendants sued to recover possession of the land and alleged that the *ex parte* decree was a nullity and they were not bound by it and the subsequent proceedings, for the guardians had colluded with the opposite side:

Held, that the suit was not maintainable until and unless the *ex parte* decree against them was set aside. The right as to the possession of the land was *res judicata* so long as that decree subsisted. *Prima facie* a suit to set aside the *ex parte* decree would be barred under article 95 of the Indian Limitation Act,

Chuni Lal v. *Amir Bibi*, P. L. R. 1909 p 431, referred to.

Petition, under section 70 (*a*) (*b*) of Act XVIII of 1884 as amended by Act XXV of 1899, for revision of the order of the Divisional Judge, Rawalpindi Division, dated the 3rd May 1909, affirming the decree of the Munsif, 1st Class, Rawalpindi, dated the 14th December, 1908, decreeing plaintiffs' claim.

Bhagat *Govind Das*, for the Petitioner.

Mr. *Bishen Singh*, for the Respondents.

Judgment.—In my opinion the Courts are clearly wrong in holding (1) that the present suit is within time and (2) that it is not barred as *res judicata*. The defendant Dayal Singh, in 1890, obtained an *ex parte* decree for possession of the property. In this case the present plaintiffs were defendants and being minors were represented by their cousins, Mangu and Badli as guardians *ad litem*. In execution of decree Dayal Singh obtained possession of the property and mutation was sanctioned in his favour by the Collector (on appeal) on the 17th February 1902 and duly effected on the 14th March 1902. Present plaintiffs appealed to the Commissioner but their appeal was rejected.

In these mutation proceedings plaintiffs

admitted that they had knowledge of the *ex parte* decree. In 1904 the defendant obtained a decree for produce against plaintiffs in the Revenue Court, and this decree has not been set aside. Plaintiffs' present suit for possession cannot, I think, be maintainable unless and until the *ex parte* decree which defendant obtained in 1900 against them is set aside, that decree may have been obtained by fraud and the then guardians of the plaintiffs (Mangu and Badli) may have colluded with defendant, but the decree is not, on that account, a mere nullity, though it might have been (and possibly may still be) open to attack by the plaintiffs and be shown by them to be voidable on the ground of fraud, [*Ghulam Rassul* v. *Ajab Gul* (1)] ; on the other hand, it is clear that plaintiffs knew of its existence in 1902, and the present suit was not brought till 1907. *Prima facie*, therefore, a suit to set aside the *ex parte* decree of 1900 would be barred under article 95 of the Indian Limitation Acts (XV of 1877 and IX of 1908). But in addition to this fact, it is to be remembered that the *ex parte* decree of 1900 was executed, and this, too, to the knowledge of the plaintiffs, and consequently any question as to defendant's right to the possession of the land must be regarded as *res judicata* so long as that decree subsists [*Chuni Lal* v. *Amir Bibi* (2).] I hold, therefore, that it is not open to plaintiffs to ignore the proceedings of 1900 and of 1904, and that whatever right they *may* have to set aside these proceedings, they cannot sue for possession of the land so long as the *ex parte* decree against them subsists. I, therefore, accept this application and reversing the decrees of the lower Courts, I dismiss plaintiffs' suit with costs throughout.

Petition accepted.

(1) 57 P. R. 1891.
(2) P. L. R. 1900, p. 431.

(s. c. 54 P. L. R. 1910.)

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL NO. 486 OF 1908.

March 9, 1910.

Present:—Sir Arthur Reid, KT., Chief Judge, and Mr. Justice Rattigan.

Sayad RUKN ABDULLA SHAH—PLAINTIFF—APPELLANT

versus

DAYALA MAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Pre-emption—Purchase-money—Interest on money prepaid by vendee to vendor—Registration Act (III of 1877), s. 17, clause (c)—Receipt for money paid prior to sale—Pre-emption Act (Punjab No. II of 1905), s. 22.

All that a pre-emptor has to pay to the vendee is the sum actually representing the purchase money and interest chargeable on amounts prepaid by the vendee to the vendor before the date of sale cannot be levied from him. The mere fact that the pre-emptor is not legally bound to pay the interest, which is shown as part of the consideration for the sale, does not mean that the parties to the sale did not fix the price in good faith within the meaning of section 22 of the Punjab Pre-emption Act.

A receipt for money paid previous to a sale by the vendees to the vendor is not compulsorily registrable under clause (*c*) of section 17 of the Registration Act if the sale was not completed when the money was paid.

Sardar Partab Singh v. *Lala Karm Chand*, 184 P. R. 1889 (F. B.) at p. 653, followed.

First appeal from the order of the District Judge, Multan, dated the 19th March 1908, decreeing the claim in part.

The Hon'ble Mr. *Muhammad Shafi*, for the Appellant.

Rai Sahib Lala *Sukh Dial*, for the Respondents.

Judgment.—On the 18th September 1906, Rai Sahib Ditta Mal, late Officiating Civil Surgeon of Gurdaspur and a well-known and respected member of Amritsar Society, purporting to act on behalf of himself and his son, Kundan Lal, who was at the time in England, executed a deed of sale of certain lands, situate in *Mauza* Kukar Hatta in the Multan District, in favour of Dayala Mal, Mangha Mal, Tika Mal and Dewa Mal, (residents of *Mauza* Sarafrazpur in the said District) for an alleged consideration of Rs. 31,762. This deed of sale was duly registered in the office of the Registrar, Multan, on the 18th October 1906. On the 20th August 1907, the present appellant, Sayad Rukn Abdulla Shah, instituted a suit for pre-emption of the lands above mentioned, but it appears that one Bahawal (defendant No. 7 in the present case) had somewhat earlier instituted a like suit and both suits were heard and decided together by the District Judge.

Various pleas were raised by the parties concerned in the two suits. There was, for instance, a plea by the defendants-vendees that the suits were barred by limitation, inasmuch as the sale to them had really taken place on the 21st April 1906. This plea was abandoned at an early stage, as the vendees were obviously unable to prove that the sale to them was complete on the date

last mentioned, inasmuch as Kundan Lal was one of the owners of the property and the power of attorney authorising his father to sell his share in the property was not received by the latter till about the end of August 1906. There was also, at first, a contest between the rival pre-emptors *inter se*, the present appellant contending that Bahawal was not entitled to claim any right of pre-emption as against him. The District Judge has found that the two claimants for pre-emption were both entitled to pre-empt the property, but that Bahawal could not claim more than 1/312th part of it. In his grounds of appeal to this Court, the appellant, Rukn Abdulla Shah, takes objection to this finding, but in arguing his client's case before us, Mr. Muhammad Shafi did not attempt to support either the 1st or the 2nd of his grounds of appeal. We may take it, therefore, that these objections have been abandoned.

Upon the case as a whole, the District Judge found that the amount actually paid was Rs. 31,504-14-0, and in arriving at this conclusion he relied upon the evidence of *Sardar* Jiwan Singh, an Honorary Magistrate of the 1st class. The learned Judge also found that the market-value of the property was approximately the same as the sum above mentioned and he accordingly granted the two plaintiffs a decree for pre-emption upon that basis, Bahawal being granted a decree for possession of 1/312th part of the property on payment of the proportionate share of the sale-money, Rs. 31,564-14-0, within 6 months, and Rukn Abdulla Shah a decree for possession of the remainder of the property in suit on payment of the remaining amount of the purchase-money within the said period of 6 months. It is admitted that Rukn Abdulla Shah, the present appellant, duly paid into Court the amount of the decree within the period specified. Rukn Abdulla Shah has, however, preferred this appeal from the decree of the District Judge, and on his behalf his learned counsel has strenuously urged that no such sum as Rs. 31,504-14-0 was actually paid to the vendor by the vendees and that the market-value of the property does not, at the outside, exceed Rs. 20,000 or Rs. 21,000.

This is the sole question that has been argued before us, and we have, therefore, only to consider whether the District Judge was justified in accepting that amount as (1) the sum paid by the vendees, or (2) the market-value of the property. In the sale-deed the consideration is stated to have been Rs. 31,762, but in this sum is included a sum of Rs. 476-8-0, due for interest upon the sum of Rs. 10,650 paid to the vendor on the 1st May 1906. Obviously the pre-emptor cannot be saddled with the payment of this amount, and if the vendees thought fit to advance a sum of money to the vendor before the date of sale to them, it would be inequitable to hold the pre-emptor liable to pay interest on that money. All that he has to pay is the sum actually representing the purchase-money and interest chargeable on amounts prepaid by the vendees to the vendor before the date of sale cannot be levied from him. At the same time, we have no doubt that both the vendor and the vendees acted in good faith in including this amount of Rs. 476 in the consideration-money. The mere fact, therefore, that the pre-emptor is not legally bound to pay this amount of Rs. 476-8-0, does not mean that the parties to the sale did not fix the price in good faith, within the meaning of section 22 of the Punjab Pre-emption Act, 1905.

The District Judge, in holding that the sum of Rs 31,504-14-0 was actually paid by the vendees to the vendor, has relied mainly upon the evidence of Sardar Jiwan Singh, who was a witness to the two receipts D-2 and D-3, dated respectively, the 1st May and the 17th September 1906. We see no reason whatever for discrediting the evidence of this witness, who is a gentleman of high position and whose impartiality appears to be beyond attack. Mr. Shafi, seeing the hopelessness of assailing this witness' evidence, argued very ingeniously that his evidence, could not be admitted in evidence, because his replies were given in respect of the two receipts which were put before him and which were themselves inadmissible in evidence under clause (*c*) of section 17 of the Indian Registration Act of 1908. We are not by any means prepared to concede that these receipts (D-1-and-D-2) are inadmissible in evidence *per se*. It may be that they would be inadmissible if the sale had been actually completed in April 1906, for in that event it might very well be argued that they were instruments which acknowledged the receipt or payment of consideration on account of the

creation, etc., of a right, title or interest in immovable property of the value of Rs, 100 or upwards, (clause (*c*) of section 17 of the Registration Act). But even so, while the documents themselves would, under section 50 of the Act, be inadmissible as evidence of any transaction affecting that property, we are not prepared to say that the evidence of Sardar Jiwan Singh, to whom the said documents were handed for the purpose of refreshing his memory, would be equally inadmissible. He distinctly and in emphatic terms states that the said sums of money were actually paid by the vendee, and we cannot agree that his evidence on this point is inadmissible because the receipts themselves could not be put in evidence. The questions put to him might possibly have been objected to on the ground that they were "leading questions," but no such objection was taken, and in point of fact the witness was not asked to answer any cross-interrogatories. Mr. Shafi suggested that an important witness of this kind should not have been examined by way of interrogatories, but we find that no objection whatever was taken to this procedure in the Court of first instance, and it is too late to take exception to it now.

We are not, however, prepared to admit that the receipts in question are inadmissible in evidence. No doubt, the vendees in their pleas contended that the sale to them was complete in April 1906, but this plea, which was put forward to substantiate their further plea that plaintiff's suit was barred by limitation, was obviously incorrect. Negotiations for the sale unquestionably took place in April, but the property was entered in the revenue papers as jointly owned by Rai Sahib Ditta Mal, and his son, Kundan Lal. The latter was in England at the time and it was impossible for the former to give a good title himself to the vendees. It was found necessary, therefore, to procure a power-of-attorney from Kundan Lal, and, as we have above remarked, this document, which was verified before the Lord Mayor of London on the 2nd August 1906, could not have arrived in India much before the end of that month. The sale, therefore, could not have taken place in April, and it was for this reason, no doubt, that the vendees abandoned their plea of limitation. But if the sale did not actually take place till the 18th September 1903, when the deed of sale was executed, it follows that the two receipts which were given prior to that date, did not require registration, [see *Sardar Partab Singh* v. *Lala Karm Chand* (1)]. Indeed, Mr. Shafi admitted that in that case no registration would be necessary.

We hold, then, that the two receipts are admissible in evidence. But quite independently of them we have the evidence of Sardar Jiwan Singh, and the admission of Rai Sahib Ditta Mal, a witness of position, whose evidence we see no reason whatever to discredit, to the effect that no less sum than Rs. 31,504-14-0 was actually paid by the vendees. Both these gentlemen are witnesses whose evidence should not be lightly set aside, and Mr. Shafi was unable to give us any reason for refusing to believe their sworn testimony. It is quite true that Sardar Jiwan Singh states in his answer to question 4 of the interrogatories put to him (page 31 of the paper book), that the money shown in the receipt (D-3) as paid to the vendor was paid before him; part of this money (*viz.*, the sum of Rs. 476-8 0, is shown on this very receipt to represent interest on the sum of Rs. 20,000. Clearly, therefore, this sum of Rs. 476-8-0 could not actually have been paid to the vendor in the witness' presence. But the explanation is simple. The bulk of the money referred to in this document was paid in the presence of the witness and the vendor, in the receipt admitted that he owed the vendees the sum of Rs. 476-8-0 by *way of interest*. The witness was, therefore, not incorrect in saying that the vendor had been paid the full sum of Rs. 20,631, though he might have explained that the sum of Rs. 20,631 *minus* Rs. 476 8-0 had been actually paid to the vendor and that the vendor acknowledged receipt of the balance. In the receipt it is not stated that the Rs. 476 were paid to the vendor, and all that is entered is that this sum was due to the vendees as interest. We have no doubt that, with the receipt before him as it was, he would have given this explanation had he been called upon to explain the discrepancy. But no such attempt was made to cross question him and the very fact that he had the receipt actually before him when he was giving his answer shows that he was under the impression that the vendor must be taken to have

(1) 184 P. R. 1889 at p. 653.

received all that he acknowledged to have been paid to him.

We see no good reason, therefore, for differing from the finding of the District Judge that the sum of Rs. 31,504-14, was actually paid to the vendor, though we agree with Mr. Shafi that from this sum Rs. 476-8-0 should be deducted as being an amount which the pre-emptor is not legally bound to pay.

In arriving at the above conclusion, we are fortified, in our view, by finding (as we do) that the market-value of the property must be very near the price at which it was sold. We see no reason to disbelieve the evidence of Lala Daulat Ram, the canal *Zilladar*, to the effect that the vendor informed him on several occasions that he would not sell the land "for any price less than Rs. 55 or Rs. 56 *per bigha*", (page 69, *line* 18). The land revenue assessed upon the property for the last 15 years shows an average (after deducting *malikana* and *sawai*) of Rs. 343 *per annum*. In our opinion, it would not be assessing the value of the land too high if we took it to be at least 80 or 90 times the value of that amount.

Mr. Shafi laid great stress on the fact that the highest price previously given in the village for similar land was at the rate of Rs. 41 *per bigha*. But this sale took place early in 1904, and it is in evidence that the value of land in this village has very considerably increased since then. Even plaintiff's own witness, Allah Yar, the former lessee of the land, who is said to have lost pecuniarily in the matter of his tenancy, has admitted that "the land is now in good condition and has been yielding good produce for 3 or 4 years in consequence of the water-supply being large". In our opinion, the Commissioner (a local officer of experience) and the District Judge have given good reasons for holding that the market value of the land approximates very nearly to the price alleged to have been paid for it by the vendees, and this being the case, we are further satisfied that the witness, Sardar Jiwan Singh, is stating the truth when he says that Rs. 31,504 14-0, was "paid" to the vendor, though he is technically wrong in stating that that amount was actually paid in his presence. The major part of it, no doubt, was so paid and as to the small balance of Rs. 476-8-0 the vendor admitted the receipt. But while we do not, by reason of this very small discrepancy, discredit the evidence of this witness, we agree with Mr. Shafi that his client is not legally bound to pay any part of this small sum. We, therefore, so far accept the appeal as to direct that the appellant is not liable to pay his share of this amount. Bahawal, the other pre-emptor, has presumably paid 1/312th part of the amount roughly speaking, about one rupee; and, therefore, from the sum of Rs. 31,504-14-0 must be deducted Rs. 475. Plaintiff, therefore, has only to pay to the vendees Rs. 31,504-14-0 *minus* the sum paid by Bahawal and *minus* the sum of Rs. 475-8-0. Plaintiff-appellant has practically lost his case in this Court, and we, therefore, direct that he pay the costs of this appeal to the vendees.

Appeal accepted.

(s. c. 70 P. L. R. 1910.)

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 821 OF 1908.

February 11, 1910.

Present:—Sir Arthur Reid, KT., Chief Judge and Mr. Justice Chevis.

AMOLAK SHAH AND OTHERS—DEFENDANTS—APPELLANTS

versus

MAULA BAKHSH—PLAINTIFF—RESPONDENT.

Limitation Act (*XV of* 1877), *s.* 28, *Sch. II, art.* 144—*Adverse possession—Suit by vendee or auction-purchaser for possession.*

Ordinarily a purchaser, who has not acquired possession, has 12 years from the date of the purchase within which he can sue for possession, but after that time any suit brought by him would be time barred. In the case of a vendee who has obtained a decree or of an auction-purchaser, if merely symbolical possession has been obtained, the decree-holder or auction-purchaser has 12 years from the date of obtaining symbolical possession within which he may bring a suit for physical possession; at the end of that time his rights are extinguished.

Juggobundhu Mukerjee v. *Ram Chander Bysack*, 5 C. 584; *Hari Mohan Shaha* v. *Babir Ali*, 24 C. 715 at p. 717; *Nam Dev* v. *Ramchandra*, 18 B. 37, *Gopal* v. *Krishna Rao*, 25 B. 275; *Mahadeo* v. *Parashram*, 27 B. 358; *Mangli Prasad* v. *Debi Din*, 19 A. 499, followed.

First appeal from the order of the Sub-Judge, 1st Class, Lahore, dated the 15th June 1908, decreeing plaintiff's claim.

Mr. *Beechey*, and Lala *Bhagwan Das*, for the Appellants.

Mr. *Muhammad Shafi* and Chaudhri *Nabi Bakhsh*, for the Respondent.

Judgment.—In this case the plaintiff, Pir Bakhsh, son of Murad Bakhsh, sues Amolak Shah and Rughnath Das, sons of

Manak Shah, for possession of a vacant site, area 11 *marlas*, situate outside the Shahalmi Gate. The land in question appears beyond all reasonable doubt to be a part of the 12 *marlas* which plaintiff's father sold to defendant's father for Rs. 128 by sale-deed, dated 3rd December 1869; the plaintiff does not admit that it is the same land, but fails to point out which other 12 *marlas* of land were covered by the sale-deed. Pir Bakhsh, *Jat*, (*not the present plaintiff*) and 9 others, *Jats*, brought a suit to contest this sale, and in the judgment of 10th April 1874 recorded by Diwan Baij Nath, Honorary Extra Assistant Commissioner, in this suit we find the previous history of the land. It was part of the land attached to a *takkia* known as *Takkia Jattanwala*, where a tomb, graves, well and mosque existed. In the Revenue Records Muhammad Bakhsh was shown as owner, and when he died mutation of names was effected in favour of his son, Murad Bakhsh. Murad Bakhsh sold a well attached to the *takkia* and Pir Bakhsh, *Jat*, brought a suit claiming ownership of the *takkia*. Murad Bakhsh at first claimed ownership, though he admitted the *takkia* to be *waqf*, but he subsequently admitted Pir Bakhsh *Jat's* claim to the extent of one-half, and judgment passed accordingly. This was in 1866. The subsequent Revenue Records show Murad Bakhsh and Pir Bakhsh, *Jat*, as owner, half and half.

Then, as already related, came the sale of the 12 *marlas* by Murad Bakhsh to Manak Shah in 1869.

In 1871 Manak Shah sued Murad Bakhsh for possession; Murad Bakhsh admitted the claim and a decree was passed in Manak Shah's favour, and he filed a *dakhalnama*, showing that he had obtained possession, on 9th January 1872.

Two days later, *i.e.*, on 13th January 1872, Pir Bakhsh, *Jat*, and others lodged objections, and on these failing they brought a regular suit. Diwan Baij Nath decided the case in their favour by judgment, dated 10th April 1874; Manak Shah's appeal was dismissed by the Commissioner on 16th April 1875, and his further appeal was dismissed by this Court, on 15th November 1875. So the order of the first Court that "the possession of Manak Shah should be removed from the site" was upheld. It does not appear that the Court was ever moved to execute the decree then obtained by Pir Bakhsh, *Jat*, and others.

Who has since been in possession is the principal question for decision in the present case According to plaintiff, he and his father before him have all along been in possession, either directly or through lessees or mortgagees holding under them. In support of this contention two deeds are produced. There is the lease of 3rd August 1878, by which plaintiff leases a house and 1 *kanal* of vacant site to Lal Din and Fazal Din for Rs. 48 per annum. And there is the mortgage-deed of 29th December 1890, by which Pir Bakhsh mortgages a one storeyed shop and vacant site lying in front of the said shop to the same Fazal Din for Rs. 650. Fazal Din subsequently parted with his rights as mortgagee to Nur Din, who sued and obtained a decree, and in execution obtained physical possession of the mortgaged property in the Court of the Sub-Judge on 15th January 1904. Then the present defendants lodged objections as regards the 11 *marlas* now in suit. Sardar Charat Singh by order, dated 23th July 1904, allowed the objections saying that though the property was *waqf* and should not have been sold, Pir Bakhsh could not undo the sale effected by his father. The defendants then obtained physical possession of the 11 *marlas* in August 1904. Nur Din then brought a declaratory suit, which failed. Nur Din then realised his mortgage-money by sale of another part of the mortgaged property. Then comes the present suit by plaintiff, which has been decided in his favour by the lower Court. The defendants appeal.

In order to explain how the present claim relates only to 11 *marlas*, whereas the sale of 1869 was for 12 *marlas*, it may here be stated that Tirath Ram and Lal Chand had purchased the shops (marked A on plan, and vacant site (marked B). The present defendants sued them for the site (B.) in 1907, but failed, their suit being dismissed by Agha Muhammad Ibrahim, Munsif, 2nd Class, on 16th December 1907. An appeal to the District Judge was lodged, but subsequently withdrawn. The site then in dispute, 16 feet by 8 feet, is about 1 *marla* in area.

For the defendants, it is contended in appeal that they have been in possession ever since 1872, and that the present suit is time-barred. It is said that the decree obtained

by Pir Bakhsh, *Jat*, and others was never executed, and so Manak Shah was never dispossessed. It is also urged that the plaintiff cannot sue in the face of the sale-deed executed by his father.

For the plaintiff, it is contended that Manak Shah never got more than symbolical possession, and that whatever rights he may have had became extinguished under section 28, Limitation Act, at the end of 12 years, from the date of Manak Shah's obtaining symbolical possession.

The first question to decide is one of fact, *viz.*, who has been in possession from 1872 to 1904. The lease of 1878 and the mortgage-deed of 1890 are both registered documents. Lal Din and Fazal Din are both dead, but Kalu, their nephew, gives evidence as to the lease and mortgage-deed, the latter of which is witnessed by him. Lal Singh, brother of Hari Singh, also deposes to his brother getting a decree against Pir Bakhsh and in execution having the shops (A.) put to auction. Lal Singh purchased in auction and re-sold to Tirath Ram. For the appellants, it is urged that the lease and mortgage do not cover the 11 *marlas* now in suit, but counsel is quite unable to point out what other land was covered by these two documents. He urges that the boundaries do not agree with those mentioned in these documents, but we cannot agree with him. The 1 *kanal* mentioned in the lease, no doubt, includes the site now covered by the buildings marked (A.) in the plan; the evidence shows that these buildings were subsequently erected by the lessees. The shop mentioned in the mortgage-deed is undoubtedly the buildings marked (A.), and as to the contention that the "vacant site lying in front of the said shop" refers to theverandah lying to the north of the said shop [*i.e.*, the northern-most of the three buildings marked (A.)] we note that if this were so, the southern boundary shown in the mortgage-deed should have been part of the land now in suit, and not "*Ahata* of Lala Kishen Mal." We have, therefore, no hesitation in agreeing with the decision of the lower Court that it is the plaintiff, and not the defendants who have all along been in possession. The defendant's documentary evidence on this point is quite useless, as it all relates to a period subsequent to August 1904, and as to the defendants' possession from August 1904 onwards, there is no dispute whatever. It is also a point to be noted that it is not at all likely that Pir Bakhsh, *Jat*, and others would have allowed Manak Shah to remain in possession after they had won their case against him up to this Court. But if Murad Bakhsh was still in actual possession they would be quite content no doubt. We find, therefore, that Manak Shah never obtained more than mere symbolical possession when he filed the *dakhalnama* in 1872.

As to the plea that plaintiff cannot challenge the sale effected by his father, the reply is that plaintiff is not challenging that sale; the plea on his behalf is thatany rights which accrued to the vendee under that sale are now extinguished under section 28, Limitation Act. The law, as propounded by counsel for the plaintiff, appears to us quite correct. Ordinarily a purchaser who has not acquired possession has 12 years from the date of the purchase within which he can sue for possession, but after that time any suit brought by him would be time-barred. In the case of a vendee who has obtained a decree or of an auction-purchaser, if merely symbolical possession has been obtained, the decree-holder or auction-purchaser has 12 years from the date of obtaining symbolical possession within which he may bring a suit for physical possession; at the end of that time his rights are extinguished. There is ample authority for this in *Juggobundhu Mukerjee* v. *Ram Chandra Bysack* (1); *Hari Mohan Shaha* v. *Babur Ali* (2); *Nam Dev* v. *Ram Chandra* (3); *Gopal* v. *Krishna Rao* (4); *Mahadeo* v. *Parashram Bahavanchand* (5) and *Mangli Prasad* v. *Debi Din* (6).

Here symbolical possession was obtained on 9th January 1872, and the vendee's rights became extinguished on 9th January 1884. As to the plea that the plaintiff has no title by reason of the decision in the case brought by Pir Bakhsh, *Jat*, and others in 1872, we note that the vendor and vendee were then in collusion and that the decision in favour of the then plaintiffs is in no way binding on the then defendants *inter se*, as they were not then contesting against one another at all, but simply joined in contest-

(1) 5 C. 584.
(2) 24 C. 715 at p. 717.
(3) 18 B. 37.
(4) 25 B. 275.
(5) 25 B. 358.
(6) 19 A. 499.

ing the claim of the then plaintiff. The present plaintiff held possession from 1872 to 1894, and dealt with the property as his own during this period; there is not the least ground for holding that he was in possession as a trustee or that his possession was in any way permissive. Such possession must, therefore, be counted as adverse as against the whole world, and the plaintiff must be regarded as the owner.

We uphold the decree of the lower Court and dismiss the appeal with costs.

Appeal dismissed.

(s. c. 71 P. L. R. 1910.)

PUNJAB CHIEF COURT.

CRIMINAL APPEAL No. 524 OF 1909.

March 13, 1909.

Present:—M. Justice Shah Din.

JAHANA AND OTHERS—CONVICTS—APPELLANTS

versus

EMPEROR—COMPLAINANT—RESPONDENT.

Penal Code (Act XLV of 1860), s. 395—Dacoity—Proof—Identification of accused—Tracker, evidence of—Benefit of doubt.

The accused were convicted of the offence of dacoity on the statements of the complainants as to their identification and of the trackers as to the identification of their tracks. The dacoits had issued from the road side jungle, made a sudden attack on the complainants and put dust into their mouths. The night was a dark one and each complainant was separately assaulted and overpowered so that he did not and could not see what the dacoits did with the other. Two trackers were originally mentioned in the *chalan*, but only one was examined by the prosecution, the other was examined by the defence. Their evidence was found to be extremely suspicious:

Held, that though there were suspicious circumstances against the accused, they could not be convicted of the offence charged as the evidence was not shown to be reliable.

The Court observed that the tracker examined by the defence must be regarded for all practical purposes as a witness for the prosecution.

Appeal from the order of the Magistrate, 1st Class, Lyallpur District, dated the 18th September 1909, convicting the Appellants.

Messrs. *Grey* and *Nand Lal*, for the Appellants.

Mr. *Broadway*, for the Crown.

Mr. *Ganpat Rai*, for *Nihal Chand* and *Ram Mal*, Respondents.

Judgment.—The appellants have been convicted of the offence of dacoity under section 395, Indian Penal Code, and have been sentenced to undergo seven years' rigorous imprisonment each.

I have heard the counsel for the appellants and the Assistant Legal Remembrancer, who at my suggestion has appeared for the Crown, at some length and have carefully gone through the record. My conclusion is that the offence of dacoity has not been clearly and conclusively brought home to the appellants, though I certainly think that there are strong suspicions against them in connection with the occurrence of the 15th June 1909, and I am, therefore, constrained to acquit them.

The facts of the case are stated in sufficient detail in the judgment of the Magistrate, and it is only necessary here to discuss briefly the evidence bearing on the points sought to be established by the prosecution and on which I have been addressed by the learned counsel on both sides.

These points, so far as they are material to the decision of this appeal, are (1), the alleged identification of the appellants Nos. 2 and 3, Bakhtawar and Kamiroo, by Ram, complainant, and of appellant No. 1, Jahana, by Ahmad Din (P. W. No. 12) as three of the dacoits who committed the offence in question; and (2), the alleged identification of the tracks of all the four appellants by Naman, tracker (P. W. No. 3) from the scene of the occurrence all the way to the Salarwala Railway Station.

Other points were also touched upon in argument, but they are of a subsidiary character and will be noticed later on. I shall now take up the above two points *seriatim*.

As regards the first point, I must say I have very considerable doubts as to the truth of the evidence of Ram and Ahmad Din respecting the alleged identification of the dacoits. Admittedly the night on which the occurrence took place was a dark one. The dacoits, issuing from the road side jungle, made a sudden attack on the complainants and put dust into their mouths. Each complainant was separately assaulted and over-powered, so that he did not and could not see what the dacoits did with the other. According to Ram, they were naked and had only *langotas* on; and he was, as appears from the Medical evidence, rather severely beaten by them. The attack lasted only for a short time; the complainants were robbed of all they had and the dacoits disappeared with the booty as suddenly as they had come. Khushali

(P. W. 9) who took a *ruqqa* from the *thana* to the *Thanadar*, who was out investigating another case, says that "Ram and Nihal were confused and had no *hosh*, therefore, they did not go to the *Thanadar*." He explains this further on by saying that they were not "altogether insensible," but "were in grief on account of the loss of money." I certainly think that they must have been very much confused, and the circumstances, as detailed above, under which the dacoity took place, were such that identification was most difficult, if not impossible. Nihal admits that he did not identify the dacoits, whereas Ram proposes to identify Bakhtawar and Kamiroo. In the first report made to the police, both of them are said to have stated that they would be able to identify their assailants. Ram gives no particular reason for being able to identify Bakhtawar and Kamiroo, and I am at a loss to understand why, under the circumstances stated, he should be able to identify them any more than Nihal should be in a position to identify his assailants. The assault on both of them was equally sudden and equally severe and no reason at all has been given for believing that Ram had better opportunities of close and accurate observation than his companion, Nihal. I, therefore, reject the evidence of Ram on the question of the identification of the dacoits.

The evidence of Ahmad Din (P. W. No. 12) is equally inconclusive. He says that he accompanied the two Hindus (Nihal and Ram) part of the way, when 6 or 7 men met them. "They shut our mouths. One man struck me with a stick and searched my person, but found nothing with me. They left me and I ran off. But they began to assault the Hindus and I heard their cries occasionally." In the first report, it is stated that this man had silver *kangans* (wristlets) on, and yet Ahmad Din says that he was not robbed of anything, because the dacoits searched his person and found nothing with him. Though Ahmad Din states that he ran off before the Hindus were assaulted, Ram, on the contrary, says that he "went away after the thieves had left. He went to *Manza* Paharang." I do not believe that Ahmad Din was at all assaulted by the dacoits, and this conclusion is irresistible from the first report. Both Ram and Ahmad Din, no doubt, say that he received a stick blow, and the latter say that it was Jahana who gave the blow. But I am inclined to think that the circumstance of this stick blow was simply invented to strengthen Ahmad Din's statement that he identified Jahana as one of the dacoits. Some reason for the alleged identification was to be assigned, and what is more natural in this connection than for Ahmad Din to say that he identified Jahana because he assaulted him. If he had received a *lathi* blow, he should have been medically examined, just as Nihal and Ram were examined to see if he bore a mark of injury on his person, and then one would have been in a position to test his veracity. As it is, his evidence, in view of the first report, is open to doubt; and on the strength of his uncorroborated testimony I cannot hold that Jahana took part in the dacoity in question.

The evidence of Shadi, baker (P. W. No. 10) as to his having seen Nathu, appellant, 10 or 12 other men, at his shop at Chiniot Road some short time before the dacoity took place, is at best, but of corroborative value, and is of no use to the prosecution in the absence of direct evidence against Nathu.

We now come to the track evidence in the case, and I have no hesitation in saying that that evidence is of the weakest possible description. Two trackers, Naman and Ganda, have been examined as witnesses in connection with this part of the case, Naman for the prosecution and Ganda for the defence. I may note in passing that Ganda was originally mentioned in the *chalan* as a prosecution-witness, but for some reason he was not produced by the prosecution, and was examined by the accused as their witness. He must, therefore, be regarded for practical purposes as a witness for the prosecution. Naman (P. W. No. 3) states that after the accused had been arrested at the Salarwala Railway Station, the *Thanadar* left with them by train for Chiniot Road *thana*, and directed the witness "to trace the accused's coming tracks," namely, their tracks from the place where they were arrested at the Railway Station back to the place they had come from. The witness goes on to say, "I traced accused's coming tracks to the spot where the dacoity had been committed; and there the accused's tracks were identified. The accused were brought to the spot; and their tracks were identified there." In cross-examination he

says, "there was no other tracker with me when I identified accused's tracks. The coming tracks could not be traced from the spot." Sub-Inspector Nur Ahmad (P. W. No. 8) is absolutely silent on the question of the alleged identification of tracks. He only says that he "said to Khushali and Naman that they should go to the spot at once and trace tracks there, and that I would follow in the morning." This was just at the time when Khushali brought a *ruqqa* from the *thana* to the Sub-Inspector informing him of the dacoity, and long before Naman went to the Railway Station and suspecting the accused, had them arrested. The Sub-Inspector does not say that he deputed Naman, after the accused had been arrested, to trace their tracks back to the place whence they had come, nor does he say one single word as to their tracks having been so traced by Naman and identified at the spot in his presence. If the alleged identification at the spot was carried out in the absence of the Sub-Inspector or other Police Officer, it is of little value as a piece of evidence for the prosecution; and if the Sub-Inspector was present when the tracks were identified, his silence on the point is most suspicious and very much favours the defence. Naman's own evidence as regards the identification of the tracks is of the most meagre description, and it is positively discredited when read with that of Ganda (D. W. No. 9). This witness states that he was called by the police to identify tracks at the scene of the occurrence; that he found there tracks of two offenders, which he compared and identified to be those of Natha and Kamiroo's (appellants Nos. 3 and 4); that the tracks of the other two accused had been destroyed by rain, and Naman, tracker, was also present at the time. Naman, on the other hand, not only does not say that Ganda compared the tracks in his presence, but states (as we have seen) that there was no other tracker with him when he identified the accused's tracks. I have no doubt that Naman is not telling the truth and is deliberately making a false statement as regards the identification of the tracks with a view to help the prosecution. Naman's father is *lambardar* and *sufedposh* of *Chak* No. 106 J. B. and both the complainants, Nihal and Ram, are also residents of this very *Chak*. It does strike one as an extraordinary coincidence that when Khushali informed the Sub-Inspector at Salarwala of the dacoity at Chiniot Road, the latter should have by his side the son of the *Lumbardar* of the complainant's own *Chak*, and that he should have deputed this man to go to the spot with Khushali and identify the tracks there. And the strangeness of this coincidence is enhanced when we find, as stated by Naman himself, that the money (Rs. 600) which the complainants had taken from Khushali and of which they were robbed on the fateful night of the 15th June last, was the money which they had to pay to the father and the brother of this Naman as price of the wheat that had been purchased from them. I refuse to believe that these circumstances constitute a mere coincidence, and I think that there is more than appears on the surface in this case. The track-evidence is extremely suspicious, and I reject it as wholly unworthy of credence.

There remain a few minor facts sought to be established by the prosecution in support of the appellants' alleged guilt, *e. g.*, the discovery of Exhibit C, and a little sugar in the possession of one of the appellants and of various sums of money on the persons of all the appellants, supposed to be their shares of the booty, as also the circumstance that when arrested two of the appellants gave wrong names. These facts, even if held to be satisfactorily proved, fall far short of the legal proof of the appellants' guilts, and I need not, therefore, discuss them in detail. Suffice it to say that, in my opinion, the identification of Exhibit C as a price of cloth belonging to Nihal's wife is not established, nor is it very clearly proved that appellants Nos. 1 and 2 gave wrong names (see cross-examination of Ram at page 10 of the record).

For the foregoing reasons, I hold that it is not clearly and conclusively proved that the appellants committed dacoity on the night of the 15th June last, and accepting the appeal I acquit them.

Under section 520, Criminal Procedure Code, I direct that the sum of Rs. 408 found on the persons of the appellants be restored to them.

Appeal accepted.

(s. c. 78 P. L. R. 1910.)

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 768 OF 1909.

May 12, 1910.

Present:—Mr. Justice Johnstone.

ALLAH DIA—PLAINTIFF—APPELLANT

versus

SANDHA AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Alienation by, sonless male proprietor—Suit by reversioner—Delay in suing—Necessity—Burden of proof.

Where a suit to set aside an alienation by a sonless male proprietor is filed with great delay, a strict proof of payment of consideration or of necessity is not to be required from the alienee.

Further appeal from the order of the Divisional Judge, Ambala Division, dated the 20th April 1909, reversing that of the Munsif, 1st Class, Ambala, dated the 23rd December, 1908, decreeing plaintiff's claim.

Lala *Balwant Rai*, for the Appellant.

Lala *Dwarka Das*, for the Respondents.

Judgment.—This is a suit by one reversioner of deceased Ismail for possession of land sold by him in 1894 (8th March). The suit was not instituted till August 1908 and the other reversioners (defendants Nos. 6 and 7), whose share would be 3/4th, side with the heirs of the vendee, who is dead. The sale was for Rs. 400 made up of four items, Rs. 99, Rs. 187, Rs. 84 and Rs. 30. The first Court passed the first two items, but disallowed the rest, while the learned Divisional Judge passed all four and dismissed the suit.

Plaintiff appeals, and I have gone through the evidence with the appellant's pleader and find little force in the appeal. The item of Rs. 99 is supported by the concurrent findings of two Courts, and I see no good ground for differing; there is evidence, which has been believed, both of consideration and "necessity." The item of Rs. 187 is similarly supported, and the only point in connection with it taken by Mr. Balwant Rai is that the mortgage-deed for Rs. 187, Exhibit D-5, being unregistered, cannot be used in evidence. This does not meet the case. The endorsement of an actual payment by Hoshiar Khan of Rs. 187, on behalf of the alienor, Ismail, and the other evidence regarding that payment are fully relevant and they prove the point.

As regards the item of Rs 84, the only point taken against it is that taken by the Munsif, namely, that Bhuru, the actual recipient, has not been called. It seems he was ill on 30th November, when other evidence on the point was taken, and was not called for the next hearing 11 days later; but even so, I cannot see why we should infer from this any fear that Bhuru would have testified against defendants. Most probably he was still ill.

The Rs. 30 item is so small as to need no comment.

Any deficiencies in defendants' evidence are fully accounted for by the immense delay in suing.

Appeal dismissed with costs.

Appeal dismissed.

(s. c. 79 P. L. R. 1910.)

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 373 OF 1909.

March 29, 1910.

Present:—Mr. Justice Shah Din.

VIRU—PLAINTIFF—APPELLANT

versus

IMAM DIN AND OTHERS—DEFENDANTS. —RESPONDENTS.

Custom—Alienation—Gift—Donee dying without children—Pleadings.

Where a plaintiff has failed to prove that he is a collateral of the donor, he is not entitled to claim the gifted land on the ground that it reverted to him on the death of the donee or his descendants.

Further appeal from the order of the Additional Divisional Judge, Sialkote Division, dated the 28th January 1909, reversing that of the Extra Assistant Commissioner and Munsif, 1st Class, Sialkote, dated the 26th October, 1908, decreeing plaintiff's suit.

Chaudhri *Nabi Bakhsh*, for the Appellant.

Mr. *Jalal-ud-Din*, for the Respondents.

Judgment.—After hearing the pleader for the appellant, I think that the decision of the lower appellate Court is correct and must be maintained.

The plaintiff claims in his plaint to be a collateral of Roda, deceased, husband of *Musammat* Bakht Bhari, and as such to be entitled to one-half of the land in dispute. In his statement he subsequently alleges gift of the land by Naman in favour of his daughter, *Musammat* Karam Bhari, and claims that it reverts to the collaterals of Naman on failure of the donee's line. It is admitted that the plaintiff is not a collateral of Roda, and, therefore, the ground of claim, as originally put forward in the plaint, fails. As

regards the alleged gift by Naman to *Musammat* Karam Bhari, I agree with the lower appellate Court in holding it unproved. The entries in the Settlement papers are not uniformly in favour of that hypothesis, and it is admitted that the Records of 1855 are silent on the point.

The appeal fails and is dismissed with costs.

Appeal dismissed.

(s. c. 80 P. L. R. 1910.)

PUNJAB CHIEF COURT.

CRIMINAL REVISION No. 1268 OF 1909.

May 21, 1910.

Present:—Mr. Justice Chevis and
Mr. Justice Shah Din.

KALYAN SINGH—ACCUSED—PETITIONER

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 193—Criminal Procedure Code (Act V of 1898), s. 195—Perjury—Sanction to prosecute—Judicial Proceedings—Punjab Land Alienation Act (XIII of 1900), s. 19—Delegation of power.

A mortgagee having produced before the Deputy Commissioner a copy of a mortgage-deed, that officer referred it to the *Tahsildar* for investigation and report. The *Tahsildar* did not make any enquiry. Before the *Naib-Tahsildar*, the mortgagee stated that no payments were made by the mortgagor to him. On enquiry it was found that payments had been made which were endorsed on the back of the original mortgage-deed and the document was withheld for that reason. The Deputy Commissioner sanctioned prosecution of the mortgagee for falsification of evidence by fraudulently producing the copy and not the original of the mortgage-deed and making a false statement before the *Naib-Tahsildar*:

Held, that the prosecution was illegal for (1) the mere production of the copy did not amount to falsification of evidence and (2) the proceedings before the *Naib-Tahsildar* were *ultra vires*.

Petition, under section 439 of the Criminal Procedure Code, for revision of the order of the Sessions Judge, Rawalpindi Division, dated the 21st June 1909, reversing that of the Magistrate, 1st Class, Murree, dated the 2nd April 1909, discharging the petitioner.

Bhagat *Gobind Das*, for the Petitioner.

Mr. *Broadway*, for the Respondent.

Judgment.—A criminal charge under section 193, Indian Penal Code, has been brought against the petitioner, sanction having been obtained from the Deputy Commissioner.

The sanction covers two points: (1) that in proceedings under section 9 (2), Land Alienation Act, petitioner produced a copy of a mortgage-deed before the Deputy Commissioner, keeping back the original on which a part payment was endorsed, thereby pretending that no such payment had been made; and (2) that on 12th August 1902, the petitioner falsely stated before the *Naib-Tahsildar* that no such payment had been made.

The Magistrate held that there could be no conviction under the first count, as proceedings by a Deputy Commissioner under section 9 (2) of the Alienation of Land Act were not judicial proceedings, and that though the proceedings were legal proceedings before a public servant, the misleading copy was not intended to appear *in evidence*, as the above Act does not empower the Deputy Commissioner to take evidence. As to the second count, the Magistrate held that the *Naib-Tahsildar* was acting only in his executive capacity and that the petitioner was not bound by law to make a declaration before him and the Magistrate discharged the petitioner.

The Sessions Judge thought it doubtful whether the mere production of the copy instead of the original deed amounted to fabrication of false evidence, but held that the statements in the original application to the Deputy Commissioner as well as the statements to the *Naib-Tahsildar* on 12th August and 4th September 1902 were *prima facie* false, and that as the *Naib-Tahsildar* had power to investigate and as under section 19, Land Revenue Act, coupled with section 19 of the Alienation of Land Act, the petitioner was bound to state the truth before the *Naib-Tahsildar*, the prosecution was good, so the learned Sessions Judge set aside the order of discharge.

As regards the first count, the Deputy Commissioner's sanction is only as to the presentation of the copy. We agree with the learned Sessions Judge that the mere presentation of the copy does not amount to a falsification of false evidence (see section 192, Indian Penal Code). The statements in the application to the Deputy Commissioner which was accompanied by production of the copy of the deed may, or may not, amount to such falsification, but as yet the Deputy Commissioner has not given sanction as regards those statements. As to the second count, we note that under Rule 5 of the Rules made by the Local Government in exercise of the powers conferred upon it by section 25 of the Land Alienation Act and published in

Government Notification No. 24, dated 22nd May 1901, the Deputy Commissioner has power to decide such applications, and may make enquiry himself or may refer the case to any Revenue Officer subordinate to himself for investigation and report. The proceedings of the Revenue Officer to whom such a case is referred are governed by Chapter II of the Land Revenue Act, *vide* section 19 of Alienation of Land Act, and under section 19, Land Revenue Act, the Revenue Officer may summon any person and the person attending in obedience to the summons is bound to state the truth upon any matter respecting which he is examined or makes statements. Therefore, a person making a false statement before a Revenue Officer in such a case, being legally bound by an express provision of law to state the truth, gives false evidence, *vide* section 191, Indian Penal Code, and is punishable under section 193, Indian Penal Code, even if it be correct to say that the proceedings in such cases are not judicial proceedings.

But there is a flaw which vitiates the whole of the *Naib-Tahsildar's* proceedings, and that is that the case was never referred to him by the Deputy Commissioner. The learned Sessions Judge says that the *Tahsildar*, to whom the Deputy Commissioner referred the case, referred it to the *Naib-Tahsildar*.

We can find no order of reference by the *Tahsildar* to the *Naib-Tahsildar*, but even if such an order were on the file, it would not avail as the power of delegation conferred by Rule 5 of the Local Government Rules, above referred to, is one conferred solely on the Deputy Commissioner. The Deputy Commissioner having referred the case to the *Tahsildar* that officer, and that officer alone, was competent to make the investigation and report, and the proceedings of the *Naib-Tahsildar* were entirely *ultra vires*.

We, therefore, accept this application for revision, set aside the order of the learned Sessions Judge and restore the order of discharge passed by the Magistrate.

Petition accepted.

(s. c. 83 P. L. R. 1910.)

PUNJAB CHIEF COURT.

CIVIL REVISION No. 137 OF 1910.

June 21, 1910.

Present:—Mr. Justice Shah Din.

MEDA AND OTHERS—DEFENDANTS—PETITIONERS

versus

MOHAN LAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Custom—Alienation by sonless male proprietor—Ancestral property—Property acquired by gift from maternal uncle is self-acquired property in the hands of donee—Consideration—Onus probandi.

Property acquired by a person from his maternal uncle by gift is self-acquired property in the hands of the donee and his power to alienate the property is not restricted.

In a suit in which the power of the alienor to sell was questioned and the passing of consideration was denied, it was found that the sale was by a registered deed, that the plaintiff got possession of part, at least, of the land in suit, and that at the time of mutation the defendant verified the sale on his behalf and on behalf of his brothers:

Held, that all these circumstances gave rise to a strong presumption in favour of the passing of consideration under the sale-deed, and it was, therefore, for the defendant to show that no consideration passed.

Petition, under section 70 (*a*) and (*b*) of Act XVIII of 1884 as amended by Act XXV of 1899, for revision of the order of the Divisional Judge, Delhi Division, dated the 2nd June 1909, confirming that of the Munsif, 1st Class, Delhi, dated the 21st July 1908, decreeing plaintiff's claim.

Bakhshi *Tek Chand*, for the Petitioners.

Rai Sahib Pandit *Shiv Narain*, for the Respondents.

Judgment.—After hearing arguments I think that this revision must fail. The question of custom that arose in this case and with reference to which notice was issued to the other side need not be considered and decided, as it appears from the evidence of the *Patwari* (answer to question No. 6), that the land in suit was the acquired property of Dhani, the father of the defendants, having been gifted to him in 1883 by his maternal uncles, Radha and Hardial. In the hands of Dhani, therefore, the land in suit was not ancestral, and he had every power to alienate it with or without necessity.

The only other question which requires determination is, whether full consideration passed in respect of the sale in dispute. The *onus probandi* in respect of this matter rests, under the circumstances of the case, on the

defendants, inasmuch as the deed of sale being a registered one imports consideration, and also because, as the lower appellate Court has shown, soon after the sale took place, the plaintiffs got possession of part, at least, of the land in suit. Another important fact in this connection is that in 1897 mutation was effected in favour of plaintiffs, Meda, defendant, being present in person and verifying the sale for himself and on behalf of his brother, Desa, before the Assistant Collector. All these circumstances give rise to a strong presumption in favour of the passing of consideration under the sale-deed, and it is, therefore, for the defendants to show that no consideration passed. This they have failed to prove. I agree with the lower appellate Court that, although the statement that Rs. 1,000 out of the consideration-money were paid one day before the registration of the deed may be a suspicious one, yet it is not wholly incredible in view of the fact that a sum of Rs. 460 is proved to have been paid by Dhani only three days after the execution of the deed to one Ram Kishan for redemption of land. If consideration under the sale had not passed to Dhani, it is impossible to believe that the present defendants would not have denied receipt of consideration before the Assistant Collector and refused their assent to mutation.

On the whole, therefore, I think that it must be held that full consideration passed to the vendor, Dhani, under the sale now sought to be impeached, and I, therefore, agree in the finding of the lower appellate Court on this point and dismiss this revision with costs.

Application dismissed.

(s. c. 84 P. L. R. 1910.)

PUNJAB CHIEF COURT.

CIVIL REVISION No. 502 OF 1910.

June 1, 1910.

Present:—Mr. Justice Shah Din.

LALA DAS AND ANOTHER—DEFENDANTS—PETITIONERS

versus

MR. A. SPRATT, CHEMIST OF AMBALA—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XI, R. 21—Jurisdiction of Court to strike out defence of defendant of its own motion.

A Court has no power to strike out the defence of a defendant of its own motion under Rule 21 of Order XI of the Civil Procedure Code.

Sohara v. *Musammat Zainab*, 80 P. R. 1889; *Hans Raj* v. *Jhanda Mal*, 59 P. R. 1892, followed.

Petition, under section 25 of Act IX of 1887, for revision of the order of the Judge, Small Cause Court, Ambala, dated the 26th February 1909, decreeing claim.

Mr. *Sundar Das*, for the Petitioners.

Mr. *Gokal Chand*, for the Respondent.

Judgment.—After hearing counsel on both sides, I am clearly of opinion that the order of the lower Court is contrary to the provisions of Rule 21 of Order XI of the Civil Procedure Code, and it cannot, therefore, be allowed to stand. The decision of this Court in *Sohara* v. *Musammat Zainab* (1), lays down that a Court has no power to strike out the defence of a defendant *of its own motion* under section 156 of the Civil Procedure Code of 1882, which corresponds to Rule 21 of Order XI of the new Code. If the defendant fails to comply with an order made under Rules 1 and 2 of Order XI, the plaintiff may apply under the second clause of Rule 21 for an order striking out the defence; but if no such application is made, there is no power given to the Court to strike out the defence of its own motion. The decision of this Court reported as *Hans Raj* v. *Jhanda Mal* (2) is to the same effect.

In this case no application was made by the plaintiff under Rule 21 of Order XI, Civil Procedure Code, and the lower Court had, therefore, no power to act under that rule. Apart from this, one of the defendants, Lala Das, filed a petition of objections under Rules 6 and 7 of the aforesaid Order on the 14th February 1909, and the lower Court does not seem to have disposed of that petition. As against Lala Das, at any rate, the order passed under Rule 21 was obviously illegal.

I set aside the judgment and decree of the lower Court, and send the case back for re-decision according to law. The costs in this Court will be costs in the cause.

Petition accepted.

(1) 80 P. R. 1889.
(2) 59 P. R. 1892.

RAM RATTAN SHAH *v.* KIRPA RAM.

(s. c. 86 P. L. R. 1910.)

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 674 OF 1909.

April 14, 1910.

Present:—Mr. Justice Rattigan.

RAM RATTAN SHAH—DEFENDANT—APPELLANT

versus

KIRPA RAM —PLAINTIFF AND OTHERS DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 105 (2), O. XLIII R. 1 (u)—Appeal—Remand—Power of Chief Court on appeal against order of remand—Waiver of right—Pre-emptor taking active part in negotiations for sale in favour of vendee—Waiver.

The Chief Court is competent on an appeal against an order of remand to go into questions of fact decided by the lower appellate Court.

Where it was found that the pre-emptor had taken active part in the negotiations for sale, that he brought his suit for pre-emption only about a week before the expiry of the period of limitation prescribed for the suit and that he was present when mutation was effected in favour of the vendees and raised no objection :

Held, that the pre-emptor must be deemed to have waived his right and his suit must be dismissed.

Miscellaneous appeal from the order of the Divisional Judge, Jhelum Division, dated the 25th April 1909, reversing that of the District Judge, Gujrat, dated the 19th August 1907, dismissing claim.

The Hon'ble Mr. *Shadi Lal* and Mr. *Nanak Chand*, for the Appellant.

Pandit *Ram Bhaj Dutta*, for the Respondents.

Judgment.—In this case plaintiff, a cousin of the vendors, instituted a suit for pre-emption in respect of a sale which had been made in favour of defendant on the 22nd May 1901. The suit was instituted on the 13th May 1902 and has been, for various reasons, protracted up to the present date.

Pandit Joti Parshad, District Judge, before whom the case came in the first instance, dismissed the claim on the ground that no custom existed in *Mauza* Rangpur by which an agnate of the vendor excludes other share-holders from purchasing land. This decision was upheld by the Divisional Judge on appeal, but on further appeal this Court reversed the decrees of the lower Court and remanded the case for determination upon the other issues.

The case then came before Lala Moti Ram, a Munsif of the 1st Class, who gave plaintiff a decree for pre-emption on payment of Rs. 5,180. This decree was set aside by the Divisional Judge on the ground that the Munsif had no jurisdiction to pass it.

The case was, therefore, remanded to the Court of the District Judge.

The District Judge, upon this remand, held (1) that plaintiff had acquiesced in, and consented to, the sale and was, therefore, debarred now from challenging it; (2) the plaintiff's claim must also fail because he had not sued for the *whole* of the property sold, he having omitted from his claim a plot of land which he claims as his own; and (3) that plaintiff had failed to prove the existence of a custom of pre-emption in respect of this property which was situate in the town of Gujrat. He accordingly dismissed plaintiff's suit. The learned Divisional Judge has reversed the findings of the District Judge on the first two points and has remanded the case, under Order XLIII, Rule 23, to the District Judge for decision on the merits.

Defendant has appealed to this Court and challenges the correctness of the lower appellate Court's findings on the grounds above referred to. Mr. Ram Bhaj Datta objected that it was not open to the appellant in an appeal under Order XLIII Rule 1 (clause (*u*) to contest the findings of the Court below and that he was entitled merely to show (if he could) that the order of remand was erroneous in other respects.

This contention appears to me to be untenable in view of the stringent provisions of section 105 (2) of the Civil Procedure Code, and I accordingly overrule it.

The first question, then, with which I have to deal, is, whether the plaintiff has, by his own conduct, debarred himself from impugning the present sale and seeking for a decree for pre-emption in respect of it?

The District Judge has held that plaintiff is proved by the evidence of three very respectable witnesses to have taken an active part in the negotiations for the sale; that he brought his suit for pre-emption at the eleventh hour, and that he was present when mutation was effected in favour of the vendees and raised no objection. The Divisional Judge admits that the three witnesses in question are respectable, but he summarily rejects their evidence, because there is one small discrepancy (of no particular importance), between the statements of Tara Chand, Municipal Commissioner, on the

one side, and Jhanda Mal and Narain Das on the other side. These witnesses were at the time deposing to facts that had occurred some 6 years previously and it would have been surprising if in some minor points their statements had not been at variance. It is, to my mind, astonishing to find a Divisional Judge of experience rejecting the evidence, *in toto* of admittedly respectable witnesses, because, some 6 years after the event, two of them say that Tara Chand was sitting at Jhanda Mal's house when Ram Rattan came and asked them to come to his shop, whereas Tara Chand states that he was stopped by Ram Rattan while he was walking past his shop. The Divisional Judge curiously enough regards this "discrepancy" as "material." In my opinion, it is absolutely trivial and such as one would naturally expect when evidence was being given of facts that had occurred years ago. Upon the main facts the three witnesses are in entire accord, and if their evidence is to be accepted, and I confess I see no reason why it should not, it conclusively proves that plaintiff not only acquiesced in the sale, but that he took an active part in bringing it about. The fact, that the vendees were mortgagees in possession and that the property was apparently burdened with mortgage charges up to the hilt, would seem to sufficiently account for his conduct.

But not only have we the evidence of these three witnesses in support of the plea that plaintiff waived his right of pre-emption; it is also established that mutation took place on the 14th May 1901 in favour of the vendees, and that the entry in their favour was made in the presence of plaintiff, who in this entry is expressly referred to as the cousin of the vendors. He raised no objection to the mutation. Mr. Ram Bhaj Datta argues that all this evidence was given at a late stage—only when the case was remanded by the Divisional Judge to the District Judge—and that nothing was pleaded by defendant in the first instance, to the effect that plaintiff had lost his rights (if any) by waiver. This is not correct. When the case first came into Court in 1901, defendant raised this plea, and the second issue framed by Pandit Jawala Pershad was, "Was the transfer in dispute by consent of the plaintiff, and whether he relinquished his right of pre-emption?" It was not necessary for the Courts at that time to go into this question, as the suit was dismissed on the first issue. I agree with the District Judge, that plaintiff is proved to have waived his right of pre-emption, and I, therefore, accept this appeal and, setting aside the order of the lower appellate Court, I restore the decree of the District Judge. Plaintiff must pay costs throughout.

Appeal accepted.

(s. c. 87 P. L. R. 1910)

PUNJAB CHIEF COURT.

CRIMINAL REVISION NO. 200 OF 1910.

July 2, 1910.

Present:—Mr. Justice Chevis.

SITAL DAS—PETITIONER

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 190—Complaint—Information to Magistrate—Initiation of Criminal Proceedings—Prosecution in conformity with an ultra vires *order.*

Where a District Judge directed the prosecution of a guardian of a minor and the District Magistrate ordered the case to be tried by the Additional District Magistrate, the Chief Court on revision set aside the order of the District Magistrate as one passed without jurisdiction on the ground that the order of the District Judge was illegal and there was no authority for the prosecution. The order of District Judge could not be regarded as information, within the meaning of section 190 (1) (c) of the Criminal Procedure Code.

Petition for revision of the order of the District Magistrate, Dera Ghazi Khan, dated the 17th January 1910, directing the trial, under sections 379, 380 and 406, Indian Penal Code, of the Petitioner upon information supplied by the District Judge, Dera Ghazi Khan, in his order, dated the 13th January 1910.

Mr. *Pestonji Dadabhai*, for the Petitioner.

Lala *Sangam Lal*, for the Respondent.

Judgment.—It is admitted on all sides that the District Judge had no power, as a Civil Officer, to order the prosecution of Sital Das. But the learned Government Advocate contends that the District Judge's order may be regarded as information "*vide* section 190 (1) (*c*), Criminal Procedure Code—and the order of the District Magistrate as an order taking cognizance upon information received." I doubt, however, if the District Magistrate took this view of the case when he passed his order. I fancy he

never thought of looking through the Guardians and Wards Act to see if the order of the District Judge was warranted thereby, and I take it that the District Magistrate simply passed his order making over the case to the Additional District Magistrate for trial on the understanding that a case had properly been instituted. I do not think the District Magistrate ever considered the case on the merits as to whether the facts called for a prosecution or not.

The order of the District Judge being *ultra vires* goes for nothing. The order of the District Magistrate I take simply as an order of transfer from his own Court to another and not an order for prosecution. I find that up to the present no criminal case has been properly instituted, and I direct that no further proceedings be taken on the District Magistrate's order of 17th January 1910. At the same time I note that nothing in the present order is to be regarded as a bar to any further prosecution which may be directed against Sital Das, either on complaint or otherwise; I express no opinion whatever on the merits as to whether such a prosecution should or should not be started, but I merely point out that if a prosecution is to be brought proceedings must be duly initiated as required by section 190, Criminal Procedure Code.

(s. c. 88 P. L. R. 1910.)

PUNJAB CHIEF COURT.

CIVIL REVISION No. 2239 OF 1910.

July 2, 1910

Present:—Mr. Justice Chevis.

SITAL DAS—PLAINTIFF—PETITIONER

versus

Musammat JESI BAI—DEFENDANT—RESPONDENT.

Guardians and Wards Act (VIII of 1890)—Guardian and Ward—Guardian, power of District Judge to order prosecution of—Appeal.

Upon an appeal against an order passed by the District Judge, directing prosecution of a person who was appointed guardian of a minor and required to furnish security:

Held, that the order was not appealable.

Held, further, that the District Judge had no jurisdiction to pass the order which must be reversed and set aside as *ultra vires*.

Petition, under section 70 (1) (*a*) of Act XVIII of 1884 as amended by act XXV of 1899, for revision of the order of the District Judge, Dera Ghazi Khan, dated the 13th January 1910, directing the institution of criminal proceedings against the petitioner.

Mr. *Pestonji Dadabhai*, for the petitioner.

Lala *Sangam Lal*, for the Respondent.

Judgment.—The order complained of is not an order passed under the Guardians and Wards Act and is not appealable, but I treat the appeal as an application under section 70 (1) (*a*) of the Punjab Courts Act.

Counsel for respondent does not defend the order of the District Judge; in fact he points out that his client never wished Sital Das to be prosecuted. There is nothing either in the Guardians and Wards Act or in the Criminal Procedure Code, authorizing the District Judge to order the prosecution under the Penal Code of a person who has been appointed a guardian; moreover, Sital Das' appointment was conditional on his furnishing security and that security he never furnished, so he cannot be regarded as guardian. In any case whether he be regarded as guardian or not, the District Judge had no jurisdiction to order his prosecution, and the order being *ultra vires* is set aside.

No order as to costs.

Order set aside.

(s. c. 89 P. L. R. 1910.)

PUNJAB CHIEF COURT.

CIVIL REVISION No. 2028 OF 1908.

June 14, 1910.

Present:—Mr. Justice Shah Din.

MUHAMMAD AZIM AND OTHERS—PLAINTIFFS—PETITIONERS

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL, THROUGH THE DEPUTY COMMISSIONER, RAWALPINDI—DEFENDANT—RESPONDENT.

Declaratory suit—Suit for declaration that plaintiff belonged to the Mughal *tribe.*

A claim for a declaration that the plaintiffs belonged to the *Mughal* tribe and not to the *Miana* tribe, as shown in the Revenue Records, was maintainable and the plaintiffs were entitled to the declaration, for in the *Shajra-nasab* of 1860, their ancestor was shown as *Miana Mughal* and the entry was not rebutted by any evidence.

Petition under section 70 (*a*) of Act XVIII of 1884 as amended by Act XXV of 1899, for revision of the order of the Divisional Judge, Rawalpindi Division, dated the 12th June 1908, confirming that of the Dis-

trict Judge, Rawalpindi, dated the 25th May 1908, dismissing plaintiffs' claim.

Bhagat *Govind Das*, for the Petitioners.

Mr. *Petman*, for the Respondent.

Judgment.—After hearing arguments and referring to the original Settlement Records of 1860 and 1905-06 of the village of Darkali Shershahi, *Tahsil* Kahuta, I think that this revision must succeed. In the *Shajra-nasab* of 1860 of the said village, Niamat-ullah, the ancestor of the plaintiffs, is shown as *Miana Mughal*, and there is a note to the effect that the descendants of Muhammad Salim, the great-grandson of Niamat-ullah, had settled in the village of Dera Khalsa. It is not disputed that that entry refers to the plaintiffs and that the plaintiffs are descended from Niamat-ullah, the original ancestor. The entry in the Settlement papers of 1860 being thus in favour of the plaintiffs they start with a legal presumption that they are *Miana Mughals*, and it is for the other side to show that the above-mentioned Settlement entry is wrong. It is not seriously disputed by the learned Government Advocate that it is nothing short of an anomaly that, whereas in their ancestral village, *Mauza* Darkali Shershahi, the agnatic relations of the plaintiffs are shown up to the present moment as *Miana Mughals* in the village of Chhappar Dakhili Dera Khalsa, to which the plaintiffs' ancestor had migrated before 1860, the plaintiffs should be shown as only *Mianas* and not as *Miana Mughals*. In my opinion, in the part of the country to which the plaintiffs belong, *Miana* denotes or signifies a profession and not a caste or tribe, and I am equally clear that it has not been proved that the entry in the Settlement Records of 1860, which is repeated in the Records of the current Settlement, in which the members of the plaintiffs' family are shown as *Mughals*, is erroneous. Until this entry is shown to be erroneous, the plaintiffs are entitled to have themselves entered as *Miana Mughals* in the Revenue Records of village Chhappar; and I hold that the Courts below were wrong in refusing to grant to the plaintiffs the declaratory decree prayed for by them.

I accept the revision and reversing the decree of the lower appellate Court, decree the plaintiffs' claim.

Petition accepted.

(s. c. 37 P. W. R. 1910 Cr.)

PUNJAB CHIEF COURT.

CRIMINAL REVISION No. 500 OF 1910.

July 16, 1910.

Present:—Mr. Justice Ryves.

SOMAN SON OF MOHAMMAD BAKHSH—ACCUSED—PETITIONER

versus

EMPEROR—PROSECUTOR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 110 (c)—Non-liability of manager of a shrine freely open to public where theives resort—Previous convictions of gambling and of offences not relating to property.

The Manager of a Public Shrine, which does not belong to him and is not under his exclusive control and which is freely open to the public, cannot be called upon to furnish security for good behaviour under section 110 (*c*) of Act V of 1898, although some theives have been arrested there on several occasions and it is generally used as a gambling resort, and among the people, who come up there, are a number of thieves and bad characters; and although the manager himself has nine convictions against him, none of which has anything to do with property and six of which are for gambling; inasmuch the shrine is not his house and he cannot be said to harbour thieves and such like convictions cannot fairly be raked against a person involved in the proceedings under the said section 110 (*c*):

An order under this section is not justifiable where apart from the police officials only two persons are produced to support the prosecution, against a large body of apparently respectable witnesses of immediate neighbourhood who testify in favour of the accused.

Petition for revision, under sections 435 and 439 of Criminal Procedure Code, of the order of the District Magistrate of Amritsar, dated 21st March, 1910, confirming the order of S. Jiwan Singh, Honorary Magistrate, 1st Class, Amritsar, ordering the accused to furnish a reliable surety for Rs. 1,000 and execute two bonds and a personal recognizance in a like sum for good behaviour for one year, or in default to undergo one year's rigorous imprisonment.

Mr. *Lal Chand*, for the Appellant.

Judgment.—This is an application to set aside the order passed by the Honorary Magistrate, First Class, of Amritsar calling on the petitioner to furnish a security for Rs. 1,000 under section 110 of the Criminal Procedure Code.

The learned District Magistrate in his judgment on appeal says: "What brings accused within the provisions of section 110, Criminal Procedure Code, is the proof that he consorts with thieves and harbours them. This is clearly proved from the arrests made in his house and from the discovery that

well-known *badmashes* were being kept by him."

I quite agree with the learned District Magistrate that if it was proved that the petitioner harboured thieves, he would come within section 110, Criminal Procedure Code. He says, this is proved by the arrests made in his house. On examining the record I find that no arrests were made at his house.

It appears that the petitioner is, or was, the manager of a shrine in Amritsar. It is proved by the evidence of the prosecution that this shrine is freely open to the public and in fact is used generally as a gambling resort. It is admitted by the Court of first instance that this shrine does not belong to the accused. I do not think it is proved that he has exclusive control of it. If it is a fact, as I have no doubt it is, that among the people who come up to this shrine, particularly for purposes of gambling, are a number of thieves and bad characters. But I do not see, how this fact alone is sufficient to prove the petitioner comes within section 110 of the Criminal Procedure Code. It is very unfair that no less than nine previous convictions, none of which had anything to do with property and 6 of which were for gambling, should be raked up against the petitioner in these proceedings. Apart from the evidence of the police officials, only two persons have supported their case. One of them speaks entirely from hearsay and the other, if anything, favours the petitioner. There is large body of apparently respectable witnesses of the immediate neighbourhood, who testify in favour of the petitioner.

Under these circumstances, I do not think that the order under section 110 was justified and I hereby set it aside.

Petition accepted.

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s. c. 38 P. W. R. 1910, Cr.; 24 P. R. 1910, Cr.)

PUNJAB CHIEF COURT.

CRIMINAL APPEAL No. 8 OF 1910.

March 29, 1910.

Present:—Sir Arthur Reid, KT., Chief Judge, and Mr. Justice Rattigan.

GUL HASSAN AND OTHERS—CONVICTS—APPELLANTS

versus

EMPEROR—PROSECUTOR—RESPONDENT.

Confession—Statement by a person not implicating himself—Inadmissibility of such a statement—Circumstantial evidence—Evidence Act (I of 1872), ss. 11 and 30—Murder.

A statement of an accused to the effect that under threats of death he was forced to sit outside the door of the house where a murder was being committed to warn the murderers of the approach of any body, and not to divulge the secret and to remain a passive agent in the crime and that he took no part in committing the crime, does not amount to a confession of either murder or its abetment, and consequently is inadmissible in evidence under section 30 of Act I of 1872, against the co-accused.

Satisfactory proof that clothes found on the body of a murdered person belong to him and were worn by him immediately before disappearance, is sufficient to find that the corpse is of that person although it is too decomposed to be identified otherwise.

Appeal from the order of E. A. Estcourt, Esquire, Sessions Judge, Attock Division, dated the 13th December, 1909.

Mr. *Vishnu Singh*, for the Appellants.

The *Government Advocate*, for the Respondent.

Judgment.—Three persons, namely, (1) Said Rasul *alias* Rasul Khan; (2) Gul Hassan, brother of the said Said Rasul; and (3) a youth by name Muhammad Khalil (aged 18, and the cousin of the two first named persons) have been convicted by the Sessions Judge of the Attock Division, agreeing with the opinions of the assessors, of the murder of one *Musammat* Gul Jan, *alias* Rahmat Jan, at Mianwali on the 25th May 1909, and have been sentenced, the first two to death and the third to transportation for life. They have appealed from the order of the Sessions Judge and their case also comes before us under section 374 of the Criminal Procedure Code, for confirmation of the sentences passed upon the first two accused. The case is one of peculiar difficulty and for this reason as also because it involves a question of life or death, we have given it our most careful consideration. It seems that on the 25th July 1909, one Said Muhammad, a warder in the Mianwali Jail happened to be passing by a disused well near the jail and by chance looked down into it. He saw a body floating on the surface and forthwith went off to the police *thana* and made a report of what he had seen, and he added that he was unable to say whether the body was that of a human being or an animal. Information was at once given to the Sub-Inspector who happened to be away from the *thana* when the report was made and the

same evening that officer proceeded to the well and finding that nothing could be done at the time as the well was very deep and it had become dusk, he put a guard over the place. On the morning of the 26th July, the body was taken out and found to be in very decomposed state. It was at once sent to the Civil Surgeon for examination and was found to be that of a woman. The corpse when found had upon it a *khaki kurta* and certain glass bangles, but owing to the decomposition which had set in, the Civil Surgeon was of opinion that identification was impossible so far as the body and its features were concerned. He was of opinion that the body must have been in the water for 2 to 4 weeks or even more; and that the woman must have been dead before she was thrown into the well, this opinion being based on the facts that the legs crossed each other and the thighs touched the abdomen and that there was no water found in the stomach or the lungs. On the 30th July, the Sub-Inspector on examining his registers found that there had been received a report to the effect that one Kudrat Khan, a jailor in the Mianwali Jail, had in April abducted the wife of the son of one Saadat, a *mirasi* of Rajoya. He accordingly went to the jail taking with him the *kurta* and the glass bangles, in the hope that some one might be able to throw light upon the affair.

The Jailor, Wali Ahmad, to whom the Sub-Inspector first applied for assistance, seems to have suggested that the material of which the *kurta* was made was similar to that of which the *pagris* or *safas* of native infantry soldiers are made, and he threw out a hint that a brother of Rasul Khan had been to Mianwali on a visit and that the former was a *sepoy* in a regiment. He suggested that the articles might be shown to *Musammat* Alam Khatun, the jail matron. This was done and the matron at once identified the *kurta* as belonging to a young woman of the name of *Musammat* Gul Jan who, she said, had been living in the quarters of Said Rasul (*alias* Rasul Khan) and was said to be the wife of the latter's brother, Gul Hassan, a *sepoy* in a native infantry regiment. She said that she had no hesitation in identifying the *kurta* as it was "sewn" in her presence and that in point of fact she had herself sewn a certain part of it. The matron further informed the police that Said Rasul had three women living with him in May 1909, (1) *Musammat* Bukhtan, who was said to be his own wife; (2) *Musammat* Sharfo; and (3) *Musammat* Gul Jan, the alleged deceased woman. She has in her evidence before the Sessions Judge deposed to similar effect and has stated that Gul Hassan came to Mianwali and that on one evening about 7 or 8. P. M. *Musammat* Gul Jan informed her that she (*Musammat* Gul Jan) was going away early with Gul Hassan and that they were going to the hills. Since then she never saw *Musammat* Gul Jan again; but she had no hesitation in identifying the *kurta* and the bangles as those worn by that woman.

After examining the above persons and certain others (including one Muzaffar Shah, a warder, with whom *Musammat* Gul Jan is alleged to have had an intrigue), the Sub-Inspector found that Said Rasul had taken leave on the 10th July and had gone to his home which was stated in the "service book" to be *mauza* Nartopa, in the Attock District. On the 3rd August he arrived at the Hazro *thana* and from inquiries there made he discovered that Said Rasul was in fact a resident of *mauza* Rajoya in the Abbottabad district and he accordingly proceeded to the latter village, where he arrived on the 6th August. The houses of Said Rasul, his father and his cousin were promptly searched and in the former was found a trunk which was locked. Said Rasul said the trunk belonged to his brother, Gul Hassan and that the latter had the key, whereupon the trunk was broken open and found to contain various articles of jewellery worn by women. Said Rasul was examined by the police but stated that he knew nothing about any woman of the name of *Musammat* Gul Jan and that the jewellery and the trunk belonged to his brother Gul Hassan. We refer to this statement solely because it is in entire accordance with the statement he made subsequently, on the 22nd September 1909, to the Magistrate, 1st class.

Said Rasul was arrested at *mauza* Rajoya on the 6th August and taken to Mianwali on the 9th idem. On the 13th August Muhammad Khalil who was at the time a warder in the Multan Jail, arrived at Mianwali under arrest, and from the police papers it appears that on the mornings of the 14th and 15th August, he (for some unknown reason)

made two more or less identical and detailed statements to the police, as a result of which further search is said to have been made in the well, leading to the discovery of pieces of the bag in which the corpse is said to have been enclosed previously to being thrown into the well. On the 16th August, Muhammad Khalil made the statement to Rai Ganga Ram, which is referred to, and treated by the Sessions Judge, as a "confession." It is, in point of fact, nothing of the sort, as we shall presently show, and there can be no doubt that it was wrongly admitted in evidence against the two other accused. We shall deal with this part of the case later on. It is only necessary here to remark that this "confession" was subsequently retracted, and is said to have been made in consequence of police malpractices.

On the 29th August, Gul Hassan, who was with his regiment at Kohat, was then arrested by the police.

The three accused were tried for the offence of murdering *Musammat* Gul Jan and the Sessions Judge sums up the case against them in the following words:—"The evidence produced, apart from the confession, clearly shows that the body found was that of *Musammat* Gul Jan, otherwise *Musammat* Rahmat Jan; that she had been living in the jail quarters with Said Rasul ostensibly as his brother's wife; that Gul Hassan was in Mianwali for some days before the night of the 25th May and that he went away on the morning of the 26th May, that *Musammat* Gul Jan had had quarrels with Said Rasul and Gul Hassan, and that she disappeared on the night of the 25th May. Taking this into consideration, and also taking into consideration the confession made by Muhammad Khalil, the recovery of the pieces of sacking from the well on the 15th August, and the jewellery at Rajoya on the 4th August, including the broken nose ornament and the necklet with the broken string, I find the corroborative evidence is so overwhelming that there can be no doubt but that the confession made by Muhammad Khalil is substantially correct. The assessors carefully considered the case and arrived at the same opinion."

We might here add that *Musammat* Gul Jan, *alias* Rahmat Jan, is said to have been originally married to one Fatteh Khan of Nawanshahr, and to have been abducted from him some four or five years before the alleged murder. Fatteh Khan has been examined and he purports to identify a certain nose ornament and some clothes as the property of his wife. He admits that "other people have clothes like this" and he says that one Nur Ahmad made the nose ornament. Nur Ahmad (P. W. No. 9) deposes that he made the gold part of the nose ornament for Fatteh Khan some five or six years ago, but adds that other goldsmiths make similar nose ornaments. In view of this evidence it is hardly fair to the accused to say that the cloth and tha nose-ring were identified by Fatteh Khan and Nur Ahmad. In a sense they were, but the so-called identification of articles very like those generally worn by women cannot be regarded as entitled to much value. On the other hand, *Musammat* Alam Khatun (P. W. No. 14), the jail matron, appears to have no doubt as to the jewellery produced being the property of *Musammat* Gul Jan, and there seems to be no reason to discredit her evidence. She would appear to be an impartial disinterested person who had ample opportunity of becoming familiar with *Musammat* Gul Jan and the latter's cloths and ornaments. Nor do we see any reason for not accepting her evidence to the effect that on the day previous to her disappearance from Mianwali, *Musammat* Gul Jan had told her that she was going away early the next day with Gul Hassan to the hills. In view of this evidence and of *Musammat* Alam Khatun's very positive statement that the *kurta* found on the body of the corpse belonged to *Musammat* Gul Jan, we must conclude that the body was that of the young woman who was known to the jail people as *Musammat* Gul Jan and was at the time living with Gul Hassan in the jail quarters adjoining those occupied by Said Rasul. That this young woman was foully murdered and that her corpse was thereafter thrown down the well, are facts, in our opinion, well substantiated. But there comes the next, and most important question, who committed this murder?

The learned Sessions Judge, in arriving at the conclusion that it was committed by Said Rasul and Gul Hassan with the connivance of Muhammad Khalil, has relied very largely upon the so-called "confession" made by the last-mentioned person before Rai Ganga Ram, though the other facts proved in the case

lend, in his opinion, corroboration to the statements made by Muhammad Khalil. Before proceeding, we might here observe that it is only in this "confession" that any motive is alleged for the crime, and that if this confession is ruled out of Court (as, in our opinion, it must be), there would seem to be no very strong reason for Said Rasul and Gul Hassan putting the unfortunate young woman to death. Even in the "confession", the motive assigned is a very weak one, the suggestion being that *Musammat* Gul Jan had insisted on going back with Gul Hassan whereas the latter was not in a position to provide accommodation for her at Kohat where his regiment was quartered. Gul Hassan had abducted the woman and was apparently fond of her, for it was on her account that he seems to have paid the visit to Mianwali in May 1909, and deceased was, it seems, a young and attractive woman. She had not been able to get on very well with Said Rasul and *Musammat* Bukhtan, but it is not very easy for us to appreciate this motive on the part of Said Rasul and Gul Hassan for suddenly resolving to put her to death. If we eliminate Muhammad Khalil's "confessions," there is little on the record to support the prosecution theory that the unhappy woman had proved herself to be a nuisance and that accordingly these two Pathans, with their peculiar views on the subject of the value of a woman's life, had decided to kill her. This brings us to a consideration of Muhammad Khalil's so-called confession made before Rai Ganga Ram on the 16th August.

"We are entirely unable to accept this as a confession" within the meaning and for the purposes of section 30 of the Indian Evidence Act. With its legal aspect we shall deal presently, but before doing so, we must in the first instance remark that it is a curious fact that on the 6th August (*i. e.*, some 6 or 7 days before Muhammad Khalil was arrested and at a time when apparently nothing definite was known as to the details of the crime), an entry in the police *zimnies*, made at Rajoya, discloses the fact that "a respectable man who does not wish to disclose his name" came forward and told the police practically everything that was subsequently stated by Muhammad Khalil in his "confession." Full details of the crime were given, though obviously those details (upon the prosecution theory) could be known to only three persons, Said Rasul [who was then under arrest and was stoutly denying all knowledge of the murder, Gul Hassan (who was at Kohat) and Muhammad Khalil who was at Multan]. This respectable person even went so far as to point out that the body before it was thrown into the well, had been put in "a sack"—a fact which should have led the police to search the well for the sacking before Muhammad Khalil's statement to the same effect, ten days later, suddenly inspired them with that idea. Now, how came this respectable man to know all these details on the 6th August? It is quite clear that Said Rasul had not made mention of the murder, and he was the only one of the three accused present at the time at Rajoya. Then again what necessity was there for the police to get Muhammad Khalil to twice repeat his "confession" to them on the 14th and 15th August respectively before they took him before the Magistrate on the 16th August? These are facts which *per se* must make us pause before we can accept without reservation the so-called confession made by Muhammad Khalil on the 16th August, a confession which (apart from other objections) is of but little value in face of the fact that it was afterwards retracted in the Sessions Court. Before proceeding, we must refer to one other incident. The learned Government Advocate, quite rightly, laid some stress on the evidence of one Bhagwan Das, a *sunar* of Rajoya (P. W. No. 7). Standing by itself the evidence given by this witness does certainly lend strength to the prosecution theory, for Bhagwan Das deposes that the day before the accused Said Rasul was arrested, the latter (who was illiterate) brought him a letter and asked him to read it. The witness says that this letter was to the effect that the body had been found, and that the accused had better take measures for his safety, and he adds that the accused thereupon snatched the letter away and went off with it. On reference to the police files, we find that on the 7th of August this witness informed the police that the accused had brought him a bearing letter to the above effect. The learned Government Advocate who had not all the facts before him, suggested to us that this letter must have been written by either Gul Hassan or Muhammad Khalil, and obviously that

would be the inference. But a scrutiny of the police file discloses the very important fact that this letter was actually written by one Muhammad, son of Hayat, and that the latter wrote it because he had heard from the jailor and others at Mianwali that the body found in the well was that of Rasul Khan's (*alias* Said Rasul's) sister-in-law. It is, we think, a matter for regret that a piece of evidence which *prima facie* appears to tell strongly against the accused, but which in reality only shows that from the outset of the case the Mianwali jail authorities had made up their minds that the corpse was that of *Musammat* Gul Jan and that Said Rasul had had a hand in getting rid of her, was allowed to stand as it does on the file of the Sessions Judge without any explanation. As matters stand, the deposition of Bhagwan Das must necessarily have carried weight with the assessors who heard it given in open Court, and who had not the police papers before them. That this must have been so is evident from the fact that the learned Government Advocate himself laid no little stress on this seemingly very incriminating letter and suggested with the most perfect *bona fides* that it was sent as a warning to Said Rasul by either Gul Hassan or Muhammad Khalil. And yet we find that it emanated from neither of the latter, and that it was written merely in consequence of the gossip that was going on in the jail after the body had been found. In our opinion, it would have been more fair to the accused if the prosecution had produced this man, Muhammad, and had allowed him to give his explanation of the letter which the witness Bhagwan Das refers to. Had this explanation been given, there can be little doubt that the incident deposed to by the witness would have been regarded as of no weight.

To turn now to the so-called "confessions" made by Muhammad Khalil on the 16th August and the 22nd September 1909. Section 30 of the Indian Evidence Act, 1872, provides that "when more persons than one are being tried jointly for the same offence and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well against the person who makes such confession." "Offence," as used in this section, includes the abetment of, or attempt to commit, the offence (explanation). But it is settled law that a confession, in order to be admissible under this section, must implicate the confessing prisoner substantially to the same extent as it implicates the person against whom it is to be used. Since the amendment of the section, it may well be that a confession which inculpates its author merely of abetment, may nevertheless be used as a confession against the other co-accused who is therein charged with being the principal offender. But in the present instance, Muhammad Khalil has throughout maintained that he was forced, by threats of death, to remain an impassive agent in the crime. On the 16th August he stated as follows:—"Said Rasul awoke me from sleep and asked me if I would go by their word or by *Musammat* Rahmat's. I said, I will do neither and exhorted Gul Hassan and Said Rasul not to murder *Musammat* Rahmat but let her off. They replied they would never let her off . . . . . Said Rasul and Gul Hassan asked me to sit at the door and warn them of the approach of any body, *otherwise they held out a threat to murder me. I sat at the door out of fear* . . . I stuck to my post. They returned at about 1 A. M. and told me that they had put some bricks in the sack and thrown the sack in a well. They told me not to divulge the secret; if it were done, I too would be murdered." Again on the 22nd September, he stated that the woman was murdered by Gul Hassan and Said Rasul and thrown into the well, and he added, "they threatened to kill me, and so I kept silent for fear of my life." He further explained on this occasion, that the two other accused "seated" him outside the door, saying "if any one comes, inform us, otherwise keep quiet. After this Gul Hassan and Said Rasul strangled her, I heard her cries and *became afraid of my life and kept quiet.*" We do not lay any stress on the fact that on the 22nd September the confessing accused informed the Magistrate that he had been offered a pardon by the Superintendent of Police. The Magistrate disillusioned him on this point before he made his statement. But we cannot possibly accept the statements made by Muhammad Khalil as a "confession" within the meaning and for the purposes of section 30 of the Evidence Act. He does not even admit that he abetted the murder. His allegation is that he was forced by threats of

death sit outside the door and that he acted in this impassive manner because he was in fear of his own life. This is not a confession of guilt in any sense of the term. We must accordingly eliminate from our consideration the statements made by Muhammad Khalil on the 16th and 22nd September, and we have the less hesitation in doing so in view of other facts to which we have already referred.

There is then no direct evidence against the accused persons of either (1) any immediate motive for the crime, or (2) their participation in its commission.

The case against the accused persons thus rests on purely circumstantial evidence. We must, on the evidence, accept as proved facts (1) that *Musammat* Gul Jan was seen alive on the 25th May, and that on this date she informed *Musammat* Alam Khatun that she was going off early next day with Gul Hassan; (2) Gul Hassan went off on the morning of the 26th May; (3) that Gul Hassan was living at the time with *Musammat* Gul Jan in quartes adjoining those occupied by Said Rasul; (4) that *Musammat* Gul Jan disappeared after the 25th May and was never heard of until her body was taken out of the well on the 26th July; (5) that the unhappy woman was unquestionably murdered somewhere about this time and her body thrown into the well; and (6) that Said Rasul, when arrested on the 6th August at Rajoya, had in his possession a trunk which contained jewellery (including the necklet with the broken thread, and the broken nose-ring) which has been identified as belonging to the deceased woman. There is further, the very significant fact that though *Musammat* Gul Jan undoubtedly disappeared on the night of the 25th-26th May, no report of her disappearance was made by either Gul Hassan or Said Rasul to the police and that neither of them mentioned this fact to any one. The question before us is, whether upon these facts the three accused persons can be held guilty of her murder? As regards Muhammad Khalil, we have no doubt at all. He was in no way concerned with, or interested in, the crime and there is, as the learned Government Advocate admits, nothing against him but his own statements. We have some reason to doubt the genuineness of those statements, but even if we accept them as they stand, they merely go to show Muhammad Khalil was compelled by fear of death to take the very minor part that he is said to have taken. According to his own statement, he protested against the crime and the only thing that could be alleged against him (so far as his statements go) is that he did nothing to prevent a murder. We are by no means satisfied that his statements, which were subsequently retracted, correctly represent the facts, but even if we take them as true, he cannot be held guilty of the murder of *Musammat* Gul Jan, or indeed of its abetment. Cowardice is not a criminal offence, and practically it is to this alone that Muhammad Khalil pleads guilty when he says that after vainly trying to dissuade the two other accused persons from committing murder, he sat outside the door in fear of his life. We must, therefore, accept his appeal and set aside the sentence passed upon him. But as against Gul Hassan and Said Rasul, the case is, in our opinion, clear. *Musammat* Gul Jan was unquestionably in their company on the 25th May and was to have left Mianwali with Gul Hassan on the 26th May. She was never again seen at the jail and Gul Hassan arrived at Kohat, admittedly without the woman, on the 27th May. And on the 6th August a trunk containing jewellery which has been satisfactorily proved to have been the property of *Musammat* Gul Jan, and to have been worn by her at Mianwali, is found in a trunk in the house of Said Rasul at *mauza* Rajoya. The accused have given obviously false explanations to account for their possession of this jewellery, and what is even more significant, neither brother gave any information to the police regarding the mysterious disappearance of *Musammat* Gul Jan on the night of the 25th-26th May. The suggestion that she may have been murdered by some lover who was averse to her going back with Gul Hassan is fanciful and in view of the fact that all her jewellery was found in the possession of Said Rasul—and especially with reference to the necklet with the broken thread, very improbable. If the woman was intending to elope with a lover, she would hardly have abandoned her ornaments or gone out of her way to forcibly break off her necklet and her nose-ring.

We have given the case our most careful consideration and we regret to say that we must hold that there can be no doubt that the unhappy woman was foully murdered on

the night of the 25th-26th May, and that her murderers were the two brothers, Gul Hassan and Said Rasul. What their object or motive may have been is not altogether clear, but there can be little, if any, doubt that the woman had become a nuisance to the brothers, and it is unfortunately not unknown to the Court that Pathans hold life, and especially a woman's life rather cheap. But be their motive what it may, we are satisfied that Gul Hassan and Said Rasul have been rightly convicted of the murder of *Musammat* Gul Jan, and we accordingly reject their appeals and confirm the sentences of death passed upon them. The murder was cold-blooded and cowardly, and no sentence other than that of death would be appropriate.

Appeal of Muhammad Khalil accepted; that of the other accused rejected.

(s. c. 40 P. W. R. 1910 Cr.)

PUNJAB CHIEF COURT.

CRIMINAL REVISION NO. 553 OF 1910.

August 18, 1910.

Present :—Sir Arthur Reid, KT., Chief Judge.

HARI KRISHAN—CONVICT—PETITIONER

versus

EMPEROR—PROSECUTOR—RESPONDENT.

Cheating—Mortgagor not disclosing his defective title—Penal Code (Act XLV of 1860), s. 420.

Mere suppression of some facts at the time of borrowing money does not amount to cheating where there is no evidence of either active deception or dishonest or fraudulent action. So where a person mortgaged to another for Rs. 1,000 a a mortgage executed in his favour of a house for Rs. 2,000 and also agreed that in case of his mortgagee not being able to recover his money from the mortgage rights, he would make good the money from his other property:

Held, that there was no element of cheating in that person's act even if he knew at the time of borrowing money that his mortgagor's title to the house was defective and did not disclose this defect to his creditor.

A mortgage of a mortgage of a house is not a re-mortgage of the house.

Gendan Lal v. *Abdul Aziz Khan*, 27 A. 302; A. W. N. (1904) 265; 1 Cr. L. J. 1044 and *Emperor* v. *Bishan Das*, 27 A. 561; A. W. N. (1905) 98; 2 A. L. J. 268; 2 Cr. L. J. 218, referred to.

Petition for revision of the order of W. A. LeRossignol, Esquire, Sessions Judge, Amritsar, dated the 1st April, 1910, confirming that of G. Gordon, Esquire, Magistrate, 1st Class, Amritsar, dated the 17th March, 1910, convicting the petitioner.

Facts.—In 1906, one R a grandson of one T mortgaged a certain house with possession to H (accused) for Rs. 2,000 by a registered deed of mortgage. Instead of giving actual possession, R executed a lease in favour of H. After this one M, brother of H, obtained a decree against R and in execution thereof attached the house subject to the lien of his brothers' mortgage. On 29th November, 1906, T filed an objection that the house belonged to him. In the course of these proceedings M executed a *mukhtarnama* in favour of H for the purpose of opposing T's objection. On 29th July, 1907, the executing Court decided the objection in favour of T and released the house from attachment.

No regular suit to get the order of releasing the house was filed by M.

On 10th April, 1908, H borrowed Rs. 1,000 from one of his customers G on the security of his rights as a mortgagee of the house for Rs. 2,000 and agreed that in case of G being not able to realize the said sum of Rs. 1,000 by the sale of his rights G will be entitled to realize the money from his other property. H also executed a lease in favour of G and made over to him the mortgage-deed and the lease executed by R in favour of H. This mortgage was acted upon both by H and G and H went on paying interest for some months. In September 1908, T died leaving the house by a Will to his other grandson K. It was not till towards the end of 1909 that G rushed into Criminal Court with a complaint under section 420, Indian Penal Code, alleging that he was deceived by H as H did not disclose the house did not belong to R.

The main defence of H was that the house belonged to R who was in its possession and that he did not know anything about the objection proceedings.

Both the Courts unanimously found that H was aware of the objection proceedings and he knowingly deceived G and accordingly convicted H and gave him a sentence of 9 months' rigorous imprisonment and a fine of Rs. 1,000.

Lala *Hukam Chand*, for the Petitioner.

Mr. *Vishnu Singh*, for the Complainant.

Order.—The Courts below have apparently been misled by the false impression that a mortgage of a mortgage of a house is a re-mortgage of the house.

KHADAM *v.* EMPEROR.

All that the petitioner did was to mortgage to the complainant for Rs. 1,000 a mortgage executed in his favour of a house for Rs. 2,000. Even accepting the facts that the house was the property of Tilok Nath, grandfather of the mortgagor, Radha Kishen, and that Tilok Nath has left it by Will to another grandson, the elements of the offence of cheating punishable under section 420 of the Penal Code have not been established.

In arriving at this conclusion, it is unnecessary to go as far as the Allahabad Court went in *Gendan Lal* v. *Abdul Aziz Khan* (1) and *Emperor* v. *Bishen Das* (2). Neither fraud nor dishonesty has been established and the Courts below have apparently overlooked the words "fraudulently or dishonestly" in section 415 of the Penal Code, their attention having apparently been distracted, by the finding that the defence set up was false, from the true issues for decision in this case; and, moreover, no active deception has been established. The complainant's remedy was by Civil suit, he rushed into a Criminal Court, adopting the erroneous and cheaper remedy.

I allow this application and set aside the conviction and sentence.

The fine, if realised, will be refunded.

Petition allowed.

(1) 27 A. 302; A. W. N. (1904) 265; 1 Cr. L. J. 1044.
(2) 27 A. 561; A. W. N. (1905) 98; 2 A. L. J. 268; 2 Cr. L. J. 218.

(s. c. 42 P. W. R. 1910 Cr.)

PUNJAB CHIEF COURT.

FIRST CRIMINAL APPEAL No. 379 OF 1910.

August 31, 1910.

Present:—Sir Arthur Reid, KT., Chief Judge.

KHADAM—ACCUSED—APPELLANT

versus

EMPEROR—PROSECUTOR—RESPONDENT.

Rape—Attempt to commit rape—Assault to outrage modesty—First report to the Police—Penal Code (Act XLV of 1860), ss. 354, 376/511.

The conviction of having committed rape cannot be maintained, where in the first report to the Police the girl merely stated that the accused seized her by the arm and asked her to have connection with him.

But where evidence proves that the accused stripped her nearly naked and was lying upon her when her cries attracted people to the spot, he commits an offenc under sections 376-511 and not merely under section 354, Indian Penal Code.

Appeal from the order of H. A. Smith, Esquire, I. C.S., District Magistrate, Jhelum, dated the 25th May, 1910.

Mr. *Nund Lal*, for the Appellant.

The Assistant Legal Remembrancer, for the Respondent.

Order.—The only evidence of penetration is the statement of the girl herself that penetration was effected.

Having regard to the fact that the record contains no evidence of injury to her person, to the difficulty which would be experienced by an unaided man in overcoming at once the struggles of a Lehar girl of 18 or 20 and to the fact that in the first report the girl merely stated that the appellant seized her by the arm and asked her to have connection with him, the conviction of having committed rape, cannot be maintained. The evidence, however, contains ample evidence that the appellant attempted to commit that offence, that he had stripped her nearly naked and that he was lying on her when her cries attracted people to the spot.

The argument that the facts deposed to by witnesses for the prosecution constitute only the offence of assault punishable under section 354 of the Penal Code is hopeless.

I see no reason for rejecting the evidence of the witnesses for the prosecution except the girl's statement as to penetration which is unsupported and cannot, in my opinion, safely be acted upon; and while I allow the appeal to the extent of setting aside the conviction and sentence under section 376 of the Penal Code, I convict the appellant of an attempt to commit rape and sentence him to rigorous imprisonment for four years, including solitary confinement for two months, under sections 376-511 of the Penal Code.

Appeal partly allowed.

PONNUSAMI *v.* VYTHILINGAM PILLAI.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 408 OF 1908.

September 3, 1910.

Present:—Mr. Justice Munro and Mr. Justice Sankaran Nair.

PONNUSAMI, MINOR BY NEXT FRIEND SANNASI MUTHIRIAN, DECLARED NOW A MAJOR—APPELLANT

versus

VYTHILINGAM PILLAI AND ANOTHER—RESPONDENTS.

Civil Procedure Code (*Act XIV of* 1882), *s.* 317—*Suit for specific performance and possession against certified purchaser—Amendment of plaint—Damages.*

Plaintiff, a minor, sued by his next friend for specific performance of an agreement by defendant who had promised to purchase certain lands in a Court auction for the minor and to deliver the same to him and also for possession of those lands:

Held, that the suit for specific performance and possession was barred by section 317, Civil Procedure Code:

Held, also, that as the plaintiff was a minor, the plaint should be allowed to be amended by the insertion of a prayer for damages.

Second appeal against the decree of the District Court of Trichinopoly, in Appeal Suit No. 136 of 1906, presented against the decree of the Court of the District Munsif of Sreerangam, in Original Suit No. 74 of 1905.

Judgment.—We think that section 317 of the Code of Civil Procedure of 1882 is a clear bar to the suit for specific performance and possession. But in view of the minority of the plaintiff we think the plaint should be allowed to be amended by adding a prayer for damages, and we must ask the District Judge to find to what amount, if any, the plaintiff is entitled as damages. Fresh evidence may be taken. The finding should be submitted within six weeks and 7 days will be allowed for the filing of objections.

In compliance with the above order, the District Judge submitted the following

FINDING.

The appeal has been remanded by the High Court with a direction that (1) the plaintiff should be allowed, in view of his minority, to amend his plaint by adding a prayer for damages and (2) this Court should record a finding, after taking fresh evidence, on the question "To what amount, if any, the plaintiff is entitled as damages?"

2. It appears that the plaintiff has now attained his majority. He appeared in person and declared his intention to proceed with the suit. Under Order XXXII, Rule 12 (1) he should apply for an order discharging the next friend and for leave to proceed in his own name.

3. It is said these steps will be taken in the High Court where this appeal is now pending. I do not think it is the duty of this Court to grant leave on such an application at this stage, or to delay proceedings while such steps are taken in the High Court.

4. The plaint has been amended and the plaintiff claims Rs. 1,800 as damages from the 1st defendant. Whether the plaintiff is entitled to damages at all depends on the decision on issues 1 and 2.

5. The District Munsif found both issues in plaintiff's favour. My predecessor in first appeal did not consider these issues, as he found the suit was barred by the provisions ef section 317 of the Civil Procedure Code of 1882.

6. I have no doubt that the decision of the District Munsif on these issues was correct. From Exhibit A and the evidence of Mr. Ganapathi Aiyar it is clear that plaintiff's next friend withdrew from contesting the suit O.S. No. 34 of 1901, on the undertaking of 1st defendant, who was plaintiff therein, to purchase two items of Nanja and Survey No. 221 in Advatur at the Court auction and re-convey them to the minor plaintiff without payment.

7. These lands were only a small fraction of the family lands concerned in O. S. No. 34 of 1901. The 1st defendant did not carry out his part of the agreement.

8. The Rs. 1,800 now claimed is the supposed value of the lands at the date of Court auction.

9. The claim is not an exorbitant one. The evidence now recorded proves that the lands are now worth much more. The two items of Nanja are well supplied by a channel and similar land adjacent has been sold for over Rs. 600 an acre in 1895 *vide* Exhibit G.

10. Under Exhibit F, land not so favourably situate was sold at Rs. 400 for $\frac{3}{4}$ *cawni* in 1909. From the evidence of plaintiff's 7th witness it appears that such Nanja lands can be rented for 18 *kalams* of paddy per acre per annum. Such lands would, therefore, yield at Rs. 3 per *kalam* Rs. 108 per annum. The evidence of defendants' 6th witness corroborates this. He is now a Survey peon but until $1\frac{1}{2}$ months ago he was

1st defendant's agent. He has leased plaint Nanja for 2 years past. As 1st defendant's agent, he probably got the lands on better terms than an outsider would have to pay, for there is no reasonable doubt that defendant No. 2—the purchaser at Court auction—is really a *benamidar* for 1st defendant. Defendants' 6th witness pays 32 *kalams* rent for the two lands. According to this witness he had to pay Rs. $4\frac{3}{4}$ per *kalam* for 5 *kalams* of paddy retained by him out of the produce.

11. It is urged that the price fetched by these Nanjas at the Court auction *viz.*, Rs. 705 for the two items, represents their real value at the date of the auction 1905, as it is shown that plaintiff's next friend bid the lands up at the auction.

12. I cannot accept this view. Lands sold at Court auction seldom realize anything like their real value. The auction purchaser knows that he will probably have much more expense to undergo before he acquires possession and a good title. In the present instance there was good reason to anticipate future trouble and litigation. The 1st defendant, who had promised to buy in the lands and re-convey them to plaintiff, did not bid at all but set up 2nd defendant to bid. This is probably what induced plaintiff's next friend to bid at the auction but it must also have had the effect of restricting the bidding to a point far below the real value of the lands.

13. I find that the two plaint Nanjas were at the date of the auction worth at least Rs. 1,200.

14. As regards Survey No. 221, 8 acres in extent, it appears to be a cocoanut tope. Defendants' evidence is interested and unreliable. The tope has some hundreds of young cocoaunt trees on it. Plaintiff's 8th witness purchased an adjacent tope with only 45 trees on it and less than half the size for Rs. 700 under Exhibit H in 1905. Rupees 600 is, no doubt, an undervaluation for this plaint item.

15. In the result, I find on the first issue, that the agreement contained in 1st defendant's letter, dated 23th April 1901, to Mr. Desikachariar, is valid and enforceable.

On issue 2, that the consideration for 1st defendant's undertaking therein contained was the withdrawal from contest in O. S. No. 34 of 1901 and on the new issue No. 6 that the damages claimed by plaintiff *viz.*, Rs. 1, 800 are reasonable and that plaintiff is entitled to such damages.

This second appeal coming on for final hearing, after the return of the finding of the lower appellate Court, the Court delivered the following

Judgment.—We accept the finding. The plaintiff has attained majority and has elected to take the benefit of the agreement, Exhibit A. He will, therefore, have a decree for Rs. 1,800 against the 1st defendant with costs on this appeal as filed.

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL No. 527 OF 1910.

August 9, 1910.

Present:—Sir George Knox, KT., Judge, and Mr. Justice Karamat Husain.

EMPEROR—APPELLANT

versus

CHANDAN SINGH AND OTHERS—RESPONDENTS.

Evidence Act (I of 1872), s. 105—Onus—Statement of witness and of accused person made to Police officer during investigation cannot be taken in evidence—Admissibility of eridence—Special diary—Presumption—Criminal Procedure Code (Act V of 1898), s. 162.

The burden of proving the existence of circumstances bringing a case within any special exception or proviso contained in any part of the Penal Code is upon the person accused and the Court shall presume the absence ofsuch circumstances.

Statements made to a Police Officer by witnesses during investigation and reduced to writing cannot be used as evidence against the accused. Nor can the statements of accused persons under arrest made to a Sub-Inspector of Police and reduced to writing and put in a special diary be used against the accused.

Criminal appeal against the judgment of the Sessions Judge of Banda.

Mr. *Dillon* and Mr. *A. P. Dube*, for the Opposite Party.

The Government Advocate, for the Crown.

Judgment.—Chandan Singh and eight others with him were convicted for trial to the Court of Session on the following offences, namely, that on 25th March 1910, they committed riot being armed with deadly weapons, to wit *lathis*, that on the 25th March 1910, they caused the deaths of Chinte Singh and Gandha Singh and so committed culpable homicide not amounting to murder. In the case of Chandan Singh the latter head of charge ran that on the 25th March 1910 he committed murder.

The learned Judge has gone into the case with very great care and at great length and

it is, therefore, with the greater regret that we find ourselves compelled to record that the procedure adopted by the learned Judge has rendered the trial infructuous and thus leaves us no alternative but to order the accused to be re-tried. As this is the case, we for obvious reasons abstain from commenting in any way upon the value of the evidence, recorded in the trial. They will stand committed for trial to the Court to which we shall commit them precisely in the same position as they stood when they were committed for trial on the 18th May 1910. There is, however, one error in the charge against the eight accused (other than Chandan Singh) which we find ourselves obliged to put right. Both the learned Magistrate and the Sessions Judge seem to have quite misunderstood the law regarding an offence under section 304, Indian Penal Code. Section 300, Indian Penal Code, lays down that "except in the cases hereinafter excepted, culpable homicide is murder, if the act, by which the death is caused, is done with the intention of causing death, or bodily injury likely to cause death, or bodily injury sufficient in the ordinary course of nature to cause death or if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death and commits such an act without any excuse for incurring the risk of causing death or such injury as aforesaid."

In the present case the learned Magistrate who committed the accused arrived at the opinion that Chandan Singh did not commit any offence less than murder. Now we do not say whether the opinion of the committing Magistrate was correct or not, but if there was any ground for it, then not only Chandan Singh but the other accused persons were, by the provisions of section 149, Indian Penal Code, guilty of the offence of murder, provided it be found that the offence of murder was committed in prosecution of the common object of the assembly, *viz.*, to commit an assault upon Chinte Singh and Gandha Singh, or if it be found that the offence was such that the members of the assembly knew it likely to be committed in the prosecution of that object.

Nor must it be forgotten that under the provisions of section 105 of the Indian Evidence Act, when a person is accused of any offence, then the burden of proving the existence of circumstances bringing the case within any special exception or proviso contained in any part of the Code, is upon the person accused, and the Court shall presume the absence of such circumstances. An illustration given is that of A accused of murder alleges that by grave and sudden provocation he was deprived of the power of self-control, the burden of proof is on A and the Court has to presume the absence of such circumstances as would bring the case under grave and sudden provocation depriving him of the power of self-control. As regards this portion of the case, the learned Judge appears to have been quite wrong, but there is a still more serious error of procedure vitiating the trial as held by the learned Sessions Judge. In the case of witness after witness and more particularly in the case of Abdul Jalil Khan we find that the learned Sessions Judge took from the mouth of Abdul Jalil Khan the statements made to that officer in the course of investigation. The Sub-Inspector has not merely been allowed to refresh his memory by referring to the diary but the learned Judge has actually used the statements which the Sub-Inspector reduced to writing as evidence against the accused. For this there is no authority whatever in law. The learned Judge has also taken into account the statements made by the accused, to the Sub-Inspector while under arrest, statements which were reduced to writing and put in the special diary. It is impossible to say that these statements did not influence the learned Judge and the assessors who assisted him in holding the trial. Indeed we ourselves have felt very great difficulty in consequence of these admissions. We might have decided the case upon the evidence, but then we should have had to call upon the accused Bishnath Singh, Ram Charan, Nanku, Sheoraj, Dulare, Mullah Singh, Ramnath and Hazari to show cause why they should not have been committed of the more grievous offence of culpable homicide amounting to murder.

We wish it to be distinctly understood again that we are not pronouncing any opinion whatever either upon the guilt or innocence of the accused persons. The change in the charge would have been necessary and it would have to be made before we had even looked into the evidence. As a re-trial in the case of the eight accused above mentioned becomes neces-

sary, it is only right to order that accused Chandan Singh be also re tried.

We, therefore, reverse the finding and the sentence in the case of all the accused and we order them to be re-tried by the Court of Session at Jhansi. The accused will be restored to the lock up as usual.

Re-trial ordered.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 1957 OF 1908.

September 23, 1910.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Krishnaswamy Aiyar.

HUKDAR SYED BACHA SAHEB—APPELLANT

versus

KARUPPANA PILLAY AND OTHERS—RESPONDENTS.

Compromise decree—Settlement for a particular period—Claim for future years on the basis of the compromise—Res judicata—*Construction of compromise decree.*

By the terms of a compromise, which was made a decree of Court, the plaintiff agreed to his being adjudged entitled to a certain share for a particular *fasli*, on the basis of an admission by the 4th defendant. In a claim by plaintiff for the share due to him for subsequent years:

Held, that plaintiff was not estopped by the rule of *res judicata* from claiming a larger amount by reason of the said compromise decree which only settled plaintiff's share for a particular period.

In re South American and Mexican Co., 1 Ch. 37; 12 R. 1; 71 L. T. 594; 43 W. R. 131; 64 L. J. Ch. 189, referred to.

Second appeal against the decree of the Temporary Subordinate Judge's Court of Madura, in Appeal Suit No. 718 of 1907, presented against the decree of the Court of the District Munsif of Dindigul, in Original Suit No. 571 of 1905.

Facts of the case are fully set forth in the following judgment of the lower appellate Court:—

Plaintiff and defendants Nos. 5 and 6 are brothers. They are the heirs of one Habibuddin Sahib. Defendants Nos. 7 and 8 are the scns of one Abdul Khadir. Defendants Nos. 1 to 3 are members of the mosque Committee, and 4th defendant is the manager. He is the appellant before the Court.

2. There are nine villages attached to the plaint mosque. The net income is divided into 5 shares, 2 of which are allotted for the expenses of the mosque and the remaining 3 shares go to the descendants of the Saint Syyed Sultan Allauddin Avulyar. These descendants are grouped into three classes so that each class would get $\frac{1}{3}$rd of 3/5ths of the net income. The class with which we are concerned in this suit is called the third class or the third Pangu.

3. The third Pangu was divided into 16 shares at the time of the *Inam* Settlement. For purposes of this suit, it may be mentioned that Syed Habibuddin Sahib *alias* Masumiah Sahib, Syed Abdulkhadir and Syed Hussain Sahib formed the third Pangu. Of these Syed Hussain is dead and his line is extinct. Plaintiff and defendants Nos. 5, 6, 7 and 8 are the representatives of the other two persons as stated at the outset.

4. Notwithstanding ground No. 3 in the Memorandum of Appeal, it is admitted before me, just as it is was admitted in the written statement, that plaintiff and defendants Nos. 5 and 6 are entitled to and were receiving $7\frac{3}{8}$ths/16 shares out of 1/5th of the total net income and that defendants Nos. 7 and 8 were similarly entitled to and were receiving $2\frac{5}{8}$th/16 shares. The whole dispute now relates to 6/16 shares in the third Pangu originally owned by Syyed Hussain whose line became extinct. It is not clear when the line became extinct.

5. By an adjustment before the lower Court, it was agreed, among plaintiff and defendants Nos. 5 and 6 on the one hand and defendants Nos. 7 and 8 on the other hand, that the former should take $11\frac{1}{2}$/16 shares and that the latter should take $4\frac{1}{2}$/16 shares. In other words they appropriate among themselves in certain proportions the share of the extinct line.

6. The first question for consideration in appeal is whether the 6/16th share of Syyed Hussain has lapsed to the Durga or enures for the benefit of the surviving members of the branch to which he belonged. The original grant was made, *firstly*, for the maintenance of the mosque, and *secondly*, for the subsistence of descendants of the Saint whose remains lie buried in the mosque. A definite share of the total net income, namely 2/5th, is allotted for the former object and the balance should be utilized for the latter purpose. The surplus income after deducting what is allotted for the maintenance of the mosque should be distributed among the surviving descendants in each branch. In the third Pangu with which we are concerned in this suit, admittedly, the only surviving

members are plaintiff and defendants Nos. 5 to 8. It is not the case for the appellant that the deceased Syyed Hussain has left any nearer heir than these persons. I agree with the lower Court in finding that the 6/16th share in the third Pangu does not lapse to the Durga but that the manager of the mosque holds the surplus income in trust for the descendants of the original Saint; in other words, that this 6/16th share is held by the manager in trust for such parties as may be found entitled to it.

7. As regards plaintiff's case to a share in the said 6/16ths share, the first objection raised is, that his claim is barred as *res judicata*. The facts which give rise to this plea are these. In O. S. No. 526 of 1900 on the file of the Madura Munsif's Court, plaintiff sued for $\frac{1}{2}$ of 1/5th share appertaining to the third Pangu. It will be remembered that the third Pangu is entitled to 1/5th of the net income. Plaintiff is one of three brothers, one of whom had gone abroad then. Plaintiff, therefore, claimed that he was entitled to a moiety of 1/5th and that the other moiety belonged to his brother who was present. Thereby, he ignored not only the claim of his absent brother but also of the defendants Nos. 7 and 8. The present 4th defendant (manager) was also the 4th defendant in that suit. He specifically raised the point that plaintiff was not entitled to $\frac{1}{2}$ of 1/5th or 1/10 of the income but that he was entitled only to $\frac{1}{3}$rd of $7\frac{3}{8}$/16 of 1/5th of the income. In other words, his defence was that plaintiff and his two brothers were not entitled to the whole of the third Pangu but were entitled only to $7\frac{3}{8}$/16th of the Pangu and that plaintiff as one of three brothers was entitled to $\frac{1}{3}$rd of it. It is an admitted fact, that Syyed Hussain's line became extinct long before the date of that suit. If plaintiff was entitled to participate in the share of Syed Hussain's branch, it was a claim which he might and ought to have made a ground of attack in the former suit. Nay, he did make it a ground of attack in that suit, for he claimed not only $7\frac{3}{8}$/16 to which his branch was entitled but the whole of the 16 shares of the third Pangu for his branch. The only ground upon which he could lay such a claim was an alleged right to succeed, either by inheritance or survivorship, to the share of the defunct branch. I have mentioned these facts in some detail to make it clear that the very point now in issue formed the subject of controversy in the former suit. In fact, the 3rd issue raised in O. S. No. 526 of 1900 was:—"Is plaintiff entitled to 1/10th of the gross income (and to 1/6th of the surplus of 2/5th of the gross income) or is he entitled only to $\frac{1}{3}$rd of $7\frac{3}{8}$th 16 of 1/5th of the net income (after deducting the items of expenditure mentioned in para 2 of 4th defendant's written statement). The portions in parenthesis relate to other matters with which we are not concerned. Plaintiff claimed a certain proportion of the gross income whereas the defence was that he was entitled to a smaller proportion of the net income. It is now settled that the net income and not gross income is to be the basis of calculation. But the main point to be noted is that whereas plaintiff claimed 1/10th for himself, the plea was that was entitled only to $\frac{1}{3}$rd of $7\frac{7}{8}$/16 of 1/5. Now to the allegations in this suit, plaintiff's two brothers are both before the Court. And so instead of claiming $\frac{1}{2}$ of 1/5 he has now sued for $\frac{1}{3}$rd of 1/5th but the defence is just what it was in the earlier suit, namely, that he is entitled only to $\frac{1}{3}$rd of $7\frac{3}{8}$/16 of 1/5. This point is included in the 3rd issue raised in the present suit. I think I have shown with sufficient clearness that both in the former as well as in the present suit plaintiff's claim included the share of the defunct branch, but the 4th defendant resisted his claim to anything more than $7\frac{3}{8}$/16 of the third Pangu, thereby excluding the share of the extinct line. This matter has formed the subject of a specific issue in both the suits.

8. Suit No. 526 of 1900 was compromised. Before the filing of *razinamah*, plaintiff presented the application X (*c*) alleging that he had agreed to accept $\frac{1}{3}$ of $7\frac{3}{8}$/16 of 1/5th share. The final *razinamah* was to the same effect. [*Vide* X (*c*) and X (*d*)].

9. I do not think the lower Court is right in remarking that the pleadings in the former suit do not show that the question was raised in the present form. The wording of the 3rd issue in both the suits is substantially the same. It is urged that there was no specific issue as to whether Sayyed Hussain's line was extinct and as to who was entitled to the share appertaining to the said line. The issue in the former suit is, no doubt, not worded in that manner but there can possibly be no doubt that it did comprise the share

of the extinct line as part of the matter raised for adjudication. It will not be inappropriate to point out that the issue in this suit is not worded in the manner suggested by the respondent and that the logical outcome of upholding this contention would be that the matter would not be set at rest even by the adjudication in this suit.

10. The lower Court is also wrong in observing that there is a reservation in the *razinamah* so as to prevent the operation of *res judicata*. The reservation, it must be noted, has no reference to the extent of the share claimable by plaintiff but relates to the amount of collections made for two *faslies*, the claim for which had matured before the date of *razinamah*.

11. I am also of opinion that the lower Court's view that the consent decree can operate as *res judicata* only so far as the claim for the *faslies* to which it relates is concerned is incorrect. What was the subject-matter of the former suit and what was the matter actually decided by the *razinamah*? The point was not the particular amount due for a particular *fasli* but the rate at which plaintiff may claim. It was a question of right, which, when decided in one suit, must operate as *res judicata* in a subsequent suit.

12. Plaintiff filed O. S. No. 566 of 1902, on the file of the Madura Munsif's Court alleging that he had been defrauded in the suit of 1900. He objected to the *razinamah* X (*d*) not on the ground that he was allotted therein a share less than what he was properly entitled to, but on the ground that the amount of collections was not properly represented to him. This suit was also compromised, but the *razinamah* does not affect the matter now under consideration.

13. It is an admitted fact that plaintiff has both before the suit of 1900 and subsequent thereto and until the institution of this suit received only $\frac{1}{3}$ of $7\frac{3}{8}/16$ of the 3rd Pangu. The decision in the suit of 1900 gives him a right to recover only at the said rate. He did not object to it but acquiesced in it even during the suit of 1902. Even later, he has granted receipts which acknowledge his share to be $\frac{1}{3}$ of $7\frac{3}{8}/16$. I am of opinion that he cannot now for the first time claim a higher rate.

14. Finally it is argued that the decree in O. S. No. 526 of 1900 was only a consent decree and that "there was not even a judicial pronouncement regarding plaintiff's contention." The question for consideration is whether a consent decree would operate as *res judicata*. A judgment by consent or by default raises an estoppel just in the same way as a judgment after the Court has exercised a judicial discretion in the matter. [*In re South American and Mexican Company* (1).] When a state of facts is accepted as the basis of a compromise whereby a suit pending decision is amicably adjusted and when the compromise is not vitiated by fraud, those who were parties to it and their privies should not afterwards be heard to say, for the purpose of reviving the controversy, that the real state of things was otherwise [*Nilakandhen Nambudirapad* v. *Padmanabha Revivarma* (2)]. It follows that a consent decree is just as binding on the parties to the proceeding as a decree after a contentious trial. [*Nichalas* v. *Asphar* (3)]. The same principle is applied in cases in which a decree is passed after the taking of an oath on a question of fact [*Venkatapathi Naidu* v. *Tirumalai Chetty* (4)]. *Roma Nath Das* v. *Mohesh Chundar Lal* (5) is a case where the doctrine of *res judicata* was held to apply where in a previous suit one of the parties made default and his counsel said that he had no instructions. It is needless to multiply analogous cases.

15. Though the present claim relates to different *faslies* from the claim in the former suit, the same issue has arisen in both suits and the decision in the one suit operates as *res judicata* in the other suit notwithstanding that the former decision was based upon a compromise. The application of the principle of *res judicata* is regulated by the ground of legal right on which the claim is based rather upon the casual circumstance that the present claim relates to a different period. [*Udaiya Tevar* v. *Katama Natchiyar* (6) and *Rama Rao* v. *Suriya Rao* (7), *Sitanath Midda* v. *Basudev Midda* (8).]

16. In the result, I find on the 7th issue, that plaintiff is concluded by the decision in

(1) 1 Ch. 37; 12 R. 1; 71 L. T. 594; 43 W. R. 131; 64 L. J. Ch. 189.
(2) 18 M. 1 ; 22 I. A. 128.
(3) 24 C. 216 at p. 237.
(4) 24 M. 447.
(5) 9 C. W. N. 679.
(6) 2 M. H. C. R. 131.
(7) 1 M. 84.
(8) 2 C. L. J. 540.

O. S. No. 526 of 1900 from claiming more than $\frac{1}{3}$ or $7\frac{3}{8}/16$ of 1/5 of the net income —unless by a reason in the change of circumstances since the said decision, plaintiff has become entitled to a large share. But there is no allegation to that effect.

17. It is admitted before me that in the light of II (*d*), the claim for *fasli* 1310 was fully discharged. For *fasli* 1311, plaintiff is entitled to recover Rs. 86-1-1, *minus* Rs. 37 or Rs. 49-1-1; for *fasli* 1312, plaintiff is entitled to recover Rs. 62-2-2. (*Vide* I *d*). Plaintiff will get a decree for Rs. 111-3-3.

18. In modification of the lower Court's decree, I direct that plaintiff do recover Rs. 111-3-3 from the Durga funds in the hands of the 4th defendant. The rest of the claim is dismissed. Proportionate costs throughout between plaintiff on the one hand and the 4th defendant on the other hand. I make no order as to the costs of other defendants.

Judgment.—The only question raised by the present appeal relates to the construction of Exhibit XIc. That is a decree in pursuance of a compromise between the parties in a previous suit (O. S. No. 526 of 1903) for recovery of the amount due to the present plaintiff, appellant, on account of his share. The question is, did the decree settle the dispute beween the parties as to the share to which the plaintiff was entitled? The decree does not in so many words purport to decide what is the proper share of the plaintiff. Does what is decided thereby involve then a decision as to the share to which the plaintiff was entitled? Paragraph 1 recites that the 4th defendant in that suit, the 1st respondent, admitted that the plaintiff was entitled to a $7\frac{3}{8}$ share with his brother.

The parties consented to a decree in favour of the plaintiff for certain *faslis* on that basis. But the acceptance by the plaintiff of the amount due to him for a particular period calculated on the basis of his share admitted by the 4th defendant, does not imply that the parties necessarily intended to settle what should be the shares of the plaintiff for future years. [*In re South American and Mexican Company* (1)]. The decree for the exact amount claimed due for the 2nd instalment and the dismissal of the counter-claim with reference to the 1st instalment, necessarily involved a decision of the question as to the truth of the grant. Further, in that case there were other circumstances set out in the judgment of Lord Herschell which clearly pointed to the parties having settled the dispute as to whether the agreement propounded was true. In the present case all that is embodied in the decree, Exhibit X (c) is consistent with the plaintiff having agreed to accept what was admitted to be due without the parties having decided the question as to future years. The respondents having failed on the question of *res judicata*, and the plaintiff being found to be entitled to $\frac{1}{3}$rd of Rs. 111-2 of the third Pangu, the decree of the Subordinate Judge will be varied by adding Rs. 68 to the amount awarded by him. Each party will bear his or their own costs.

Decree varied.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 682 OF 1909.

September 13, 1910.

Present:—Mr. Justice Munro and Mr. Justice Krishnaswami Aiyar.

VENKATACHALA ASARI—

APPELLANT

versus

SUBRAMANIA CHETTY AND OTHERS—

RESPONDENTS.

Limitation Act (*XV of* 1877), *Sch. II, art.* 11—*Civil Procedure Code* (*Act XIV of* 1882), *s.* 335—*Suit brought within one year of adverse order under s.* 335, *Civil Procedure Code—Suit by* benamidar—*Adverse possession as against mortgagor subsequent to mortgage—How far affects mortgagee's rights.*

Plaintiff, against whom an order was passed under section 335, Civil Procedure Code, 1882, sued for possession within one year from the date of the order. At the hearing it was found that he was only a *benamidar* and the 2nd plaintiff was brought on record as the real owner. It was contended for defendants that the suit was barred under article 11 of Schedule II of the Limitation Act as the 1st plaintiff, as *benamidar*, was not entitled to sue and time had run out before 2nd plaintiff was brought in as such. It was also found that after the mortgage to plaintiff, 4th defendant had held possession of property adversely to the mortgagors for over 12 years:

Held, (1) that the plaintiff, though a *benamidar*, was entitled to sue as the person against whom the order was made under section 335, Civil Procedure Code, 1882.

(2) that as the 4th defendant's adverse possession commenced subsequent to the date of the plaintiff's mortgage, it was not adverse to the plaintiff till the latter purchased the property in Court auction in 1904.

VENKATACHALA ASARI *v.* SUBRAMANIA CHETTY.

Aimadar Mandal v. *Makhan Lal Day*, 33 C. 1015; 10 C. W. N. 904, followed.

Second appeal against the decree of the District Court of Salem, in Appeal No. 287 of 1907, presented against the decree and judgment of the Court of the Principal District Munsif of Salem, in Original Suit No. 248 of 1906.

Facts of the case are sufficiently clear from the following extracts from the judgment of the first Court.

This is a suit for a declaration of plaintiffs' title to the plaint houses etc., and for recovery of possession thereof from defendants together with costs.

2. The plaint is based on the following allegations :—The properties in suit originally belonged to one Arunachala Asari, the adoptive father of 1st defendant, and to his brother, Ulagappasari. Subsequent to their death, they were owned and enjoyed by 1st defendant and Ulagappasari's widow and, after the death of the latter without issue, 1st defendant and his natural father, the 2nd defendant, were in possession of the same. They mortgaged the properties to the plaintiff for Rs. 350 on 16th October 1891 and raised the amount to meet the expenses of Ulagappa's widow's obsequies and to meet their own family necessities. A decree directing the sale of those properties was passed by this Court upon the said mortgage in Original Suit No. 292 of 1903, in execution of which the plaintiff purchased them and obtained a certificate of sale. On attempting to obtain possession, 3rd, 4th and 5th defendants at the instigation of 1st and 2nd defendants obstructed and as the result of a petition filed by plaintiff for removal of their obstruction and for possession, the Court, upon the contention of the 4th defendant, referred the petitioner to a regular suit. Fourth defendant is a mere tenant under 1st defendant and he has no manner of right to the plaint properties. He was also a party to Original Suit No. 19 of 1897 of the Salem Sub-Court instituted by one Akilandammal, the daughter-in-law of Arunchalasari, for possession of the plaint properties and was placed *ex parte* and hence the 4th defendant is estopped from contesting the plaint claim.

3. Fifth, 6th and 7th defendants are impleaded for the reason that they are tenants occupying the plaint houses.

First, 2nd and 3rd defendants pray for their exclusion from the suit on the ground that they offered no obstruction to plaintiffs' possession and that they are unnecessarily impleaded.

5. Fourth and 5th defendants totally deny the plaint allegations and lay claim to the suit properties under a gift by Ulagappasari to the 4th defendant made about 40 years ago. It is alleged that these defendants were not under any necessity to contest the claim in Original Suit No. 19 of 1897 referred to in the plaint by reason of the withdrawal by the plaintiff in that suit of her claim to the properties in question and one Kasturi Chattiar is stated to be the beneficial owner. Fourth and 5th defendants pray for dismissal of the suit with costs.

6. Sixth defendant contends that the house in question was built by him on 4th defendant's vacant site with his permission about 15 years ago, agreeing to pay a monthly rent of 8 annas to the 4th defendant therefor. He further pleads that the suit is barred by limitation and prays for dismissal of the claim with costs.

7 Seventh defendant states that he is only a tenant under Velayudasari, the 4th defendant, and that he has no other right to the properties in suit.

8. Kasturi Chetti, referred to in the written statement of 4th and 5th defendant was made 8th defendant in the suit, but subsequently on his own application he was made 2nd plaintiff.

* * * * * *

10. *Issue* No. 12.—The plea of limitation involved in this issue is of a two-fold character. One aspect of it has to be dealt with, before we can proceed to consider the remaining questions in the case. It arises in this way. The 1st plaintiff, who purchased the plaint property in Court sale in execution of the decree obtained by him against the 1st and 2nd defendants in Original Suit No. 292 of 1903 on this Court's file, proceeded to take delivery thereof and he was obstructed by the other defendants and thereupon he applied to the Court for delivery of possession free of the obstruction. The application was disallowed and he was referred to a regular suit on 8th August 1905 (*vide* Exhibit VI). He then instituted this suit under section 335, Civil Procedure Code, on 5th July 1906 or within one year from the date of the said order. The contending de-

fendants in their written statement objected to the suit on the ground that the 1st plaintiff was only a *benamidar* and that the beneficial owner was one Kasturi Chetti, who was then added as 8th defendant. Upon his application since made he was transposed as the 2nd plaintiff by order dated 12th September 1906. Now, the contention is that 2nd plaintiff ought to be deemed to have actually instituted this suit on the last-mentioned date and as it is more than a year from the date of the order on 1st plaintiff's application to remove the defendants' obstruction and give him possession, the same is barred. The former part of the contention is, no doubt, right. In considering the latter, several questions arise. First we have to see whether the 1st plaintiff was a *benamidar* at date of the order or when he filed the suit. The 2nd plaintiff states in Exhibit I, the affidavit filed by him when seeking to be made a plaintiff, that he is entitled to the property in suit in the manner alleged by the 4th and 5th defendants. In his evidence he explains that his right was derived under an agreement from the 1st plaintiff. It would show that when the property was first purchased in Court auction, it was in his own right and not on behalf of the 2nd plaintiff that the 1st plaintiff purchased it and that he agreed to admit the 2nd plaintiff to a right therein on some future date. What that date is, it is not expressly specified. But it is clear that it must have been subsequent to the date of the order referring the 1st plaintiff to a regular suit, for we find that, in opposing the 1st plaintiff's application for delivery, the 4th and 5th defendants have not raised the contention that he was only a *benamidar* and that the real title lay in another. Even now it would appear from the 2nd plaintiff's evidence that his right is inchoate, and the extent of it too has not yet been settled. There is absolutely no evidence on the other side that the 2nd plaintiff was the real beneficial owner at the Court purchase, so that the proceedings which led to the order under Exhibit VI could affect him. Supposing, however, that this was the case, it is evident that 2nd plaintiff should have the benefit of 1st plaintiff's act in instituting the suit. In his affidavit Exhibit I, he swears that he gave consent to the 1st plaintiff to institute the suit. This means he had constituted him his agent for the purpose and under the ruling in *Kuthaperumal Rajali* v. *The Secretary of State for India in Council* (1), he can maintain a suit as an agent, even if he were a *benamidar*. If no agency can be implied from this, the principle of the rule in *Shangara* v. *Krishnan* (2) is applicable. The presumption is that all acts done by a *benamidar* are done with the knowledge and consent of the real owner. He is held to be his agent and, in consequence his acts are held to bind the principal. Conversely, if the *benamidar's* acts would bind the real owner with liability, it follows that the rights arising out of them would enure to his benefit. In this view, the institution of the suit by the 1st plaintiff would enure for the benefit of the 2nd plaintiff also. This case has some affinity to the one decided in *Mahadev Ram Mesta Sutar* v. *Bahi Chimnaji Sutar* (3) with a distinction in its own favour. The 2nd plaintiff is at best an assignee from the first. An order having been passed against the assignor, he filed regular suit in time in this case which was not done in the other. Placing a liberal and equitable construction on the matter, the High Court held that the assignee was entitled to bring a suit within one year from the date of his assignment and in this case as it has been found that the assignment or the agreement to assign must have been subsequent to the date of the order, it may be presumed to have been within one year before the 2nd plaintiff's addition on the record as such.

11. Another view of the matter is that if the proceedings instituted by a *benamidar* are null and void, behind the back of the real owner, the latter is not affected by them. He can regard them as not having been initiated by him and his general rights will survive. Assuming that the 2nd plaintiff was the real owner, he can avoid all the proceedings instituted by the 1st plaintiff and bring a suit on the basis of his title under the sale certificate and ask for possession within 12 years from its date. Viewed in all its aspects, the objection under consideration has no force and I hold that the suit is not barred under article 11 of the second Schedule to the Limitation Act".

On the question of adverse possession in respect of a portion of the property by the 4th defendant, the Munsif held that his pos-

(1) 30 M. 245. (2) 15 M. 267.
(3) 26 B. 730; 4 Bom. L. R. 513.

session was adverse to that of the 1st and 2nd defendants from 1891, *i.e.*, more than 12 years prior to the institution of this suit, and hence it was adverse to the plaintiff who was a mortgagee from 1st and 2nd defendants.

The Munsif decreed plaintiffs' claim except in regard to the said portion.

The defendants appealed and the District Judge affirmed the Munsif's decree in the following judgment:—

The first question raised in this appeal is the plea of limitation discussed in paras. 10 and 11 of the Munsif's judgment. It is strongly urged for appellant that the ruling in *Kuthaperumal Rajali* v. *Secretary of State for India in Council* (1) bars the suit absolutely. In that ruling the general principle enunciated is that the question whether a *benamidar* can sue depends upon his showing that the facts of the case are such as to give him some right to sue under the general law. In the case of *Shangara* v. *Krishnan* (2), quoted in the former case, it was held that there is a presumption that a *benamidar* sues with the consent of the owner. In the present case the 2nd plaintiff (2nd respondent), who was brought on the record after the institution of the suit, has given an express statement that he gave his consent to the institution of the suit by 1st plaintiff and there is no evidence to the contrary. The suit was admittedly brought in time by the 1st plaintiff and I think that the view of the Munsif that he must be held to have instituted the suit as an agent for the 2nd plaintiff is correct and that 1st plaintiff is not a mere *benamidar*. But even if this view is not correct, and the institution of the suit by 1st plaintiff is of no effect, the 2nd plaintiff cannot be held to be bound by his action. This case appears to me to be similar to the case quoted in *Aiyyan Chetti* v. *Poongavanam* (4), in which it was held that the limitation provided for by article 11 of the Limitation Act applies to suits under section 335, Civil Procedure Code, only in so far as it is against the person in whose favour the order was made, and that consequently the fact that other persons were joined after the limitation period as parties on the representation of the person in whose favour the order was made that he was only a *benamidar* for the parties so added, does not bar the suit. It seems to me that 2nd plaintiff was not bound by the order under section 335, Civil Procedure Code, and has 12 years from the date when he was brought on record within which to bring the suit. No objection was apparently taken to the addition of 2nd plaintiff before the lower Court and the objection now taken that he is not the real owner cannot be held to be valid.

2. On the evidence, I have no hesitation in coming to the conclusion that the plea of gift by the 4th defendant is not proved, and that the oral and documentary evidence shows that the main portion of the houses in dispute was in possession of the 1st and 2nd defendants. It is objected by respondent's pleader that the Munsif was wrong in not decreeing for the whole of respondents' (plaintiffs') claim, but the evidence for the plaintiffs shows that 4th defendant has been living in part of one of the houses for more than 12 years before the suit. The evidence of 2nd defendant (7th witness for plaintiff) and Exhibit V seem to prove that his possession was adverse and that his claim was not resisted. I think, therefore, that the objection fails and that the decree is correct. The appeal is dismissed with costs.

Mr. *V. Venkata Chariar*, for the Appellant.

Mr. *T. Subramania Aiyar*, for the Respondent.

Judgment.—The 1st plaintiff against whom the order under section 335, Civil Procedure Code, was passed, was entitled to sue and this suit was in time under article 11 of Schedule II of the Limitation Act of 1877. The appeal is dismissed with costs.

The memorandum of objections raised the question whether the lower Court was right in holding that the suit was barred by limitation as regards the northern portion of house No. 6. The plaintiff was mortgagee under the 1st and 2nd defendants. Subsequent to the mortgage, the 4th defendant was in possession adversely to the 1st and 2nd defendants. That possession was not, however, adverse to the plaintiff until in 1904 he bought the property in execution of a decree [*Aimadar Mandal* v. *Makhan Lal Day* (5)].

We, therefore, allow the memorandum of objections with costs throughout.

Appeal dismissed.

Memorandum of objections allowed.

(4) 18 M. L. J. 464.

(5) 33 C. 1015; 10 C. W. W. N. 904.

In re DADDAPANENI RARAYANAPPA.

MADRAS HIGH COURT.
SECOND CIVIL APPEAL No. 956 OF 1910.
October 6, 1910.
Present:—Mr. Justice Krishnaswami Aiyar.
In re DADDAPANENI NARAYANAPPA—APPELLANT.

Evidence Act (I of 1872), s. 32 (3)—Recital as to ownership—Recital in a document relating not to suit land but to neighbouring land.

Where the question was as to who was the owner of a certain land:

Held, that a recital in a document dealing with a neighbouring land that the land in question belonged to the plaintiff was not legal evidence. Nor was it admissible under section 32 (2) of the Evidence Act.

Niganda v. *Bharmappa*, 23 B. 63, not approved.

Second appeal against the decree of the Court of Temporary Subordinate Judge's Court of Guntur, in Appeal Suit No 374 of 1907, presented against the decree of the Court of the District Munsif of Bapatala, in Original Suit No. 247 of 1907.

Judgment.—I do not think that I shall be justified in admitting this second appeal. The only ground urged before me is that the Subordinate Judge was wrong in treating Exhibit A as irrelevant.

Exhibit A is a document relating to a neighbouring property. The neighbouring owner gave the suit property as one of the boundaries of his land. It seems to me that such a statement made by a third person in respect of the suit property as the property of the plaintiff is not legal evidence.

Reference was made to the decision in *Niganda* v. *Bharmappa* (1).

That case appears to support the appellant. Section 32 clause (3) of the Indian Evidence Act, 1 of 1872, is relied on as justifying the admission of this evidence. But I fail to see how it is a statement against the interest of a person to say that his property is bounded on the north, south, east, or west by a certain other man's property. But if the Subordinate Judge's judgment had rested practically on the rejection of this evidence, I should have felt, out of deference to the learned Judges of the Bombay High Court, inclined to admit the appeal so that the appellant might have an opportunity of a pronouncement by a bench of two Judges. But as I read the Subordinate Judge's judgment, he rests his conclusion upon a large body of other evidence which the appellant cannot attack

(1) 23 B. 63.

in second appeal. The decision of the Subordinate Judge, therefore, being supported by ample materials on record, even though I were wrong in my opinion as regards the admissibility of Exhibit H, I am justified in dismissing this second appeal.

I, therefore, order accordingly.

Appeal dismissed.

MADRAS HIGH COURT.
SECOND CIVIL APPEAL No. 844 OF 1909
September 19, 1910.
Present:—Mr. Justice Abdur Rahim and Mr. Justice Krishnaswami Aiyar.
PERIA PERUMAL MUTHIRIAN AND OTHERS—APPELLANTS
versus
PICHAN *alias* KARUPAN MUTHIRIAN AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act XIV of 1882), s. 368—Ejectment suit against several trespassers—Death of one of the defendants—Abatement of suit—Withdrawal of suit with consent of surviving defendants—Subsequent suit against representatives of deceased defendant—Whether barred.

In an action for ejectment against several trespassers, the death of one of the defendants, whose legal representatives were not brought on record within the time allowed by law, does not cause the suit to abate against the surviving defendants. The right to sue survives against them so far as their interests are concerned.

Joy Gobind Saha v. *Monmotho Nath Banerji*, 33 C. 580 and *Upendra Kumar Chakravarti* v. *Sham Lal Mandal*, 34 C. 1020, 11 C. W. N. 1100; 6 C. L. J. 715, followed.

Raj Chunder Sen v. *Ganga Das Seal*, *Ramgate Dhur* v. *Raj Chunder Sen*, 31 C. 487; 8 C. W. N. 442; 31 I. A. 71, distinguished.

Where, after the death of one of the defendants, the suit was withdrawn with the consent of the remaining defendants and the Court granted leave to plaintiff to bring a fresh suit: *Held*, that the leave was not *nonest* by reason of the 2nd defendant's representatives not having consented to the withdrawal but was operative till set aside on review or revision.

Second appeal against the decree of the District Court of Trichinopoly, in Appeal Suit No. 187 of 1908, presented against the decree of the Court of the District Munsif of Srirangam, in O. S. No. 421 of 1904.

Judgment.—The second defendant in the first suit having died and his legal representatives not having been brought on the record within the time allowed by law, the first question is whether the suit which was due in ejectment abated only as against him or against the other defendants as well.

The language of section 368 of the Code of Civil Procedure of 1882, is no doubt general but that section has been the subject of many decisions and we think the view taken of it in *Joy Gobind Saha* v. *Monmotho Nath Banerjee* (1) and *Upendara Kumar Chakaravarti* v. *Sham Lal Mandal* (2), is correct. No doubt in a case like the one in *Raj Chunder Sen* v. *Ganga Das Seal*, *Ramgate Dhur* v. *Raj Chunder Sen* (3), where the suit was for taking accounts and the winding up the affairs of a partnership, the right of action could not be said to survive against the remaining defendants partners alone, since the relief, in a suit of that nature, can only be granted when all the partners and their legal representatives are before the Court. A suit to recover possession of land from a number of trespassers stands, however, on a different footing. The plaintiff could proceed against one or more of them as he chose. We are, therefore, of opinion that the right to sue survived against the surviving defendants so far as their interests are concerned.

Now so far as the present suit as against the representatives of the 2nd defendant is concerned, the position is this. The first suit in which the 2nd defendant's representatives were not brought on record was allowed to be withdrawn with leave to institute a fresh suit. The order purports to be made with the consent of the defendants, but as a fact, the 2nd defendant on the date of the order was dead and his legal representatives had not been brought on the record and there could, therefore, be no consent on the part of his legal representatives. But that order granting leave to institute a fresh suit was not called in question by review or by revision. The question then is, was the order of no effect in law or was it one which would be operative unless set aside.

This matter is not free from some difficulty but on the whole we are inclined to the view, that the respondents ought to have got the order set aside, and, not having done so, no objection can be taken now to the suit on the ground that the order granting leave was made on a misconception of facts or that the leave was inoperative. The Court has jurisdiction to grant leave to institute a fresh suit whether the defendant consented to it or not, and apparently the Court thought that it was a proper case in which leave ought to be granted.

Under these circumstances, we do not think that the leave can be treated as *nonest*.

The appeal is allowed and we reverse the decrees of both the Courts and remand the suit to the Court of first instance for disposal according to law. Costs will abide the result.

Appeal allowed.

(1) 33 C. 580.
(2) 34 C. 1020; 11 C. W. N. 1100; 6 C. L. J. 715.
(3) 31 C. 487; 8 C. W. N. 442; 31 I. A. 71.

MADRAS HIGH COURT.
CIVIL APPEAL No. 165 OF 1907.
October 7, 1910.
Present:—Mr. Justice Abdur Rahim and Mr. Justice Krishnaswami Aiyar.
MUTHU NAICKEN—APPELLANT
versus
SRINIVASA AIYANGAR AND OTHERS—RESPONDENTS.

Hindu Law—Alienation by widow not binding on reversioners—Validity of alienation during widowhood—Re-marriage of widow, effect of, on alienee's rights—Hindu Widow's Re-marriage Act (XV of 1856), s. 2.

An alienation by a Hindu widow, which is not for purposes binding on the reversion, is only good during widowhood and to the extent of her limited interest as widow. The alienation ceases to be binding on the reversioner on her re-marriage, the widow's life-interest also lapsing on that event.

Sreeramulu v. *Krishnamma*, 23 M. 143 at p. 155 12 M. L. J. 197, *Nityu Mallo Das* v. *Srinath Chandra Chuckerbutty*, 8 C. L. J. 542 and *Ramakrishna* v. *Tripura Bhai Kuppuswami*, 33 B. 88; 10 Bom. L. R. 1029; 1 Ind. Cas. 647, referred to.

Appeal against the decree of the District Court of Coimbatore, dated 5th day of March 1907, in O. S. No. 27 of 1904.

Judgment.—The plaintiff sues as the assignee of a mortgage executed by the two widows, Bommakal and Chinnammal. Bommakkal was the widow of one of two brothers who died first, and Chinnammal and Thimmakkal, now deceased, were the widows of the other brother Palani who died in 1898. There were quarrels and criminal proceedings between these widows and the mortgage sued on was executed in favour of the plaintiff's 10th witness, the husband of Palani's sister. The 4th defendant, who alleges he is in possession of part of the mortgaged property by right of purchase from the widows, contests the validity of the mortgage. Bommakkal, who had no interest in the mortgaged pro-

perties, acquired an one-third share in them by virtue of the compromise Exhibit V entered into by the three widows. Thimmakal, who is dead, was no party to the mortgage. There are twelve items of consideration recited in the mortgage deed. Items Nos. 2 and 3 are given up, while Items Nos. 1 and 4 are admitted. As regards items Nos. 5, 6, 9, 10 and 11 of the consideration, we see no reason to dissent from the District Judge's conclusion, that they were debts by the husband Palani or borrowed for his funeral expenses. Chinnamal, who is practically the only witness for the defendants on this matter, contradicts the recital in Exhibit A to which she was a party and her evidence cannot be accepted. The plaintiff has examined several witnesses to prove the payments made in accordance with Exhibit A and their evidence is supported by the receipts J. S. and M. We accept this evidence and uphold the District Judge's finding.

As regards items Nos. 7, 8 and 12, the District Judge has given a decree against Chinnammal's life-interest in the suit properties. Mr. T. R. Ramachandra Aiyar has strenuously argued before us that these items of consideration are also binding on the reversion. The evidence with regard to them is of the plaintiff's 2nd, 6th and 10th witnesses. None of them knows for what purpose the last item 12 was borrowed. The evidence of the 6th witness has no necessary connection with any of the suit items The evidence of the 2nd witness is vague and general. The 10th witness's evidence is not sufficiently specific. We cannot regard the purpose for which these items were borrowed as established. In this view, items Nos. 7, 8 and 12 can only bind the widow's estate of Chinnammal. But that came to an end, when she re married (see section 2 of Act XV of 1856). The alienation was not good, as the District Judge has erroneously supposed during Chinnammal's life-time but only during widowhood. See *Sreeramalu* v. *Kristnamma* (1) and *Nitya Madho Das* v. *Srinath Chundra Chuckerbutty* (2). It is unnecessary for us in this case to consider the question on which the decisions in *Sreeramalu* v. *Kristnamma* (1) and *Ramakrishna* v. *Tripura Bai* (3) differ. The former of these cases distinctly recognizes the rule that a widow's alienation which is not for purposes binding on the reversion is only good during widowhood. It follows that as Chinammal has re-married, her widows' interest has ceased to exist, and no decree can be passed against the property as regards items Nos. 7, 8, 12 of the consideration.

It remains still to deal with the claim of the respondent to proceed against Survey No. 352. We cannot accept the evidence as to Palani's oral instructions. Admittedly the widows themselves have no power to make a gift of *stridhanam* to the husband's-sister. The item in question was clearly the property of the widows of Palani on his death. The plaintiff's mortgage is anterior to the gift Exhibit I. It is, therefore, good against Survey No 352. His acceptance of Exhibits II and III subsequently treating Exhibit I as a gift of *stridhanam* cannot affect his right to proceed against No. 352 under the prior mortgage.

The decree of the Court below will be modified by striking out the portion relating to items Nos. 7, 8 and 12, of the consideration as against the mortgaged property and by including Survey No. 352 among the properties that may be proceeded against. As between the plaintiff and the 4th defendant each will bear his costs throughout.

Decree modified.

(1) 26 M. 143 at p. 155; 12 M. L. J. 197.
(2) 8 C. L. J. 542.
(3) 33 B. 88; 10 Bom. L. R. 1029; 1 Ind. Cas. 647.

ALLAHABAD HIGH COURT.
CIVIL REVISION No. 73 of 1910.
August 29, 1910.
Present:—Mr. Justice Karamat Husain.
Srimati NAND RANI—DEFENDANT—APPELLANT
versus
SWASHWANESWAR MUKERJI—PLAINTIFF—RESPONDENT.

Provincial Small Cause Courts Act (*IX of* 1887), *Sch. II, cl.* 31—*Profits of immovable property, suit for, not cognizable by Small Cause Court—Jurisdiction.*

A suit for a definite sum of profits of immovable property is not cognizable by a Court of Small Causes although it involves no rendition of accounts.

Rameshwar Singh v. *Durga Das*, 23 A. 437, *Rup Singh* v. *Lachmi Kuar*, 26 A. 321, followed.

Kunj Bihari Singh v. *Madho Chander*, 23 C. 88, *Musammat Kishen Kuar* v. *Tulsa Singh*, 35 P. R. 1902; 84 P. L. R. 1902, *Subba Rao* v. *Sita Ram*, 24 M. 118, *Savarimuthu* v. *Aithurusu Rothar*, 25 M. 103, *Srinivasa Raghava* v. *Pichai Karan*, 29 M. 184, *Innasi Muthu Pillai* v. *Sarathia Pillai*, 13 M. L. J. 136, *Antone* v. *Mahadeva*,

25 B. 87, *Kesri Singh Beni Singh* v. *Narain Singh Mohabhai*, 10 Bom. L. R. 733, referred to.

Revision against the order of the Small Cause Court Judge of Allahabad, dated the 30th of April, 1910.

Mr. *Haribans Sahai*, for the Appellant.

Mr. *J. N. Choudhri*, Hon'ble Mr. *Moti Lal Nehru*, Dr. *Satish Chandra Banerji* and Mr. *Harendra Krishna Mukerji*, for the Respondent.

Judgment.—The facts of the case are as follows. The plaintiff brought a suit in the Court of Small Causes, Allahabad, against Munshi Newal Kishore claiming a definite sum of Rs. 14-14 as arrears of rent of a house alleged to belong to the plaintiff. *Musammat* Nand Rani was also made a defendant on the ground that Munshi Newal Kishore declined to pay rent to the plaintiff and contended that he had taken the house on rent from her on a certain arrangement as to its payment to her. One of the reliefs sought by the plaintiff was a decree against Nand Rani for rent that might have been paid to her. Nand Rani regarding the ownership of the house made a confused statement in the Court of Small Causes. She, however, did claim to be the owner of it. The Court below granted the plaintiff a decree against Nand Rani for the sum claimed with interest and costs and exempted Newal Kishore because he had paid the rent to Nand Rani.

Nand Rani applies in revision to this Court and the point taken is that the decree of the Court below was without jurisdiction because the claim being for the profits of immovable property belonging to the plaintiff, which had been wrongfully recovered by the defendant, was within the provisions of clause 31 of Schedule II of Act IX of 1887 and was not within the cognizance of a Court of Small Causes. In support of this contention, the case of *Rameshwar Singh* v. *Durga Das* (1) is cited.

The answer of the learned Advocate for the plaintiff is that clause 31 of Schedule II of Act IX of 1887 in terms ousts the jurisdiction of a Court of Small Causes in those suits for profits of land only in which the taking of accounts is essential, that the opening words of the clause "any other suits for accounts" apply to two classes of cases which follow and that suits for definite sums of profits of immovable property are not excluded from the cognizance of a Court of Small Causes. He says that suits for profits of immovable property in which the taking of an account is necessary are not excluded because intricate questions of title may have to be tried, but because a Court of Small Causes has no machinery for taking accounts. In support of the proposition that a suit for profits of immovable property which involves no accounts is not excluded by clause 31 from the cognizance of a Court of Small Causes, he relies on the view taken by the majority of the Judges in the case of *Kunj Behari Singh* v. *Madho Chander* (2) and on the case of *Musammat Kishen Kuar* v. *Tulsa Singh* (3).

In the course of arguments, the following cases were also referred to:—*Subba Rao* v. *Sita Ram Iyyar* (4); *Savarimuthu* v. *Aithurusu Rothar* (5); *Srinivasia Raghava* v. *Pichai Karan* (6); *Innasi Muthu Pillai* v. *Savathia Pillai* (7); *Autone* v. *Mahadeva* (8); *Kesri Singh Beni Singh* v. *Narain Singh Mohabhai* (9).

The learned Advocate for the plaintiff distinguishes the case in *Rameshwar Singh* v. *Durga Dass* (1) on the ground that there is nothing in that ruling to show that the claim in that case did not necessitate the taking of accounts and that, therefore, the case is no authority for the proposition that a suit for a definite sum of profits of immovable property is not cognisable by a Court of Small Causes.

The plaint, however, in that case, as appears from the paper-book (Miscellaneous No. 75 of 1901), shows that a definite sum of Rs. 15 being the rent of a piece of land was claimed, and yet a Bench of this Court held that the suit was within the provisions of the latter part of clause 31 of Schedule II of Act IX of 1887, and was not within the cognizance of a Court of Small Causes. In *Bhup Singh* v. *Lachman Kunwar* (10), also a decree for Rs. 120 on account of crops of Katik *Sambat* 1957 and Baisakh 1958 was asked for and it was urged that the suit was nothing more than a suit for money had and received by the defendant for the use of the plaintiff and, therefore, it was within the cognizance of a

(1) 23 A. 437.
(2) 23 C. 85.
(3) 35 P. R. 1902; 84 P. L. R. 1902.
(4) 24 M. 118.
(5) 25 M. 103.
(6) 29 M. 184.
(7) 13 M. L. J. 136.
(8) 25 B. 87.
(9) 10 Bom. L. R. 733 at p. 735.
(10) 26 A. 321.

Court of Small Causes. This Court repelled the contention and observed "we do not think that this contention is correct." The suit was not one for money had and received, but was rather one to recover from the defendants rents of property which had under a special agreement been appropriated for the purpose of providing an annuity to the plaintiff. It was in a sense "a suit relating to maintenance" as also "a suit for the profits of immovable property belonging to plaintiff which had been wrongfully received by the defendant" and so comes within the exceptions contained in the second Schedule of Act IX of 1887, clauses 31 and 33. The learned Judge of this Court was, therefore, right in overruling the preliminary objection. The above two cases of this Court are authority for the proposition that a suit for a definite sum of profits of immovable property is not cognizable by a Court of Small Causes although this point is not expressly laid down. These cases, irrespective of my own views, are binding on me.

I, therefore, hold that the Court below had no jurisdiction to entertain the suit. The result is that I set aside the decree of the Court below and direct that the plaint be returned for presentation to the proper Court. The applicant will be entitled to her costs in this Court.

Revision allowed.

(s. c. 13 O. C. 260.)

OUDH JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL No. 32 OF 1910.

July 12, 1910.

Present:—Mr. Evans, O. J. C. and Mr. Lindsay, A. J. C.

MAHABIR PRASAD—DEFENDANT—APPELLANT

versus

RAM JIWAN LAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Oudh Laws Act (XVIII of 1876), s. 9—Pre-emption—Sale in favour of one of several persons equally entitled to pre-empt—Pre-emption of part of the property sold.

The last clause of section 9 of the Oudh Laws Act is applicable not only where there are persons equally entitled to buy a property and the property has been sold to a stranger or to a person whose right to acquire it is inferior to that of the persons who are equally entitled to pre-empt but is applicable also to cases where two or more persons are equally entitled to buy the property and one or more of them has or have acquired it.

A person seeking pre-emption must sue to pre-empt all the property included in the conveyance of which he claims the benefit in respect of which his right of pre-emption exists, whether such right is a superior one giving him a preferential right of purchase or only an equal right to be exercised by the drawing of lots.

Where several properties were conveyed under the same sale-deed and the plaintiff brought a suit for pre-emption in respect only some of the properties in which he had a preferential right of purchase but did not claim pre-emption of the properties in which he had an equal right of purchase with the vendee: *Held*, that the suit must be dismissed.

Wali-ul-Haqq v. *Mohammed Ghani-ul-Haqq*, 3 O. C. 330, followed.

Durga Prasad v. *Munshi*, 6 A. 423, referred to.

Appeal against the order of the District Judge, Gonda, dated 21st March, 1910, reversing the order of the Munsif of Turabganj, dated 25th August, 1909.

Babu *Basudev Lal*, for the Appellant.

Babu *Lachhman Das*, for the Respondents.

Judgment.

Lindsay, A. J. C.—The facts of the case out of which this appeal has arisen are as follows:—

By a sale-deed executed on the 28th February, 1908, one Durga Dube transferred to Mahabir Prasad for a sum of Rs. 595 eight separate *Zamindari* shares, namely,

(1) M. Kairidih, Mohal Jawahir Singh, 8 pies.

(2) M. Karnipur, Mohal Majahra, 8 pies.

(3) M. Karnipur, Mohal Angad Singh, 8 pies.

(4) M. Karnipur, Mohal Bhaggu Singh, 8 pies.

(5) M. Karnipur, Mohal Har Ratan Singh, 8 pies.

(6) M. Karnipur, Mohal Sital Singh, 8 pies.

(7) M. Charauna, Mohal Court of Wards, 8 pies.

(8) M. Debipur, Mohal Hira Dube, 2 annas 8 pies.

The plaintiffs brought a suit to pre-empt shares (1) and (2) in this list alleging that the purchaser was a stranger so far as these shares were concerned. They also alleged (*vide* para. 3 of the plaint) that they had no right of pre-emption in respect of the other shares conveyed to Mahabir Prasad.

Mahabir Prasad contested the suit on the ground that the plaintiffs could not enforce their right of pre-emption in respect only of a portion of the property sold. He asserted

that the plaintiffs had a right of pre-emption in respect of all the eight shares conveyed to him and he offered to let them have the entire property on payment of the price mentioned in the sale-deed.

The Munsif dismissed the suit. From the admission made before him by the pleaders for the parties it appeared that the plaintiffs and the defendant-vendee had equal pre-emptive rights in certain of the shares other than those in suit, and he held that as the plaintiffs had omitted to seek pre-emption of all the property comprised in the sale deed in respect of which they had a pre-emptive right their suit could not be maintained.

According to the judgment of the lower appellate Court the shares in which the plaintiff and the defendant-purchaser have equal pre-emptive rights are Nos. (6) and (8) in the list.

In appeal the District Judge reversed the decree of the first Court and remanded the suit for disposal on the merits. The learned Judge was of opinion that the omission of the plaintiffs to sue for pre-emption in respect of the shares in which their rights were not superior but only equal to that of the purchaser was not fatal to their claim to pre-empt the shares in respect of which their right was superior to that of Mahabir Prasad.

In the course of his judgment the learned District Judge says :—

"It has undoubtedly been held in cases in which the plaintiff and the vendee were found to be equally entitled to pre-empt the property that the question as to who is entitled to the property should be decided by drawing lots."

"It does not, however, seem to me that the law contemplates the possibility of a plaintiff coming into Court and filing a plaint saying what practically amounts to this.—'A the vendee has the same right of pre emption which I have. I have paid the Court fee on this suit so that the question whether A is to keep the property or I may have it may be decided by the arbitrament of chance.' To encourage litigation of this type would be to encourage gambling pure and simple. I take the intention of section 9 of the Oudh Laws Act to be to utilize the operation of chance when two or more persons equally entitled to pre-empt are desirous of exercising the right of pre-emption against a stranger as a means of determining which of those persons can exercise the right."

The view of the law here taken by the learned District Judge is opposed to that which is expressed in the judgment of a Bench of this Court in the case of *Wali-ul-Haqq* v. *Mohammad Ghani-ul-Haqq* (1). In that case it is clearly laid down that the last clause of section 9 of the Oudh Laws Act is applicable not only where there are persons equally entitled to buy a property and this property has been sold to a stranger, or to a person whose right to acquire it is inferior to that of the persons who are equally entitled to pre-empt, but is applicable also to the case where two or more persons are equally entitled to buy the property and one or more of them has or have acquired it.

The learned Judge is, therefore, in error in thinking that the case provided for by the last clause of section 9 arises only where there has been a sale to an outsider. If this view of the law were adopted the result would be that the right of one of two persons whose claims to pre-empt were equally strong could be defeated by the other taking a conveyance of the property behind the back of the first. The law undoubtedly does contemplate that in a case of this kind where there has been a transfer to one of two persons equally entitled to pre-empt the other shall be entitled to come to the Court and to demand that the question of his right to acquire the property shall be decided by the drawing of lots.

It is settled law that a person seeking pre-emption must sue to pre-empt all the property included in the conveyance of which he claims the benefit in respect of which his right of pre-emption exists. As explained by Mahmood, J., in *Durga Prasad* v. *Munsi* (2) "the reason of this rule is that the very nature of the pre-emptive right means that the pre-emptor can substitute himself in the place of the purchaser only by taking all the benefits as well as all the disadvantages of the sale in respect of which he chooses to pre-empt—an illustration of the maxim of law that he who takes the benefit ought also to bear the burden."

In the case now before us it is admitted

(1) 3 O. C. 330.
(2) 6 A.

S. N. DAR, B. A. LL. B.,
Vakil High Court.

that the plaintiffs have a right of pre-emption in respect of two of the shares sold to the first defendant. This defendant, it is true, has an equal right of pre-emption as regards the same two shares, a fact which involves the consequence that the plaintiffs' right can only be exercised in a particular way, namely, by the drawing of lots. But the plaintiffs' right exists notwithstanding, and this being so they were bound to assert it in its entirety and as they failed to do so their suit was liable to be dismissed.

In my opinion, the judgment of the Court of first instance is correct and the order passed by the lower appellate Court is wrong and should be set aside.

I would allow the appeal, set aside the order of the District Judge and restore the decree of the Munsif.

Evans, O. J. C.—I concur.

BY THE COURT.—The order of the Court is that the appeal is allowed, the order of the District Judge is set aside and the decree of the Munsif is restored. The defendant-appellant will get his costs in this, and in the lower appellate Court.

Appeal allowed.

[(s. c. 6 N. L. R. 114.)

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 120 OF 1910.

April 29, 1910.

Present:—Mr. Stanyon, A. J. C.

NARAYAN—APPLICANT

versus

EMPEROR.

Berar Municipal Law of 1886 *ss.* 146, 151—*Municipal member interested in contract with the Municipal Committee—Offence under s.* 168 *of the Indian Penal Code.*

A member of a Municipal Committee in Berar, who becomes directly or indirectly interested in a contract with the Committee, in violation of section 146 of the Berar Municipal Law, commits an offence not punishable under the Municipal Law, but punishable under section 168 of the Indian Penal Code, and section 151 of the Municipal Law has no application to his case.

Section 151 applies only to what are generally known as Municipal offences, that is to say, offences against the powers, rules and bye-laws of a Municipal Committee, in respect of which the Committee is given a discretion to complain or not to complain, and the Criminal Courts are restrained from taking cognizance unless and until the Committee has complained.

Petition for revision against the order of the Sub-Divisional Magistrate, Amraoti, dated the 4th April 1910.

Mr. *M. R. Dixit*, for the Applicant.

Judgment.—The applicant, Narayan Krishna Godbole, is a Berar pleader; who also carries on a money-lending business. In March 1903, he was elected to be a member of the Amraoti Town Municipal Committee, and on the 2nd June 1903 was made Vice-Chairman of that Committee. By an order made under section 197 of the Code of Criminal Procedure, 1898—the date of which order is not apparent on the record—the Local Government sanctioned the prosecution of the applicant under section 168 of the Indian Penal Code, on the accusation that he had, as a Municipal member, become directly or indirectly interested in contracts made with the said Committee, in violation of the prohibition contained in section 146 (1) of the Berar Municipal Law. That sub-section is in these terms:—

> "If any member, officer or servant of a committee is, otherwise than with the permission in writing of the Commissioner, directly or indirectly interested in any contract made with the committee, he shall be deemed to have committed an offence under section 168 of the Indian Penal Code."

In pursuance of the above sanction a complaint was filed, on the 23rd February 1910, by the Amraoti City Inspector of Police, in the Court of Mr. Sorabji Shapurji, a Magistrate of the first class, wherein the allegations of the prosecution were set out, and the trial and punishment of the applicant under section 168 of the Indian Penal Code were claimed. On the 4th April 1910, the applicant filed before the Magistrate a written objection to the further progress of the trial, upon the grounds, (*a*) that there was no legal and proper sanction for the prosecution from the Local Government, and (*b*) that no such complaint, as required by section 151 of the Berar Municipal Law, had been made. On these grounds the Magistrate's jurisdiction was questioned. The Magistrate summarily dismissed this objection, stating that a complaint under section 151 aforesaid was not necessary, and that the sanction of the Local Government was in proper form. Orders of

this kind, unsupported by any reasons, satisfy no body except those who favour an autocratic and arbitrary procedure; and no judicial decision which does not display careful consideration of a doubtful point can ever command public confidence. It is not surprising that the applicant has moved this Court to give his objections that consideration which the Magistrate's order seems to have refused. No word was, however, said before me to sustain the objection that the sanction given by the Local Government, regarded as a sanction under section 197 of the Code of Criminal Procedure, 1898, is in any way defective. It is also manifest that such sanction is quite correct in form. Indeed, the application for revision now before me does not repeat the first of the objections made before the Magistrate. The whole case in revision rests upon an interpretation of sections 146 and 151 of the Berar Municipal Law. Section 146 (1) has already been quoted. Section 151 is in these terms:—

> "A Court shall not take cognizance of an offence punishable under this law, or the rules made under this law, except on the complaint of the committee or of some person authorized by the committee in this behalf."

Shortly put, the argument for the applicant is that the offence, allegedly committed by applicant, is an offence against Municipal Law, and not against the Indian Penal Code; in other words, that the offence is one punishable under section 143 of the Berar Municipal Law, and that section 168 of the Indian Penal Code is only used as a convenient method of stating the amount and form of punishment. It is then contended that no Court can take cognizance of an offence under section 146 aforesaid, except by way of section 151 of the Berar Municipal Law.

I have carefully considered all that has been said in support of the applicant's case, and upon the same point in another case, Criminal Revision No. 114 of 1910, which was also argued before me to-day. I am of opinion that the contention, that section 151 of the Berar Municipal Law stands in the way of this trial, though plausible, is unsound, and I hold that, if the facts alleged are true, applicant has committed an offence under section 168 of the Indian Penal Code. I am very clear that section 151 aforesaid applies only to what are generally known an Municipal offences; that is to say, offences against the powers, rules, and bye-laws of a Municipal Committee; in respect of which the Committee is given a discretion to complain or not to complain, and the Criminal Courts are restrained from taking cognizance unless and until the Committee has complained. This interpretation finds clear support from the language of section 152 of the same Law. Section 168 of the Indian Penal Code provides as follows:—

> "Whoever, being a public servant, and being legally bound, as such public servant, not to engage in trade, engages in trade, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both."

The Indian Penal Code contains—probably with deliberate object—no definition of the very general word 'trade', and no explanation of the equally wide term "engages in trade". Therefore, section 168 thereof has been made the radix for a number of special enactments going to control the conduct of public servants in the matter of varied descriptions of traffic and money dealings. Section 146 of the Berar Municipal Law is only one of a host of such enactments, and follows them in bringing a particular form of dealing, forbidden by it, within the definition of the word 'trade' as used in section 168 of the Indian Penal Code. It is merely a referring section—a sort of conduit pipe that leads to the main section which sets out the elements of, and provides the punishment for, a particular offence. Section 168 requires three elements only to constitute the offence with which it deals, namely,

(i) that the offender is a public servant;
(ii) that, as such, he is legally bound not to engage in trade; and
(iii) that he has engaged in trade so forbidden.

It will be seen that the section is in a way incomplete without the assistance of some other enactment or rule of law which imposes the legal prohibition required as the second of the above elements: and the enactment containing the prohibition naturally and necessarily defines the area which is covered by it, both as to the class of

public servants to whom it applies, and the nature of the dealings in which those servants are prevented from engaging. In the majority of cases, the Municipal Law, so to speak, hands over to the Indian Penal Code an offender who engages in any commercial dealing prohibited by it. But there are cases where the penalty for such an offence is provided by the special Act itself, *e. g.*, Madras Municipal Act, I of 1884, section 29; the Bengal Municipal Act, III of 1884, section 57; and the Burma Municipal Act, III of 1898, section 40. There are also cases where no penalty attaches, as in City of Bombay Municipal Act, III of 1888, sections 60 and 57. Where, however, such words are used as we find in section 146 of the Berar Municipal Law, 1886, it seems clear that the intention of the law is that the offender should be punished under section 168 of the Indian Penal Code. Therefore, the offence charged against the applicant is not one punishable under the Municipal Law, but one punishable under that Code, and section 151 of such law has no application. This application for revision is accordingly dismissed. The record will at once be returned.

Petition dismissed.

(s. c. 6 N. L. R. 117.)

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 621 OF 1909.

March 4, 1910.

Present:—Mr. Stanyon, A. J. C.

RAM CHANDRA—DEFENDANT—APPELLANT

versus

CHINDHOO—PLAINTIFF—RESPONDENT.

Central Provinces Land Revenue Act (XVIII of 1881), s. 79—Zamindari Wajib-ul-arz—Village Wajib-ul-arz—Omissions, effect of—Cultivation begar—Village cess—Suit to enforce—Small Cause Suit.

The Local Government of the Central Provinces, in carrying out a re-settlement of the Kamtha *Zamindari* of the Bhandara District in or about the year 1898, caused to be prepared a *Wajib-ul-arz* for the whole estate, called the *Zamindari Wajib-ul-arz*. A village *Wajib-ul-arz* was also prepared for the village of Kudwa in the said *Zamindari*. The *Zamindari Wajib-ul-arz* recognized the existence of *begar*. There was no mention of it, however, in the village *Wajib-ul-arz*:

Held, (1) that the *Zamindari Wajib-ul-arz* was a clear record made under the provisions of section 79 of the Central Provinces Land Revenue Act, and the entries therein concerning *begar* comprised a determination and record by the Settlement Officer of certain cesses leviable throughout the *Zamindari*. The village *Wajib-ul-arz* was merely supplementary to the *Zamindari Wajib-ul-arz*, and not a substitution therefor. The former may have repeated matters in the latter, but its omission to do so in any case would not affect the application of the latter in any degree.

Every cess which is paid, delivered or rendered, in money, kind, or service, by a tenant on account of the use or occupation of land let to him, is a part of the rent which the Central Provinces Tenancy Act specifically charges on his holding. Such a cess is the cultivation *begar* rendered by a tenant as such. Hence the suits, in which that kind of *begar* forms part of the claim, are not of a nature cognizable by the Court of Small Causes.

Second Appeal from the appellate decree of the District Judge, Bhandara, dated the 19th July 1909, modifying the decree of the Munsif, Tirora, dated the 16th January 1909.

Mr. *G. P. Dick*, for the Appellant.

Rao Bahadur *V. R. Pandit*, for the Respondent.

Judgment.—It is necessary to set out the facts of this case in detail. The plaintiff is the inferior proprietor of the village of Kudwa in the Kamtha *zemindari* of the Bhandara District. On the 22nd and 24th August 1908, the plaintiff filed 19 suits in the Court of the Munsif of Tirora against different tenants of Kudwa, claiming that he was entitled to claim gratuitous assistance from each tenant in his village in the cultivation of his land for each crop, and in the annual thatching of his house, and was further entitled to receive from each such tenants two cart-loads of fuel every year. The assistance in cultivating was stated to be the use of one plough and two bullocks, with the services of one man, for two days during the *kharif*, and two days during the *rabi* sowings. The assistance in thatching was represented by the services of one man per house in the village. The plaintiff alleged that these services were not rendered during the *Fasli* years 1315, 1316, and 1317, and he claimed that the Court should either compel their rendition during the *Fasli* year 1318, or give him compensation for the same in money.

RAM CHANDRA *v.* CHINDHOO.

The money value of the demand was thus computed:—

		Rs.	a.	p.
(*a*)	One plough for four days in each of the three years at Re. 1 per plough per day. ...	12	0	0
(*b*)	Two-cart loads of fuel per year at Re. 1 per load for three years ...	6	0	0
(*c*)	Labour of one man for thatching each year at 4 annas per job ...	0	12	0
	Total ...	18	12	0

The defendants in all the cases denied the claim and their responsibility for the services and fuel, but the Munsif held that they were liable and decreed the sum of Rs. 9-9-0 in every case. The defendants all filed appeals in the Court of the District Judge of Bhandara, which also, after the reference to the Munsif for findings on certain issues, decided on the main point against the tenants, namely that under a prevailing custom, recognized in the *zemindari Wajib-ul-arz*, the tenants were bound to assist their landlord in his cultivation. He, however, found no such authority for the levy of the demand for cart-loads of fuel, and he disallowed the claim therefor. In the result a decree in favour of the plaintiff for Rs 6-9-0 and proportionate costs was passed in each case. Thereupon the defendants came up in second appeal to this Court, and their appeals have been heard together. This judgment will govern the disposal of all the said 19 cases.

* * * *

The services and fuel which the plaintiff claims are known by the name of *begar*. It appears that the Local Government, in carrying out a re-settlement of the Kamtha *zemindari* in or about the year 1898, caused to be prepared a *Wajib-ul-arz* for the whole estate, called the "*zamindari Wajib-ul-arz*". Besides this paper, *Wajib-ul-arzes* seem to have been specially prepared for each one, or at least some, of the villages in the *zamindari*. At any rate such a paper, called the "village *Wajib-ul-arz*" was prepared for the village of Kudwa with which we are now concerned. The *zamindari Wajib-ul-arz* recognizes the existence of *begar* in its 7th clause in terms which may be translated thus:—

It is customary for the *zemindar* to take, in each village [held] in direct management, from each tenant for the cultivation of his home-farm in that village, *begar* of one man with one plough and bullocks for two days for the *kharif* crops, and for two days for the *rabi* crops, and to take *begar* of one man from each house in the village for *gharchaoni*, or thatching his houses, in that village. Similarly inferior proprietors and lessees may also take such *begar* in their villages.

Each such village shall supply once in each year at any place appointed by the *zamindar* within ten miles of the village, grass, fuel, and bamboos as detailed below:—

(Here follow the names and fuel details in respect of 28 villages apparently under the direct management of the *zamindar*, to which the clause seems confined. At any rate the village of Kudwa does not appear in this list. The *begar* record then concludes thus:—)

If it appears that the *zemindar* is acting oppressively in the exaction of *begar*, the Duputy Commissioner may suspend for a term, and, if the offence is subsequently repeated, may altogether abolish the liability for their services in any specified village or villages.

The village *Wajib-ul-arz* is entirely silent on the matter of *begar*, and this silence has been made the bed-rock of the defence. Both the lower Courts have concurred in the view that the *zamindari Wajib-ul-arz* gives the plaintiff the right to claim *begar*, and the lower appellate Court drew the somewhat reckless inference that *begar* finds no place in the village *Wajib-ul-arz* owing to inadvertence. The Courts below and parties have regarded the suit as one governed by the three years' rule of limitation, and in his plaints the plaintiff has declared his cause of action in respect of the services for ploughing and thatching to have arisen in respect of the three years as follows:—

(1) On the 31st August 1905 and 29th October 1905 for the *begar* of *Fasli* 1315.

(2) On the 21st August 1906 and 18th October 1906 for the *begar* of *Fasli* 1316.

(3) On the 8th September 1907 and 8th October 1907 for the *begar* of *Fasli* 1317.

The money value of such services is no longer in dispute, the finding of the lower appellate Court having been accepted: nor does plaintiff question the dismissal of his claim for fuel. The Courts seem to have taken it for granted that the cultivation and thatching services, left unperformed, became commuted into money and could be sued for as a debt. It is the case that in some *Wajib-ul-arzes* in these provinces, when *begar* has been sanctioned, an option has been given to the tenant to pay a specified some of money in lieu of rendering the services; but no such provision exists in the *Wajib-ul-arz* on which the plaintiff relies.

The first point taken before me by the learned counsel for the plaintiff-respondent is that no second appeal lies because the claim is for a sum of money below Rs. 500 in each case, and of a nature cognizable by the Court of Small Causes, I am very clearly of opinion that this contention is unsound. Section 76 of the Central Provinces Land Revenue Act, 1881, provides that the Settlement Officer shall determine and record the village cesses, and the persons by and from whom, and the rates at which, they are leviable; and such cesses shall, if sanctioned by the Chief Commissioner, be leviable accordingly. Section 4 (3) of the same enactment defines "village cess," as 'any cess which a person, resident or holding lands in a village, pays or renders to the proprietors, as such, of the village, [or to their transferees or assignees, as such, or to the patel] and includes service rendered or things furnished as well as money paid'. It is obvious that *begar* which has been 'determined and recorded' by a Settlement Officer, and sanctioned by the Chief Commissioner, becomes leviable as a village cess. I am clear that a claim for such a cess, when disputed, raises a question of title in land where it is imposed as an incident of land tenure. In *Churaman* v. *Balli* (1), a Bench of three Judges held that a disputed claim for *malikana*—an annuity made payable as a condition of a vendee's tenure of land by virtue of a contract between vendor and vendee—directly involved a question of title to immovable property, and was not of a nature cognizable by the Small Cause Court. In the course of his judgment, in which both the other Judges concurred, Edge, C. J., said:—

> "We do not question the correctness of those decisions in which it has been held that in those cases in which the suit is otherwise within the jurisdiction of a Small Cause Court, that jurisdiction is not ousted because it may become necessary incidentally to decide a question of title. In this case it appears to us that the question of title to immovable property was directly involved. The respondent's case was and is that he held the lands free of any charge. The appellant's case was and is that the respondent held the lands subject to the charge of Rs. 25 annual payment. We are aware that it has been decided that a suit to recover the principal money and interest secured by a hypothecation-bond on immovable property can be maintained in a Small Cause Court. In such cases, unless otherwise provided by the hypothecation-bond, the mortgagee would be entitled to his personal remedy against his debtor for the debt, or on the debtor's promise to pay, of which the bond would probably be evidence. Here there is no purely personal contract on the part of Balli to make the annual payments: his liability arises out of the fact that he is the person who is in possession of the property charged with the payments. He cannot take the benefit to be derived from the profits of the land without taking up at the same time on himself the liability to make the payments charged on the land."

These remarks are very pertinent to the present case. The *begar* claimed by the plaintiff is against each tenant, as such, in respect of the plough and labour for cultivation, and against the occupants, as such, of houses standing on plaintiff's land, in respect of the assistance, in thatching. Sever such tenants from their holdings and such occupants from their residences, and their liability for *begar* instantly ceases. There are, of

(1) 9 A. 591.

course cesses which are outside the definition of 'rent' in the Central Provinces Land Revenue and Tenancy Acts, *e. g*, the *gharchaoni begar* in the present case. But every cess which is paid, delivered, or rendered, in money, kind, or service, by a tenant on account of the use or occupation of land let to him, is certainly a part of the rent which the Tenancy Act specifically charges on his holding. Such a cess is the cultivation *begar* which is rendered by a tenant, as such. That kind of *begar* is part of the claim in the present suit, and, therefore, the suits are not of a nature cognizable by the Court of Small Causes, and the aforesaid second appeals have been properly admitted.

Turning to the cases on their merits, as I have already said, the bed-rock of the appellants' cases is the absence of all mention of *begar* in the village *Wajib-al-arz*. The lower appellate Court has inferred this to be due to an inadvertent omission. There is no justification for such an inference. Humanly speaking, in records so prepared as were the *zamindari* and village *Wajib-ul-arz* connected with the present litigation, it is impossible that any such error should have been made and perpetuated. I have no doubt that the omission of all mention of *begar* in the village *Wajib-ul-arz* was deliberate and intentional, and if the parties had taken the trouble to file copies of the correspondence connected with the preparation of this paper, that fact would probably have been brought to light. The circumstance is easily explicable. There is no such contradiction between the two *Wajib-ul-arzes* as the lower appellate Court seems to have supposed, and as the appellants contend. The village *Wajib-ul-arz* was merely supplementary to the *zamindari Wajib ul-arz*, and not a substitution therefor. The latter dealt with matters general throughout the *zamindari*; the former was supplemented to it as a record of matters particular to the village to which it appertained. The village *Wajib-ul-arz* may have repeated matters in the *zamindari Wajib-ul-arz*, but its omission to do so in any case would not affect the application of the *zamindari Wajib-ul-arz* in any degree. The *zamindari Wajib-ul-arz* is a clear record made under the provisions of section 79 of the Land Revenue Act, and the entries therein concerning *begar* comprise a determination and record by the Settlement Officer of certain cesses leviable throughout the *zamindari*. These cesses having been generally sanctioned throughout the *zamindari*, not only in villages under direct, but also in villages under delegated management, it would be absurd to credit the same authority with having omitted mention of them in the village *Wajib-ul-arz* with the object of cancelling its own general recognition and sanction of and to them. The appellants have been in pursuit of a phantom if they considered that such omission would be held to justify them in refusing to render the *begar*.

* * * *

For these reasons, this appeal is dismissed, and it is ordered that each party do bear his own costs as incurred in all three Courts. I allow Rs. 10 as pleader's fees in this Court.

Appeal dismissed.

(s. c. 6 N. L. R. 123.)

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 90 OF 1909.

March 1, 1910.

Present:—Mr. Stanyon, A. J. C.

KARAN SINGH—DEFENDANT—APPELLANT

versus

KANHAI LAL—PLAINTIFF—RESPONDENT.

Evidence Act (*I of* 1872), *s.* 92—*Decree of a Civil Court—Subsequent oral agreement to rescind or modify it not admissible.*

Under no circumstances is evidence admissible to prove the existence of a distinct subsequent oral agreement to rescind or modify the decree of a Civil Court.

First Appeal from the decree of the District Judge, Hoshangabad, dated the 4th August 1909.

Mr. *Atma Ram Bhagwant*, for the Appellant.

Mr. *J. Mittra*, for the Respondent.

Judgment.—The facts material to the decision of this appeal may be briefly stated. The respondents obtained against the appellant a decree under the Transfer of Property Act, 1882, for over Rs. 21,000. That decree was made absolute some time ago, and was in process of being executed, when the appellant filed the application giving rise to the proceedings now before me. This application asserted that an oral agreement had been made be-

tween the parties in supersession of the decree, and concluded with a prayer that the decree should be rescinded. It was not pretended that any sanction of the Court was obtained to the alleged compromise on behalf of one of the decree-holders who is a minor. In response to notices issued to them, the decree-holders appeared and denied that any compromise had taken place. The lower Court admitted oral evidence in proof of such compromise as the applicant alleged, and holding it to be unworthy of credit, dismissed the application. Hence this appeal by the applicant.

At the hearing I raised the question of the admissibility of evidence in proof of the alleged oral agreement in rescission of a sale decree, and as it was a question of pure law it was argued without adjournment, on adjournment being applied for. I am of opinion that this appeal must fail, because

(*a*) the alleged oral agreement cannot legally be proved; and

(*b*) if proof thereof be permissible, the proof adduced is quite unworthy of credit and has been rightly disbelieved.

The first point is so obvious that I am surprised that it should not have occurred to the lower Court and the legal advisers of the parties. The contents of a sale decree under the Transfer of Property Act, 1882, are clearly matter required by law to be reduced to the form of a document. Therefore, the terms of such a decree can only be proved, if disputed, under the provisions of section 91 of the Indian Evidence Act, 1872. Section 92 of the same Act also applies to such a decree. This section, of course, applies as much to a written contract, grant or other disposition of property, and matter required by law to be in writing where the same has been *admitted* as where, not being admitted, it has been necessary to prove it according to section 91 aforesaid. In the present proceedings the sale decree aforesaid stood both admitted and proved. That being so, section 92 excluded all evidence of any oral agreement or statement as between the parties to the decree or their representatives in interest for the purpose of contradicting, varying, adding to, or subtracting from its terms, except such evidence as could be got in under one of the six provisos to the section. In the present case appellant seeks to prove the existence of a distinct subsequent oral agreement to rescind the sale decree aforesaid. Unless such proof can be admitted under proviso 4, it is clearly forbidden. This proviso allows proof of distinct subsequent oral agreements to rescind or modify contracts, grants or other dispositions of property, but nothing else. Matter, required by the law to be in writing, which is not a contract, grant, or other disposition of property, is not within the purview of the proviso. If a decree, required by law to be in writing, is neither a contract nor a grant or other disposition of property, then the proviso cannot let in evidence of a distinct subsequent agreement to rescind or modify it. If, on the other hand, a sale decree under the Transfer of Property Act, 1882, is a document embodying the terms of a disposition of property, then by virtue of the exception contained in the proviso itself, in respect of dispositions of property by law required to be in writing, evidence of a subsequent oral agreement to rescind or modify it is equally excluded. The law is thus clear that under no circumstances is evidence admissible to prove the existence of a distinct subsequent oral agreement to rescind or modify the decree of a Civil Court, and the oral evidence in the present case was admitted in violation of section 92 aforesaid.

On the merits of the case it is sufficient to say that the appellant was given every reasonable opportunity for producing evidence, and that the evidence he has produced is worthless. I have read that evidence for myself, and I concur in the criticisms of the lower Court in respect of it. It is an insult to common sense to invite credence in the story put forward. It is impossible to believe that, had there been any compromise of such a decree, no writing should have been made in memorandum thereof. The whole fabric of appellant's case is a concoction to obstruct and delay the sale of his estate in satisfaction of the decree. The absence of appellant himself from the witness box is of fatal significance.

For these reasons the appeal fails and is dismissed with costs. I allow two sovereigns as pleader's fees.

Appeal dismissed.

GOKULDASS *v.* PERMANAND.

(s. c. 6 N. L. R. 125).

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 543 OF 1908.

February 16, 1909.

Present:—Mr. Skinner, A. J. C.

GOKULDASS—PLAINTIFF—APPELLANT

versus

PARMANAND—DEFENDANT—RESPONDENT.

Promissory-note—Insufficiently stamped—Inadmissible in evidence—Original cause of action—Suit may be brought even when promissory-note taken in the same transaction.

A plaintiff may fall back on his cause of action for money lent, though he has, at the time of the loan, accepted an insufficiently stamped promissory-note for the amount of the loan, and his suit brought on the said note has failed by reason of defect in the stamp.

Second Appeal from the appellate decree, of the Divisional Judge, Jubbulpore Division, dated the 4th May 1908, confirming the decree of the District Judge, Mandla, dated the 9th December 1907.

Sir *Bipin Krishna Bose*, for the Appellant.

Judgment.—The plaintiffs,-appellants, sued on a plaint, which alleged that they had lent the defendant Rs. 500 on the 2nd May 1907 on his promise to re-pay it on the 2nd June 1907. In accordance with this promise the defendant gave them a *hundi* for Rs. 500 payable in 31 days on a 5 annas stamp, though a 6 annas stamp was required. The defendant failed to honour the *hundi*, and a suit brought on it failed by reason of the defect in the stamp. The plaintiffs accordingly sued for their money and interest, and also for the costs of the abortive suit.

The defendant did not deny the loan, but disputed the rate of interest charged, and also took exception to having been again sued for the same debt. The first issue framed by the first Court was "Whether there is a cause of action in this case on which the present suit can be based?", and the second "Can the suit lie in its present form?" On these issues the first Court found the suit barred, holding that the plaintiffs could not be allowed to set up a case independently of the *hundi*, and prove it by oral evidence. And this decision has been upheld by the lower appellate Court on the authority of *Sheikh Akbar* v. *Sheikh Khan* (1), *Radhakant Shaha* v. *Abhoychurn Mitter* (2), *Parsotam Narain* v. *Taley Singh* (3) and *Yarlagadda Veera Ragavayya* v. *Gorantla Ramayya* (4) The only authority, the learned Divisional Judge says, in support of the plaintiffs' case is the judgment of Petheram, C. J., in *Pramatha Nath Sandal* v. *Dwarka Nath Dey* (5), with which Rampini, J., agreed, but which was dissented from by Aikman, J., of the Allahabad High Court in *Parsotam Narain* v. *Taley Singh* (3), and shown by him to be based on an entire misunderstanding of the judgment in *Sheikh Akbar* v. *Sheikh Khan* (1).

The plaintiffs have come up in second appeal, and the appeal has been heard *ex parte*. I have carefully examined the authorities relied on by the learned Divisional Judge, and others favourable as well as those adverse to his contentions, and I am unable to concur in his estimate of the weight of authority as affecting the plaintiffs' claim. That "When a cause of action for money is once complete in itself, whether for goods sold, or for money lent, or for any other claim, and the debtor then gives a bill or note to the creditor for payment of the money at any future time, the creditor, if the bill or note is not paid at maturity, may always, as a rule, sue for the original consideration, provided that he has not endorsed or lost or parted with the bill or note, under such circumstances as to make the debtor liable upon it to some third person", is laid down in the judgment of Garth, C. J., in *Sheikh Akbar* v. *Sheikh Khan* (1) relied on by the learned Divisional Judge. It is the English rule, and has been recognized by all the other Chartered High Courts in cases in which the judgment in *Sheikh Akbar* v. *Sheikh Khan* (1) has been cited with approval. Difficulty only arises with regard to the exception to this rule laid down by Garth, C. J., that when "The note is the only contract between the parties, and if for want of a proper stamp or some other reason the note is not admissible in evidence, the creditor must lose his money". And this rule is certainly laid down by the learned Chief Justice in terms and with illustrations, which would preclude the plaintiff from recovering in a case like the present, in which the loan and the giving of a *hundi* for its amount seem to have been practically one transaction,

(1) 7 C. 256; 8 C. L. R. 533.
(2) 8 C. 721.
(3) 26 A. 178; A. W. N. (1903) 217.
(4) 29 M. 111; 15 M. L. J. 484.
(5) 23 C. 851.

though the loan may have come first in order of time. And though the facts of that case were different, and could easily be distinguished from those of the present case, I must admit that I am unable to distinguish those of *Radhakant Shaha* v. *Abhoychurn Mitter* (2), in which the plaintiffs had advanced the defendants Rs. 500 on the security of a *hundi* payable in 15 days and being unable to recover on the *hundi* as it was not properly stamped were not allowed to fall back on their loan. That case was decided by Garth, C. J., and Bose, J., following the decision in *Sheikh Akbar* v. *Sheikh Khan* (1). That decision was, however, qualified by a Bench of the same High Court, consisting of Petheram, C. J., and Rampini, J., in *Pramatha Nath Sandal* v. *Dwarka Nath Dey* (5), and the plaintiff allowed to fall back on his cause of action for money lent, though he had at the time of the loan, and in the course of what seems to have been equally one transaction, accepted an insufficiently stamped promissory-note for the amount of the loan and interest. And though in *Parsotam Narain* v. *Taley Singh* (3), in which a promissory-note had been given at the time of the loan, a single Judge of the Allahabad High Court preferred the view taken on this point by Garth, C. J., a Bench of that Court (Stanley, C. J., and Knox, J.) in the later case of *Banarsi Prasad* v. *Fazal Ahmad* (6), though they professed to follow *Sheikh Akbar* v. *Sheikh Khan* (1), held the plaintiff entitled to recover on a loan, for which he had taken a promissory-note at the time it was made, the allegation in the plaint being that "the defendant took a loan of Rs. 572 and executed a promissory-note".

And in *Yarlagadda Veera Ragavayya* v. *Gorantla Ramayya* (4), cited by the learned Divisional Judge, in which a Divisional Bench of the Madras High Court (Boddam and Sankaran Nair, JJ.) professed to follow *Sheikh Akbar* v. *Sheikh Khan* (1) the plaintiff was held entitled to recover a loan of Rs. 400 on the original consideration, though he had accepted an unstamped promissory-note for the same day, whilst in *Krishnaji Narayan Parkhi* v. *Rajmal Manikchand Marwadi* (7) a Divisional Bench of the Bombay High Court (Jenkins, C. J., and Candy, J.) referred with approval to the explanation of the judgment in *Sheikh Akbar* v. *Sheikh Khan* (1) given by that of Petheram, C. J., in *Pramatha Nath Sandal* v. *Dwarka Nath Dey* (5) and gave the plaintiff a decree for a loan of Rs. 675, for which a *hundi* was said to have been given him by the defendant at the time of the loan, but dishonoured.

On a review of the authorities, therefore, I do not think the plaintiff's claim to recover his loan is barred by his acceptance of a *hundi*, payment of which has been refused, and I am confirmed in this opinion by a recent judgment of my brother Stanyon in *Nathusa* v. *Phulchandsa* (First Appeal No. 35 of 1908), which I have had the advantage of seeing, though the facts of that case were different, the *hundis* in question in it having been given in satisfaction of an antecedent debt. The appeal must be allowed, the decrees of the lower appellate Court, and of the Court of first instance dismissing the suit set aside, and the case remanded to the Court of first instance for a fresh decision. The plaintiffs-appellants will receive refunds of the stamps on their memoranda of appeal, and their other costs in this Court and in the lower appellate Court will be paid by the defendant. The costs in the Court of first instance will be dealt with by that Court, when finally disposing of the suit.

Appeal allowed.

(6) 28 A. 298; A. W. N. (1906) 9; 3 A. L. J. 25.
(7) 21 B. 369.

(s. c. 6 N. L. R. 129.)

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CASE NO. 19 OF 1910.

July 26, 1910.

Present :—Mr. Batten, O. J. C.
and Mr. Stanyon, A. J. C.

EMPEROR
versus
KOLHATKAR—OPPOSITE PARTY.

Legal Practitioners Act (*XVIII of* 1879), *ss.* 12, 13 *cl.* (*f*)—*Conviction for sedition*—*Misconduct*—"*Any other reasonable cause*", *significance of*—Ejusdem generis, *principle of*—*Suspension or dismissal, considerations leading to*—*Conviction final as to guilt*—Res judicata.

The Legislature did not intend, in any way, to couple clause (*f*) of section 13 of the Legal Practitioners Act with the clauses which precede it, that is the significance of clause (*f*) is not limited by the principle of *ejusdem generis*. Therefore, the words "any other reasonable cause" in the said clause are not confined to misconduct of which a practitioner is guilty in his professional capacity but embrace all causes which, in the opinion of the High Court, may afford reasonable ground for his suspen-

sion or dismissal; and a conviction for sedition constitutes "reasonable cause" within the purview of the said clause.

Where a legal practitioner is convicted of a crime involving a form or degree of moral depravity which makes him permanently unfit for association with the members of the honourable profession, so that his present continuance in, or any future re-admission to, the profession could only be allowed at the expense of degradation of the profession itself, perpetual and final dismissal is the only proper course. But there are acts which, though punishable as offences and indications of a character unfit for practice of the law, are more venial and expiable, because devoid of the lower forms of dishonesty and moral depravity. The offence of sedition may be in this category and in such cases a *locus penitentiæ* should be left open to the offender.

Where a legal practitioner has been convicted by a Criminal Court of competent jurisdiction whose decision has become final, such conviction must be taken to have made *res judicata* the fact that the practitioner concerned has been guilty of the offence whereof he was convicted. Nevertheless, a discretion remains, under section 12 of the Legal Practitioners Act, in the High Court to decide whether or not the convicted practitioner should be suspended or dismissed.

Miscellaneous Case under section 13 of the Legal Practitioners Act, XVIII of 1879.

Sir *B. K. Bose*, for the Crown.

Judgment.—This is an application by the Local Government for the removal of non-applicant, Achyut Balwant Kolhatkar, B. A., LL., B., from the roll of pleaders entitled to practise in the Central Provinces. The non-applicant was enrolled as a pleader of this Court on the 2nd January 1907, under rules framed by this Court in accordance with section 6 of the Legal Practitioners Act, 1879. By virtue of such enrolment he became entitled to practise as a pleader in the Central Provinces, subject only to the annual renewal of his pleader's certificate. The last renewal of such certificate in his case took place on the 1st March 1908.

Early in January 1907, non-applicant became the editor of a newspaper styled the *Desha Sewak*, which was printed and published at Nagpur in the Marathi language. On the 12th December 1908, in respect of certain matter published by him, or under his responsibility, in the form of a pamphlet the non-applicant was convicted by the Court of Session, Nagpur Division, of an offence punishable under section 124A of the Indian Penal Code, and sentenced to rigorous imprisonment for a period of $2\frac{1}{2}$ years. This conviction was upheld in appeal by this Court (Drake-Brockman, J. C.) on the 6th March 1909, the sentence being reduced to one of fifteen months rigorous imprisonment. Having undergone this sentence, the non-applicant was released on the evening of the 27th February 1910, and on the following day was the object of a demonstration in the City of Nagpur, in the course of which he made a speech, of the purport whereof we have been furnished with what the non-applicant admits to be a correct report. On the 1st March 1910, the present application was filed by the learned Government Advocate. A rule issued to the non-applicant to show cause on the 26th April 1910. On that date Mr. Abhyankar, Barrister-at-Law, appeared for the non-applicant and obtained an adjournment to the 28th June 1910, upon the ground that non-applicant was ill. On the adjourned date Mr. Abhyankar showed cause against the rule, and endeavoured to establish that, notwithstanding his conviction, the non-applicant was innocent of the offence of sedition. The arguments had not concluded when the hearing was adjourned to the 12th July 1910, to allow certain translations to be obtained and filed. On the 30th June 1910, Mr. Abhyankar put in a declaration signed by the non-applicant, the material part whereof is in these terms:—

"I, Achyut Balwant Kolhatkar, hereby solemnly declare—

I. That I abide by the judgment of the Court pronounced upon my publications;

II. That I shall be loyal to the King-Emperor, his successors, and British Government established by law in India;

III. That I shall be a peaceful and law-abiding citizen;

IV. And that I shall abstain from sedition."

A copy of this declaration was sent by order of this Court to the learned Government Advocate for his information. On the 12th July 1910, Mr. Abhyankar informed us, and his client there and then confirmed the statement, that non-applicant did not wish him to appear any further, but preferred to conduct his own case. Mr. Abhyankar was thereupon permitted to withdraw. The learned Government Advocate having pointed out, and, in our opinion, correctly, that the declaration of the 30th June 1910, contained no apology or expression of regret for past misconduct, nor

any definite undertaking as to the non-applicant's future attitude, beyond an idle undertaking to avoid falling into the clutches of the law, we expressed ourselves willing to receive and consider any amended application which non-applicant might wish to put in at a future date. The non-applicant asked for time for this purpose, but left the Court without awaiting the order fixing the said date. However, the 19th July 1910 was settled for further hearing. On the 14th July 1910, the non-applicant tendered another application, which purported to be nothing more than a slight amplification of the statement contained in the declaration of 30th June 1910. He was informed that the case was fixed for the 19th July 1910, on which date any application he might wish to put in would be considered. On the 19th July 1910, the applicant was absent and unrepresented; but he had presumed to address the Judicial Commissioner directly, by telegram and an informal letter. The letter which bears date "Nagpur, the 14th July 1910,"—the very date non-applicant personally appeared in Court—is in these terms:—

"May it please your Honour,

"I am going to Poona for the purpose of consulting my father, Rao Bahadur Waman Rao Kolhatkar, about the 'statement' which I intend to put in. I hope to come back in time, but if I am unable to do so, I hope your Honour will be pleased to grant me an adjournment."

The material words of the telegram are:—

"Father consulted. Recommends unconditional apology.

Adjournment humbly solicited."

The non-applicant, as a pleader, was perfectly aware of the proper procedure for moving this Court, and that he was entirely out of order in writing and telegraphing to the Judicial Commissioner as above. We are, therefore, under the impression that he has endeavoured to trifle with this Court. At any rate we could make no order of adjournment upon the letter and telegram, and as non-applicant had been given ample opportunity of showing cause against the rule, we closed the case and reserved the order we are now about to deliver.

The law governing the present case is to be found in sections 12 and 13 of the Legal Practitioners Act, 1879. Section 12 empowers the High Court to suspend or dimiss any pleader holding its certificate "who is convicted of any criminal offence implying a defect of character which unfits him to be a pleader." Section 13 gives a similar power over any such pleader (1) found to have been guilty of five specified forms of professional misconduct and (2) "for any other reasonable cause." The proper interpretation of the words last quoted has been the subject of some debate and several judicial decision which may well be considered at once. The words constitute clause (*f*) of section 13 aforesaid, and it has been urged with some degree of plausibility that the principle of *ejusdem generis* should be applied to them: or in other words, that having regard to their possession following upon five specified forms of professional misconduct they must be taken to have been associated therewith for the purpose of covering generally all other forms of professional misconduct not specified, and nothing more. This argument follows the rule laid down by Lord Bacon that *copulat'o verborum indicat acceptationem in eodem sensu.* But we do not think that the Legislature intended, in any way, to couple clause (*f*) aforesaid with the clauses which precede it, so that it should be understood in the same sense. Sections 12 and 13 deal, respectively, with legal practitioners convicted of crime, and legal practitioners not so convicted. In the one case the High Court proceeds upon the *character* indicated by the crime: in the other it has to deal with a particular act of *misconduct*; and here the Legislature makes an effort, for the purpose of codification, to crystallize matter which is otherwise in the nebulous state of an unwritten law—the unwritten law of professional etiquette. Having done so in five clauses, the Legislature then leaves to the absolute discretion of judicial authority all other possible cases in which the Court would consider it proper to suspend or dismiss a legal practitioner subordinate to its authority. The view that the significance of clause (*f*) aforesaid is not limited by the principle of *ejusdem generis* is supported directly or analogically by ample authority, namely, *In the matter of Purna Chunder Pal, Mukhtar* (1), *In the matter of Sashi Bhushan Sarbhadhi-*

(1) 27 C. 1023; 4 C. W. N. 389.

cary (2); *In the matter of a Pleader* (3); *Le-Masurier* v. *Wajib Hossain* (4) and *In the matter of A. G. Ganapathi Sastri* (5). The two last are Full Bench decisions, and in the Calcutta case the conflicting judgments of Ghose, J., and Hill, J., respectively for and against the limited interpretation of the words "any other reasonable cause" may be taken as exhaustive of the argument on both sides. It will be seen that the view of Hill, J., in which we concur, is considerably fortified by the remarks of their Lordships in the above Allahabad case, at page 108. Though their Lordships declined to give a definition of the words "reasonable cause" (as used in section 7 of the Letters Patent whereunder the High Court at Allahabad was established) they nevertheless declared it to be "obvious that the intention of the Crown was to give a wise discretion to the High Court in India in regard to this disciplinary authority"—meaning the suspension and removal of advocates. It cannot reasonably be contended that the Indian Legislature intended to allow the same Court a power less plenary over legal practitioners appointed by itself in grades lower than Advocates called to the Bar in the United Kingdom. We, therefore, hold that the words "any other reasonable cause", in section 13 clause (*f*) of the Legal Practitioners Act, 1879, are not confined to misconduct of which a practitioner is guilty in his professional capacity, but embrace all causes which, in the opinion of the High Court, may afford reasonable ground for his suspension or dismissal. This view is in accordance with the decision of Drake-Brockman, J. C., in the unreported case *In re Ane*, Miscellaneous Petition No. 129 of 1909.

On the further question whether a conviction for sedition constitutes 'reasonable cause' within the purview of the above clause, we have no hesitation in coming to a decision in the affirmative. This follows from the further view which we take that the conviction of an enrolled pleader for sedition, *prima facie* implies a defect of character which unfits him to be a pleader, and renders him liable to be dealt with under section 12 of the Legal Practitioners Act, 1879. No published case of the suspension or dismissal of a pleader upon this ground has been brought to our notice: but, in Miscellaneous Petition No. 129 of 1909, already mentioned, this Court suspended from practice a pleader, who had been bound over to be of good behaviour, upon the ground that he had made a seditious speech at a public meeting. In our opinion, loyalty to the Crown is a fundamental and indispensable part of the structure of the legal profession throughout the British Empire. It is upon an assumption of the presence of such loyalty that every member of that body is enrolled and given the particular privileges, including independence of speech, which are so highly valued. Every practitioner at law is bound to uphold and maintain the honour and dignity of the Courts of the realm in which he elects to carry on his practice and earn his livelihood. By enrolment in any such Court he becomes an integral part thereof. But if he is, in heart and tongue, disloyal to the Government by which such Court is established, he cannot entertain towards the latter those feelings which should actuate him, and he is unlikely to maintain such attitude as is demanded from him. By admission as a legal practitioner a person is given exceptional opportunities of obtaining public confidence, of enlightening public ignorance, and of swaying public opinion. It would, therefore, clearly be wrong and opposed to public policy for a Court to admit to or retain in such a position a known seditionary. It is the duty of every Court to uphold the law and to vindicate the authority of the Government established by that law. This duty cannot be complied with by a Court which maintains on its rolls legal practitioners who are proved to have made it their business to defame and disparage that Government and its machinery, including the Court itself, by seditious libels. In the unreported case already cited Drake-Brockman, J. C., wrote:—

> "This Court cannot let Ane's conduct pass without serious notice. As a pleader he is trusted with special privileges and special status in the Courts established by the very Government which he tried by his speech to bring into hatred. Under the ægis of that Government he had been earning his livelihood for about

(2) 29 A. 95; 17 M. L. J. 74; 4 A. L. J. 34; 9 Bom. L. R. 9; 11 C. W. N. 273; 5 C. L. J. 130; 2 M. L. T. 1; 5 Cr. L. J. 152.

(3) 26 M. 448; 13 M. L. J. 65.

(4) 29 C. 890.

(5) 19 M. L. J. 504; 6 M. L. T. 253 (F. B.); 3 Ind. Cas. 344; 11 Cr. L. J. 274.

> a year in a profession of which the ostensible object is to secure the operation of the law, and the sooner it is understood that such conduct is incompatible with continued enjoyment of a legal practitioner's privileges the better for the profession and for the public alike."

These remarks have our entire concurrence.

In the course of these proceedings the point was raised that the suspension or dismissal of a pleader who has undergone his sentence for conviction of the offence of sedition, amounts to a second punishment for the same offence—a retribution for a past delinquency already expiated. We see no force in such a contention. It might be enqually well used in the case of a pleader convicted of a dishonest or disgraceful crime. Suspension or dismissal from the rolls of such a pleader does not follow as a duplication of his penalty for the crime, but in protection of an honourable profession from association with a criminal who has stained his own reputation, and destroyed confidence in his future good behaviour until such time as is ever, he can re-habilitate that reputation, and revive that confidence. A man cannot reasonably complain if his character and future disposition are judged by his past conduct. Human agency has, no other *data*, pending further experience, upon which to judge them. In *Ex parte Brounsal* (6), which was the case of an application to strike off the roll of attorney one who had been convicted of theft, and punished by imprisonment and branding on the hand, Lord Mansfield said:—

> "This application is not in the nature of a second trial or a new punishment. But the question is whether, after the conduct of this man, it is proper that he should continue a member of a profession which should stand free from all supicion. Suppose he had been a justice of peace, the conviction itself would not remove him from the commission; but could there be a doubt that he ought to be struck out of the commission? As at present advised, I am of opinion, without any doubt, that the rule should be made absolute. But as it is for the dignity of the profession that a solemn opinion should be given, we will take an opportunity of mentioning it to all the Judges."

On a later date Lord Mansfield further said:—

> "We have consulted all the Judges upon this case, and they are unanimously of opinion, that the defendants having been burnt in the hand, is no objection to his being struck off the roll. And it is on this principle; that he is an unfit person to practise as an attorney. It is not by way of punishment; but the Court on such cases exercise their discretion, whether a man whom they have formerly admitted, is a proper person to be continued on the roll or not. Having been convicted of felony, we think the defendant is not a fit person to be an attorney. Therefore, let the rule be made absolute."

This case was quoted with approval in *In the matter of Rajendro Nath Mukerji* (7). It is manifest that suspension or dismissal from the ranks of a profession is only one form of the social degradation which inevitably follows upon the footsteps of conviction and legal punishment for crime.

In the case last above cited their Lordships of the Privy Council also ruled that a conviction by a competent Criminal Court could not be re-opened on the merits thereof for the purpose of a proceeding under section 12 of the Legal Practitioners Act, 1879, though accepting such conviction as correct, the High Court still has a discretion to decide whether the culpability involved was such as to disqualify the convict for continuance in the legal profession. In the case before their Lordships the conviction was under section 471 of the Indian Penal Code for the fraudulent use of a document known to be a forgery, and the Privy Council held that the conviction, followed by a sentence of imprisonment for two years, constituted sufficient cause, without further inquiry, for dismissal of the Vakil. It is thus apparent that the non applicant before us was well advised in abandoning the attempt to question the correctness of his conviction. We hold that, for the purposes of every case under section 12 of the Legal Practitioners

(6) (1778) 2 Cowper's Reports 829.

(7) 22 A. 49; 26 I. A. 242; 3 C. W. N 736.

S. N. DAR, B. A. LL. B.,
Vakil High Court,
SRINAGAR (Kashmir)

Act, 1879, where a legal practitioner has been convicted, by a Criminal Court of competent jurisdiction whose decision has become final, such conviction must be taken to have made *res judicata* the fact that the practitioner concerned has been guilty of the offence whereof he was convicted. Nevertheless, despite the conviction, the language of section 12 aforesaid makes it apparent that a discretion remains in the High Court, to decide whether or not the convicted practitioner should be suspended or dismissed. We are not disposed to fetter this discretion, or impair its elasticity, by laying down any hard and fast rule. As remarked by their Lordships of the Privy Council in *In the matter of Sashi Bhusan Sarbadhicary* (2), "Every case must depend on its own circumstances". There are, however, certain broad lines of procedure which with expediency may be set down here. It is manifest that where a legal practitioner is convicted of a crime involving a form or degree of moral depravity which makes him permanently unfit for association with the members of an honourable profession, so that his present continuance in, or any future readmission to, the profession could only be allowed at the expense of degradation of the profession itself, perpetual and final dismissal is the only proper course. Such was the view rightly taken of the attorney, permanently branded as a thief, in the English case above quoted, and of the pleader convicted of fraudulently using a forged document. But there are acts which, though punishable as offences, and indications of a character unfit for practice of the law, are more venial and expiable, because devoid of the lower forms of dishonesty and moral depravity. The offence of sedition may be in this category. It may be due to youthful fantasies, to environment, to evil influences, to inflammatory literature, to errors of judgment, and other temporary and eradicable causes. We think that in such cases a *locus penitentiæ* should be left open to the offender—a path by which, after due expiation and reform, he may return to the precincts of the honourable society from which his conviction for crime has caused him to be expelled. We propose to leave open such a *locus penitentiæ* in the present case; but we do not think that a mere order of suspension for a term will suffice; because it is impossible to make any estimate of the time within which, if ever, non-applicant will re-gain fitness for the duties and privileges of a pleader. We think that an order of dismissal, until the non-applicant can establish, to the satisfaction of this Court, his restoration to a condition of fitness for re-admission, is the only proper course open to us. Before coming to this conclusion, we have considered the youth and antecedents of the non-applicant: we have studied the main features of the evidence upon which he was convicted for sedition, and his published opinions before conviction; we have scrutinized and weighed the report of the public speech made by him the day after he concluded his punishment for that offence: and we have taken into account the application containing promises of future loyalty and submisson to the law which he has preferred in the course of these proceedings.

As to the first point, we are unable to find, either in his age or his antecedents, anything which stands in mitigation or explanation of his present attitude. His age is 27 years, and he is the son of a loyal and upright Government servant, now retired, who conferred upon him a liberal education. He has, therefore, had less excuse than many others for giving himself up to disloyalty and sedition. As regards the next point, it has been brought to our notice that the phamphelt in respect of which he was convicted—a pamphlet that purported to reproduce the seditious speeches of one Arabindo Ghosh—was not an isolated instance of seditious publication by the non-applicant. The matter contained in the pamphlet had been previously published in the *Desha Sewak* during non-applicant's control of that paper and while he was editor thereof, several articles, mostly editorial, appeared in the same journal from time to time, indicating non-applicant's entire concurrence with the views and sentiments published in the pamphlet. From a perusal of these articles we find that non-applicant's sedition took the form of implacable hatred towards the British rule and everything connected with it, indicating a desire and intention, not to correct, but to root out, the existing Government of India. We find passages in which British Indian Courts of Justice are held up to opprobrium and contempt. We are surprised to find a person professing to hold such opinions struggling to maintain his name on the rolls of a British Indian Court, and supplicating, from the Government he has

denounced, the favour of being allowed to practise as a pleader, and the privilege of enjoying forensic independence, under the ægis of its protection. Then we turn to the first public utterance of the non-applicant, following upon the sobering, if not always reforming, influence of legal punishment and we read words, and observe sentiments, that convey, beyond doubt, a stubborn adherence to his criminal tendencies, and an entire absence of any change of character or disposition in the direction of loyalty to the Crown. We find his conviction for sedition defianantly proclaimed to be an honourable distinction, and incarceration in jail for that offence recommended as a pleasant sojourn to be sought, or at least welcomed, by every true lover of this country. Finally, in this Court, with reasonable opportunity given to him of establishing a reformation of character which alone could make his retention on the rolls of this Court proper, the non-applicant has shown himself to be unable or unwilling to lay before us anything better than a superfluous acknowledgment of the correctness of his conviction, an empty promise of loyalty, and an avowal of a wise intention to avoid breaking the law in future. We place no value whatever on this application, regarded either as expiatory of the past, or as an emblem of hope for the future. No word of regret for his scandalous libels on the Government and its magistracy has been said or written by the non-applicant: nor has he attempted to adduce any evidence of a change in the feelings, habits, companions, or literature, which helped him to jail, or of any voluntary denunciation of the seditious opinions which he sowed broadcast among his fellow subjects before the arm of the law stopped him. Had we been convinced of sincere repentance, and of the initiation of a permanent reform of character and disposition—of some revival of gratitude and affectionate regard for the Government to which he and his class owe all their advantages of affluence, peace, and education—we might have been disposed to confine our order to one of suspension for a substantial term. But, as matters stand, we are driven to the conclusion that non-applicant remains substantially of the disposition which led him to violate section 124A of the Indian Penal Code, and although we do not finally and perpetually close against him, as a pleader, the doors of this Court and the Courts subordinate to it, we must do so until he can prove by his words, deeds, and conduct, extending over a period long enough to leave no doubt of his sincerity, a total and permanent abandonment by him of tendencies constituting a defect of character which, at present, renders him unfit for retention on the rolls of an honourable profession.

For these reasons we find and declare that the non-applicant Achyut Balwant Kolhatkar is, by defect of character, at present unfit to be a pleader of this Court; and we hereby dismiss him and order that his name be struck off the rolls.

(s. c. 6 N. L. R. 140.)

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 61 OF 1909.

July 22, 1909.

Present:—Mr. Skinner, A. J. C.,

DHIRAJ SINGH—APPELLANT.

versus

DINA NATH—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 52—"Contentious", meaning of—Application of doctrine of lis pendens *after decree* nisi *in a mortgage suit—Lease—Ordinary management—Tenant.*

The word "contentious" in section 52 of the Transfer of Property Act is used in distinction to such non-contentious proceedings as unopposed applications for probate. Therefore, a suit to enforce a mortgage lien on immovable property is a contentious suit and does not cease to be so because the decree actually passed in it is the result of a compromise or is consented to by the defendant.

The rule of *lis pendens* applies to transfers after the decree *nisi* in a mortgage suit and before the institution of proceedings by the decree-holder to get the decree made absolute or for bringing the property to sale.

The language of section 52 is wide enough to include a lease, and there is no difference in principle between a lease for agricultural purposes and a lease for any other purpose.

Under the terms of section 52 the question of ordinary management does not arise, nor is a lease of waste land, with the option of either cultivating it or keeping it under grass, an ordinary and reasonable incident of *interim* beneficial enjoyment which would avoid the application of the section.

Obiter—In the Central Provinces even an ordinary tenant acquires an interest in his holding, which, so long as he pays his rent and has lineal heirs, is permanent.

Second appeal from the appellate decree against the decree of the District Judge, Saugor, dated the 24th November 1908,

reversing the decree of the Subordinate Judge, Saugor, dated the 30th June 1908.

Messrs. *M. B. Dadabhoy* and *G. L. Subhedar*, for the Appellant.

Mr. *J. Mittra*, for the Respondent.

Judgment.—The plaintiff sues for cancellation of a lease by his predecessor-in-title to the defendant Dhirajsingh and for possession of the land held by the latter under it. The first Court dismissed the suit, but the lower appellate Court, holding the lease void as against the plaintiff, has given him a decree for possession and costs, against which the defendant has come up in second appeal.

One Hiralal was *malguzar* of *mauza* Chitai in the Saugor district, and had mortgaged it to one Lachmandas, who in 1902 sued on his mortgage: and on the 3rd October 1902 a conditional sale-decree was passed providing for payment of Rs. 4,336-12-0 by instalments, but that on default in payment of any of the prescribed instalments the mortgaged property should (after a delay of six months) be sold in satisfaction of the whole amount remaining due. Default was made, and on the 26th October 1905, the Court ordered that the decree be made absolute for sale, though a formal 'decree absolute' was not signed until the 19th June 1906. Meanwhile on the 9th December 1905, the lease in question had been given by Hiralal to the defendant-appellant. It is a lease in perpetuity with occupancy right for a premium of Rs. 200 and a rent of Rs. 30 of some 350 acres of waste land, of which the lessee had already been recorded as ordinary tenant at a rental of Rs. 25. Evidence was adduced in the first Court to the effect that the mortgagee had authorized Hiralal to give leases to raise money for payment of the mortgage debt, though the plea had not been specifically raised. But it was admitted before me that the Rs. 200 premium were not in fact paid to the mortgagee by Hiralal, and an offer was made to pay the amount over again to the plaintiff, if he would in consideration thereof withdraw his objection to the lease.

The decree of the lower appellate Court was attacked before me on five grounds, with which I will deal seriatim. First it was urged that, as the decree in the mortgage suit was a compromise decree, the '*litis contestatio*' thereupon ceased, and the rule of *lis pendens* no longer applied. The cases cited in support of this proposition are *Vythinadayyan* v. *Subramanya* (1); *Kishory Mohun Roy* v. *Mahomed Mujaffar Hossein* (2) and *Jogendra Chunder Ghose* v. *Fulkumari Dassi* (3). But of these only the first directly support the proposition. The second case, though the judgment contains remarks favourable to it, was decided on other grounds, whilst the third is distinctly against it (see particularly the remarks of Banerjee, J., at page 84). And the judgment of the Divisional Bench in *Vythinadayyan* v. *Subramanaya* (1) has been directly overruled by the decision of a Full Bench of the same High Court in *Annamalai Chettiar* v. *Malayandi Appaya Naik* (4). The law on the subject, English and Indian, is fully discussed in the learned judgments of White, C. J., and Subrahmania Ayyar, J., and I accept their conclusion that the word contentious in section 52 of the Transfer of Property Act is used in distinction to such non-contentious proceedings as unopposed applications for probate. And on this view a suit to enforce a mortgage lien on immovable property is clearly a contentious suit, and does not cease to be so because the decree actually passed in it is the result of a compromise, or is consented to by the defendant. As is pointed out in *Annamalai Chettiar* v. *Malayandi Appaya Naik* (4), the contrary view would allow a defendant, whilst ostensibly admitting the plaintiff's claim, to defeat it by a lease or conveyance behind his back—the very conduct the rule of *lis pendens* is intended to prevent.

There has been some difference of opinion as to whether the rule of *lis pendens* applies to conveyances made after decree in a mortgage suit, but before any action has been taken by the decree-holder to get it made absolute (see *Shivjiram Sahebram* v. *Waman Narayan Joshi* (5) and *Thakur Prasad* v. *Gaya Sahu* (6). But in this case the lease in suit was admittedly executed during the pendency of sale proceedings, and though there had been a previous oral lease in ordinary tenant right, no plea has been raised that sale pro-

(1) 12 M. 439.
(2) 18 C. 188.
(3) 27 C. 77.
(4) 29 M. 426; 1 M. L. T. 145; 16 M. L. J. 372.
(5) 22 B. 939.
(6) 20 A. 349.

ceedings were not pending when it was granted. And on the principles recognized in *Annamalai Chettiar* v. *Malayandi Appaya Naik* (4), it seems to me clear that the protection given to the plaintiff in a mortgage suit by section 52 of the Transfer of Property Act should be extended up to the final satisfaction of the conditional decree, since it might otherwise be rendered nugatory by the judgment-debtor's dealing with the mortgaged property during the 6 months grace necessarily allowed him by the conditional decree, during which the decree-holder cannot apply for a decree absolute. I, therefore, concur with the view taken by Burkitt, J., in *Thakur Prasad* v. *Gayi Sahu* (6), and though the decision in *Shivjiram Sahebram* v. *Waman Narayan Joshi* (5) leaves open the question of the applicability of the doctrine of *lis pendens* between the decree *nisi* and the institution of proceedings for bringing the property to sale, that question did not directly arise in the case, which was decided on the ground that sale proceedings having been instituted the doctrine of *lis pendens* applied.

The second point taken for the appellant was that the property now in question being a tenant right was not 'directly and specifically in question' in the mortgage suit, but I am unable to accept this contention. The whole of the 16 annas of the proprietary right in *mauza* Chitai was mortgaged, and was in question in the mortgage suit; and that, in my opinion, included all possible rights in the village, subject only to any special rights in *sir* land, which might arise under the provisions of statutes on a transfer of the proprietary right, and to any subordinate rights already existing when the suit was filed. I need not in this case consider the question of rights created in fraud of the mortgagee after the mortgage, but prior to his suing thereon.

The third and fifth points are connected and may be dealt with together. They are that there should have been an issue on the question whether the grant of the lease in question was an act of ordinary management, and that even if the grant of occupancy right is cancelled the appellant should be recognized as an ordinary tenant, and the plaintiff's claim to possession disallowed. In support of these contentions I was referred to the judgment of my learned brother Sir Bipin Bose in *Kesrichand* v. *Gumansingh* (Second Appeal No. 47 of 1909). But that was a case of a lease granted by the manager of a joint family, and the view taken by my learned brother that a lease for cultivation (carrying with it by operation of law the privileges of an ordinary tenant) was an act of ordinary and prudent management within the manager's powers but that the conferral of occupancy rights was not, is not, in my opinion, applicable to the present case, since under the terms of section 52 of the Transfer of Property Act, the question of ordinary management does not arise. The parties had the option of obtaining the sanction of the Court to the leases in question; and as they omitted to do so, they were incompetent to deal with the property so as to affect the rights of any other party to the suit under any decree or order, which might be made therein. And in *Narain Patel* v. *Abdul Majid Khan* (7) a case very similar to the present one Ismay, J. C., held that the language of section 52 was clearly wide enough to include a lease, and that there is no difference in principle between a lease for agricultural purposes and a lease for any other purpose. In *Sri-Sri Sri Gajapati* v. *Sri Gajapati* (8) a party in possession subject to the rule of *lis pendens* was held not entitled to grant a perpetual lease, and though incidentally an opinion was expressed that he might 'grant yearly leases', and do 'such other acts as are either the necessary or the ordinary and reasonable incidents of an *interim* beneficial enjoyment' I am certainly not prepared to differ in this case on the strength of this *dictum* from the ruling of Ismay, J. C. In these provinces even an ordinary tenant acquires an interest in his holding, which, so long as he pays his rent and has lineal heirs, is permanent. And though a fresh lease to avoid loss of rent of a holding that had been abandoned by a tenant might possibly be regarded as an 'ordinary and reasonable incident of *interim* beneficial enjoyment', I am clearly of opinion that a lease of 350 acres of waste land with the option of either cultivating it or keeping it under grass is not such an incident nor necessary, but an act materially curtailing the lessor's rights in

(7) 15 C. P. L. R. 6.
(8) 7 M. 96.

the village, which the mortgagee was entitled to bring to sale intact.

The fourth point raised for the appellant was that the lower appellate Court had been mistaken in thinking that no plea of estoppel has been raised in the first Court, and that this had coloured its view of the evidence on the question of estoppel. This plea is so far correct that in paragraph 5 (*d*) of the appellant's printed statement in the first Court the word estoppel is used, but there is no allegation of the fact afterwards attempted to be proved, *viz.*, that the mortgagee had agreed to the mortgagor's raising money by leases to pay off his mortgage. What seems to have been relied on is the plaintiff's having had the means of informing himself of the appellant's lease. How this could work an estoppel I do not understand. And it is admitted before me that the premium paid for the lease did not in fact reach the mortgagee, nor does the appellant seem to have taken any steps to see that it did so. Had the sanction of the Court been applied for, as it should have been, this point would probably have received the Court's attention. But as matters stand, I can see no ground for holding the mortgagee and his representatives estopped from attacking the validity of the appellant's lease, or for questioning in second appeal the learned District Judge's finding that the alleged consent of the mortgagee to the mortgagor's raising money by giving leases has not been proved.

The appeal fails and is dismissed with costs.

Appeal dismissed.

(s. c. 1 M. W. N. 513.)

MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 291 OF 1908.

July 26, 1910.

Present:—Mr. Justice Wallis.

HAJI ISMAIL SAIT—PLAINTIFF

versus

JAMES SHORT AND OTHERS—DEFENDANTS.

Principal and agent—Bought and sold notes—Offer to seller by telegram—Varied in course of transmission—Seller not bound—Broker for both sides—Contract Act (IX of 1872), ss. 230, 235—Liability of broker.

The plaintiff sued for delivery of certain shares in the My sore Manganese Company which he alleged he had purchased from the 1st defendant through the 2nd and 3rd defendants stock-brokers. The 2nd and 3rd defendants sent a cable to the 1st defendant who was then in England communicating the offer of the plaintiff but in the course of transmission the word profit seems to have got added. The first defendant accepted the offer as received by him through Reuter: *Held*, that so far as the 1st defendant was concerned, it was an acceptance of the offer he actually received in the cable and he was not liable to the plaintiff.

Hesekal v. *Pope*, (1870) L. R. 6 Ex. 7, followed.

It is a common thing for a broker to act for both sides and if he does not exceed the limits of his authority, he incurs no personal liability.

The liability of the agent arises from an implied undertaking or promise made by him that the authority, which he professes to have, does in point of fact exist and this implied undertaking cannot be displaced except by words which amount to a distinct intimation that the agreement made was in certain circumstances not to be effectual. To render the agent liable under section 235, Indian Contract Act, it is only necessary that the representation should have been untrue in fact and it is not necessary to show that the agent was in any way to blame.

Collen v. *Wright*, 8 E. & B. 647; 27 L. J. Q. B. 215; 4 Jur. (N. S.) 357; 6 W. R. 123; *Yonge* v. *Toynbee*, (1910) 1 K. B. 215; *Smout* v. *Ilbery*, (1842) 10 M. and W. 1; 12 L. J. Ex. 257; *Hughes* v. *Graeme*, 33 L. J. Q. B. 355; 12 W. R. 857; *Suart* v. *Haigh*, 9 T. R. R. 483, referred to.

Messrs. *David* and *Brightwell*, for the Plaintiff.

Messrs. *Short* and *Bewes*, for the 1st Defendant.

Messrs. *Branson* and *Branson*, for the 2nd and 3rd Defendants.

Judgment.—In this suit the plaintiff sued in respect of the non-delivery of certain shares in the Mysore Manganese Company which he alleges he purchased from the 1st defendant, Mr. James Short, through the 2nd and 3rd defendants, Messrs. Scott and Tod, who carry on business as stock and share brokers in this city. The 1st defendant denies that he ever contracted to sell at the price alleged and the 2nd and 3rd defendants deny that they have incurred any personal liability. It is admitted that the 2nd and 3rd defendants in the ordinary course of their business passed bought and sold notes (Exhibits L and M) to the plaintiff and 1st defendant respectively at the price alleged by the plaintiff, but it is alleged by the 1st defendant that he had not authorized the 2nd and 3rd defendants to sell at this price. The evidence is that the 2nd and 3rd defendants having been authorized by the plaintiff to buy at 20, cabled through Renter Agency to the 1st defendant who was then in England, that they could sell for him at Rs. 20 (Exhibit B), that Reuter varied the message in the course of transmission by inserting the word profit before twenty (Exhibit H) and that the 1st defendant cabled back "sell" (Exhibit G) which

the 2nd and 3rd defendants read as an acceptance of the offer actually made by them, whereas it was in fact an acceptance of the offer as altered by Reuter. The 1st defendant having subsequently refused to carry out the contract to sell at 20, the plaintiff brought the present suit. Now as regards the 1st defendant, his acceptance was an acceptance of the offer he actually received in the cable as altered by Reuter namely of a sale at 20 profit and I cannot see on what ground he can be held liable to the plaintiff in this suit. If authority be wanted *Hesekal* v. *Pope* (1) shows that in such a case there was no contract between the plaintiff and the 1st defendant and as against the 1st defendant, the suit must be dismissed with costs.

As regards the 2nd and 3rd defendants, it is clearly proved to my mind both from the correspondence and from the terms of the bought and sold notes in which the contract was embodied that they were brokers acting for both sides as appears to be usual in Madras, that on receipt of the 1st defendant's reply to their cable it is believed they had authority to purchase for the plaintiff and to sell for the 1st defendant the shares in question and proceeded to make out bought and sold notes in which each side was charged with commission. There is, in my opinion, no foundation for the contention that they were acting exclusively as agents for the 1st defendants. Nor is there, in my opinion, any foundation for the plaintiff's next contention that in this case the 2nd and 3rd defendants are liable under section 230, Indian Contract Act, because they did not disclose the name of their principal. The bought notes which embodies the formal contract do disclose the name of the 1st defendant as the principal. If this contention were well-founded, it would follow that the 2nd and 3rd defendants might be made liable even if the 1st defendant admitted having authorised the contract into which they entered on his behalf but was unable to perform it. It is quite a common thing for a broker to act for both sides in the sale of produce as appears from Benjamin on Sales and if he does not exceed the limits of his authority, he incurs no personal liability.

The real question in the case is whether according to the third contention urged for the plaintiff, the 2nd and 3rd defendants are not liable to the plaintiff under section 235, Indian Contract Act, which embodies the rule in *Collen* v. *Wright* (2) as having untruly represented themselves to be the authorised agents of the 1st defendant to enter into the contract in question. To render the agent liable under the section, it is only necessary that the representation should have been untrue in fact and it is not necessary to show that the agent was in any way to blame. That the terms of the section are in accordance with the English rule is shown by the recent case of *Yonge* v. *Toynbee* (3) overruling *Smout* v. *Ilbery* (4) in so far as that case lays down a contrary rule. Nor does it make any difference that the agent as here was the agent of both parties. That point was expressly raised and decided by the Court of Queen's Bench in *Hughes* v. *Græme* (5), to which Mr. Justice, afterwards Lord, Blackburn was a party. As explained in the most recent case already referred to the liability of the agent arises from an implied undertaking or promise made by him that the authority which he professes to have, does in point of fact exist. That implied undertaking cannot be displaced except by words which amount to a distinct intimation that the agreement made was meant in certain circumstances not to be effectual. See the decision of the House of Lords in *Suart* v. *Haigh* (6). There is no evidence of any such intimation here. There only remains the question of damages. Section 235 imposes on the agent the duty of making compensation for any loss or damage which the other party has incurred by so dealing with him. The contract was for delivery early in November at 50 and this is admitted by the 2nd and 3rd defendants (Exhibit Z). In my opinion the difference between the contract price 20 and the price at the date stipulated for delivery 50 or 30 per share is the loss incurred by the plaintiff which makes Rs. 6,000 for 200 shares. This is the amount claimed in the plaint. At the trial it was further contended that the plaintiff was entitled to be re-paid by the 2nd and 3rd defendants the costs which he is directed to

(1) (1870) L. R. 6 Ex. 7.

(2) 8 E. & B. 647; 27 L. J. Q. B. 215; 4 Jur. (N. S.) 457; 6 W. R. 123.

(3) (1910) 1 K. B. 215; 79 L. J. K. B. 208.

(4) (1842) 10 M. and W. 1; 12 L. J. Ex. 357.

(5) (1864) 33 L. J. Q. B. 355; 12 W. R. 857.

(6) 9 T. R. R. 483.

pay to the 1st defendant, but in my judgment the plaintiff had no ground for suing the 1st defendant as he knew when he filed the plaint that the 1st defendant had not in fact authorized the sale at 20. What gave rise to this suit as already stated was the gross blunder of Reuter in altering the terms of the offer cabled by the 2nd and 3rd defendants to the 1st defendant. For this the 2nd and 3rd defendants are in no way to blame, but the rule of law as to their liability as agents in such circumstances appears to me to be plain and I am bound to give effect to it. Judgment for the plaintiff against 2nd and 3rd defendants for Rs. 6,000 and costs. Suit against 1st defendant is dismissed with costs.

Suit against 1st defendant dismissed.
Suit decreed against 2nd and 3rd defendants.

(s. c. 1 M. W. N. 517.)

MADRAS HIGH COURT.

CRIMINAL REVISION CASE NO. 441 OF 1910.

REFERRED CASE NO. 56 OF 1910.

August 30, 1910.

Present:—Mr. Justice Sankaran Nair.

SANGILI NAICKEN—ACCUSED

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 438—Revision—Interference with acquittal on reference by the District Magistrate.

As the Criminal Procedure Code provides for an appeal against acquittal by Government, the High Court will not interfere under section 438.

The High Court has no power in Revision to convert an acquittal into a conviction.

Case referred for the orders of the High Court, under section 438 of the Criminal Procedure Code, by the District Magistrate of Coimbatore, in his letter, dated 5th August 1910, No. D. Dis. 777 M.

Order.—As there is an appeal against an acquittal under section 245 of the Criminal Procedure Code, the proper course would be for the Government to appeal. The High Court have no power in Revision to convert an acquittal into a conviction.

(s. c. 1 M. W. N. 532.)

MADRAS HIGH COURT.

CIVIL SUIT NO. 295 OF 1908.

August 24, 1910.

Present:—Mr. Justice Wallis.

G. VENKATAKRISHNA CHETTI—PLAINTIFF

versus

C. LAKSHMI NARASIMHAM AND OTHERS—DEFENDANTS.

Insolvent Act (11 and 12 Vic. Chapter 21), s. 24—Fraudulent preference.

The plaintiffs sued on a mortgage by a deposit of title-deeds to secure the amount of a promissory-note alleged to have been executed on the 10th of August by defendants Nos. 1 to 4, who absconded on the 12th of August and against whom a petition for adjudication was presented on the 13th of August. The 5th defendant was the Official Assignee, who put the plaintiff to the proof of his allegations and pleaded that the mortgage was fraudulent within the meaning of section 24 of the Insolvent Act, and hence void as against creditors. Two issues were framed:—(1) Was the suit mortgage fraudulent within the meaning of section 24 of the Insolvent Act? (2) Were the title-deeds deposited with the plaintiffs before the date of the insolvency? *Held*, that the onus of showing consideration for the mortgage and of proving that the mortgage was created before the date of insolvency was on the plaintiff; but that it lay on the Official Assignee to show that the mortgage was void under the Act as a voluntary settlement, though very little evidence was required to shift the onus.

The plaintiffs attempted to prove that the mortgage by deposit of title-deeds was to secure certain old advances and certain further advances made on the day of deposit: *Held*, on the evidence, that the further advances were not proved in face of the frequency with which insolvent debtors attempt on the eve of insolvency to put their property, movable and immovable, beyond the reach of the general body of creditors and of the assistance which they sometimes receive from particular creditors in consideration of an undue preference for themselves or even out of simple friendship: *Held*, further, that the plaintiff's case was suspicious, that for the past indebtedness the deposit was a voluntary conveyance made with a view of giving undue preference to the plaintiffs; that it was made on the eve and in contemplation of the insolvency and there was no evidence of legitimate pressure or other circumstances which could take it out of that character and, therefore, that the transaction came within the scope of section 24 of the Insolvent Act.

Section 24 only requires that the dominant view must be one of preference.

Mr. *C. P. Ramaswami Aiyar*, for the Plaintiff.

Messrs. *Short* and *Bewes*, for the Respondents.

Judgment.—In this case, the plaintiffs sue on a mortgage by deposit of title-deeds to secure the amount of a promissory-note alleged to have been executed on the

10th of August by defendants Nos. 1 to 4 who absconded on the 12th August and against whom a petition for adjudication was presented on the 13th.

Defendants Nos. 1 to 4 are *ex parte* and the 5th defendant, the Official Assignee, puts the plaintiff to the proof of all the allegations in the plaint and pleads that the mortgage was fraudulent within the meaning of section 24 of the Insolvency Act and is void against the creditors. The issues settled were "was the suit mortgage fraudulent within the meaning of section 24 of the Insolvency Act? And were the title-deeds deposited with the plaintiffs before the date of insolvency." At the trial I ruled that the onus of showing consideration for the mortgage was on the plaintiffs, and also that the mortgage was created before the date of insolvency but that assuming these things in favour of the plaintiffs, it lay in the first instance on the contesting defendant to show that the mortgage was void under the Act as a voluntary settlement though no doubt as stated in Williams on Bankruptcy at page 246 not very much would be required to turn the scale. Mr. Ramasawmy for the plaintiffs then elected to adduce his evidence on the whole case in the first instance. The contesting defendant also tendered evidence and I have now to state the conclusion at which I have arrived. The insolvents, whose failure was one of the most extensive of recent years, were in a large way of business, and appear to have enjoyed good credit. One of the European Banks in Madras is returned as a creditor for Rs. 15,000 and other Banks are also shown to have had dealings with them for which they may or may not have security. The schedule which has been prepared in the absence of the Insolvents shows large liabilities of the date of insolvency and no stock in trade but considerable outstandings. The schedule also shows items of immovable property of which the first is stated in the schedule to be under mortgage to one Penegonda Venkiah and the 2nd to Sanka Ramasawmy Chetty. There is, I think, no evidence in the case about the first but the mortgage on the 2nd has been recognised and paid off by the Official Assignee. The remaining seven items form the subject of the present suit, and the "only other item of property consists of jewels seized under warrant as to which a suit is pending" and estimated in the schedule as worth Rs. 40,000, but as considerably less by one of the witnesses who denies that all the jewels seized belonged to the insolvents. Early in August the insolvents were in difficulties. P. W. No. 10 proves that a *hundi* of theirs for Rs. 2,500 drawn on Bombay in favour of his firm in Madras was dishonoured in Bombay, and news of the dishonour received in Madras by telegram on the 4th or 5th. The insolvents asked for time until the return of the *hundi* and paid Rs. 1,000 towards it on Saturday the 8th and the balance of Rs. 1,500 on Monday the 10th. It is also shown that on the 8th, the insolvents transferred the valuable jewels already mentioned which have been seized under a warrant and are the subject of C. S. No. 305 of 1908, to the minor son of Sanka Ramaswamy a relation of theirs who had died about two months before and in whose business they acted as agent. According to the Official Assignee, this was a fraudulent transfer. According to the written statement Exhibit V, the minor's guardian *ad litem* coming to know that the defendants were in bad circumstances, he brought pressure to bear upon them and obtained from them jewels as security. He was called as D. W. No. 2 and confirmed the above statements on oath. It further appears by his evidence and his written statement that he only admits jewels worth about Rs. 12,000 to have been the property of the insolvents and the subject of the transfer of the 8th of August.

Prima facie a transfer to secure part debts on the eve of insolvency is void as a voluntary preference and the fact that the defendants Nos. 1 to 4 were the near relations of the minor and managing his business and that he already held security will not make it any easier to prove that the alleged transfer was made under such pressure as to deprive it of the character of a voluntary conveyance. But however this may be, the fact of the transfer is undoubtedly evidence of the embarrassed circumstances and I may say also of the impending insolvency of the firm of defendants Nos. 1 to 4 on the 8th of August and the following day when the transactions now in dispute must have taken place. According to the plaintiffs, the arrangements for a further advance by the plaintiffs to the defendant's firm and for the deposit of title deeds by the firm with the plaintiffs as security both for this advance and past in-

debtedness were effected on Sunday and Monday the 9th and 10th August. Business was only carried for one day more, Tuesday the 11th. On Wednesday the 12th the premises were closed in consequence of a holiday, and on the morning of Thursday the 13th, the premises were not opened, the members of the firm were found to have absconded, and a creditor's petition was presented for adjudication on which an order was subsequently made. So far I have been dealing with the uncontested facts in the case. There is also one further fact which appears to me to be beyond question. According to the plaintiffs' books, the indebtedness of the defendants' firm to them in their three branches on the 5th of August amounted to just over Rs. 6,000. Some of these had been recently incurred, but I see no reason for questioning the figures. Now the amount for which the defendants are alleged to have mortgaged apparently the whole or nearly the whole of their unincumbered immovable property to the plaintiffs on the 10th August the last day, but one on which they transacted business was between twenty and twenty-one thousand rupees or a fresh indebtedness of between 14 and 15,000 rupees. In face of the frequency with which, as experience unfortunately shows, insolvent debtors attempt on the eve of insolvency to put their property movable and immovable beyond the reach of the general body of creditors and of the assistance which they sometimes receive from particular creditors in consideration of an undue preference for themselves or even out of simple friendship, the mere statement of the above facts and figures is sufficient, in my opinion, to throw a cloud of suspicion on the plaintiffs' case and to make it incumbent on them to show by very clear and satisfactory evidence that the full consideration on which they rely was really given and is not a mere blind to deceive the Court and conceal the real nature of the transaction. Can it be said that the plaintiffs' evidence satisfies this test as to the manner in which the fresh consideration is made up or the transfer came about? The plaintiffs who are admittedly old friends of the insolvent debtors had regular dealings with them and carry on business in the same street a few doors off and have three branches of business none of which is money lending though they say they have at times made advances. The whole of the pre-existing indebtedness of Rs. 6,000 of the insolvents to them is for goods supplied; they had not previously made any advances at all to the insolvents in 1908 or 1907, and were not able to show they had accommodated them with more than Rs. 3,000 at a time receiving similar accommodation themselves from the defendants

This being the case the large advance made on the 10th August certainly requires explanation. The story of the 1st plaintiff P. W., the only plaintiff called, is that on August 8th his firm advanced Rs. 3,000 to the defendants as agents for the minor sons of their relative Sanka Ramasawmy lately deceased whose business they were managing in pursuance of a letter of demand of that date Exhibit F signed by the 3rd defendant and brought by their *gumashta* Canniah, that on the 9th Canniah came again and asked for an advance of Rs. 15,000 to the defendants themselves. The plaintiffs said: "We have been asking for our money for four or five days and can't give that. Canniah said they wanted it badly and would re-pay in a month. They had already utilized for their own purposes the Rs. 3,000 they borrowed on the previous day for the minor's and now only wanted Rs. 12,0 0. The 1st plaintiff said: 'If you give security, we will make the advance, we have not till now advanced such a large sum'." The only corroboration of the 1st plaintiff as to this instance is the *gumashta* Canniah on whose evidence I sha l have to comment later. Pausing here I may say that this part of the plaintiffs' story lacks probability. It is not their case that the transaction arose out of a demand or security made by them in the first instance and I do not think the evidence establishes that the defendants had been subjected to any pressure by the plaintiffs for re-payment of their indebtedness which was recent. If the defendants really wanted to raise money for carrying on their business why should they not have taken their jewels and their unincumbered properties to some one whose business it was to lend money and to whom they were not already indebted and from whom a much larger advance could have been obtained. Further it was odd to accompany a demand for Rs. 15,000 with a statement that you had already misappropriated Rs. 3,000 of it. The 1st plaintiff next

says the debtors sent for him on the same day and he went to their house with his *gumashta* Ramaiah and found all four defendants there. The 1st plaintiff said that they owed already near Rs. 9,000 (this includes two debts amounting to Rs. 3,000 not due to the plaintiffs but to two minors related to them whose affairs 1st plaintiff says his firm were managing) and that he would give a further advance of Rs. 9,000 if they give security for Rs. 20,000. The defendants, he says, agreed and signed Exhibit H which he calls a list; but which is really a letter from the defendants to the plaintiffs offering to execute a promissory-note for Rs. 21,000 in respect of about Rs. 9,000 already owing and a further advance of Rs. 12,000 and to deposit title-deeds of the properties mentioned in the letter which are the suit properties and inquiring if the plaintiffs would grant the loans. This letter, it is important to notice, 1st plaintiff states, was written by his *gumashta* Ramaiah who accompanied him in the defendants' house and was then and there signed by defendadts Nos. 1 and 3 for themselves and on behalf of their two brothers. I am not prepared to accept his evidence on this point. The *gumashta* Ramaiah's evidence can hardly be said to corroborate him as this witness at first said that Exhibit H was written in the 1st plaintiff's house though he afterwards corrected himself. Being a letter from the defendants and signed by two defendants and written according to the evidence for the plaintiffs on the 9th of August when it is not suggested that the defendants went to the plaintiff's house it ought, no doubt, in order to fit in with the plaintiff's case, to have been written in the defendant's house: but there are circumstances which suggest that it was not.

It is odd enough that a letter of the defendants asking the plaintiff for an advance should have been written in their own house by the plaintiff's *gumashta*. It is also odd that it is not on the paper of the defendants; for a large firm like the defendants always have paper with a printed heading and address and that these defendants had such paper appears from Exhibit V which is another letter of theirs. What, however, is not only odd but, in my opinion, most significant is that the other most important document J. which, according to the plaintiffs, was written the next day the 10th also by their *gumashta* Ramiah in the plaintiff's house also written in exactly the same plain ruled paper with the same water mark. According to the plaintiff's case, the arrangement between the plaintiffs and the defendants was entered into at the defendants' house on Sunday the 9th and was embodied in H and pursuant to such arrangement the suit title-deeds were sent to the plaintiffs the same night. If for the reasons given we cannot, as I think, act on the plaintiff's evidence that H was written at the defendant's house on the 9th, we cannot accept the evidence that the mortgage and the loan were negotiated on that occasion and no other is suggested. On the other hand, the fact that Exhibit H and J, which, as will be seen, are the cardinal documents in the case, are both written on the same papers and are both admittedly in the handwriting of the plaintiff's *gumashta*, Ramiah, goes some way to support the suggestion which is put forward by the Official Assignee though he is naturally not in a position to give affirmative evidence that Exhibits H., J. and K. do not represent a real transaction but were concocted at the same time and place probably with the assistance of some one not unacquainted with bankruptcy law as part of a scheme to defraud the general body of creditors. To return to the evidence of two former *gumashtas* of the defendants' firm, P. W. No. 6 and P. W. No. 8 speak to taking the title-deeds from the defendants to the plaintiffs on the evening of the 9th but produce no receipt and if other parts of the plaintiff's evidence are unsatisfactory, I am not disposed to place reliance on the evidence of people in the position of these witnesses. Here I may observe further that the witness Canniah, who corroborates the 1st plaintiff, generally gave his evidence-in-chief in such a manner as to induce me to note at the time that he appeared to be repeating a story learnt by heart. Coming now to the 10th August, according to P. W. No. 1, defendant No. 1 and defendant No. 3 executed in the plaintiff's house the pro-note Exhibit J for Rs. 20,962-1-6. The consideration shown in the body of the note is about Rs. 6,000 previous indebtedness Rs. 3,000 said to be due under Sanka Ramasawmi Chetty's son's account, that is, Rs. 3,000 the defendants had borrowed from him on the 8th and used themselves, two promissory-notes by the

G. N. Das
Advocate High Court
Jammu & Kashmir
Srinagar.

debtors in favour of the two minors whose affairs the plaintiffs say they were managing, on one of which Rs. 1,700 and on the other Rs. 1,200 were alleged to be due. These promissory-notes are stated in J. to have been transferred to the plaintiffs but were not in fact transferred to them by the guardians of the minors until some days after the insolvency. The inclusion of these debts suggests to my mind that the plaintiff knew of the impending insolvency and the fact that the promissory-notes had not been transferred at the date of J as therein stated shows how the transaction was hurried through. The promissory-note also acknowledges the receipt on the day itself of Rs. 6,500 and the payment of Rs. 2,500 on account of one Dora Mallikarjunudu making Rs. 20,962 in all. As to the payment of Rs. 6,500 to defendants Nos. 1 and 3 and of Rs. 2,500 to Mallikarjunudu, we have the evidence of the 1st plaintiff P. W. No. 1 and P. W. No. 3 one Ramaseshiah who says he paid Rs. 3,000 to the plaintiffs and saw them include it in a payment on the 10th to some other persons who he was told were Canthem's people. He does not show how Rs. 3,000 was due by him but says it may have been for goods supplied and to be supplied. I attach no weight to his evidence. Then we have the evidence of S. Paupiah P. W. No. 4 who describes himself as a merchant living opposite to Canthem's and who attested J. and K. (Mallikarjunudu's receipt) and says he the Rs. 6,500 and Rs. 2,500 paid. In cross-examination he says: "Kanthams were indebted to him; but he had not proved his debt." He would not say if he was insolvent or not, or if he owed money to the plaintiffs. I am not prepared to act on his evidence. If it be asked what motive a witness like this could have for giving false evidence, I can only say that assisting the insolvents to save something from the wreck of the fortunes at the expense of the general body of creditors, might not appear so reprehensible to friends and neighbours such as this witness and the plaintiffs as it must to the Court; and that where there is a motive for swearing falsely, the obligation of their oath sits very lightly on witness. The only other witnesses to the payment are *gumashtas* of the plaintiffs and the defendants whose evidence does not appear to me to be entitled to any weight. There was one person who could, if so minded, have thrown a flood of light on the whole transaction and whom the plaintiffs did not venture to put into the box, although 1st plaintiff stated he was in Court and coming as a witness. I mean Mallikarjunudu, the executant of K and the alleged recipient of Rs. 2,500. He is undoubtedly a near relation of the defendants Nos. 1 to 4,—the witness would not tell the exact relationship—and a partner in their cotton press business. According to the schedule compiled on the accounts left by the defendants, he was at this time indebted to the defendants in the sum of Rs. 58. No reason is given or suggested for thinking that Rs. 2,500 could honestly have been paid to him on this occasion. I do not accept the evidence that any payment was made to him and think it much more probable that he signed the receipt K to deceive the Court and assist the defendants in making away with their assets. The plaintiffs also rely on his accounts and those of the defendants, but I do not think they carry the case any further. There is no evidence nor does any presumption arise that the plaintiffs' accounts of the 10th were written up on the day itself on the 11th, and they certainly would not have been written upon the 12th which was a holiday. Even if the whole transaction was a sham, I should still expect it to be borne out by the plaintiff's accounts. As for the defendants, they had according to the plaintiffs' own evidence ceased to keep accounts in regular books before this. They left only rough books of loose sheets stitched together from which Exhibit N has been prepared in the Official Assignee's office. It would, therefore, have been perfectly easy to falsify these accounts in support of their transaction. I am, therefore, unable to accept Exhibit N as proof that Rs. 6,000 which is entered there as received from the plaintiffs on the 10th was paid away by the defendants in the ordinary course of business before they closed. Even assuming to be genuine, it is not easy to see what these entries of credits and debits prove and the importance attached to it by the plaintiffs' advisers may be judged by the fact that they have failed to have it translated before the trial. That the defendants, who were clearly contemplating insolvency on the 10th, paid away Rs. 8,500 as suggested by the plaintiffs is to me incredible The only independent evidence of any payment by the defendants in these days is of

Rs. 1,000 on the 8th and of Rs. 1,500 on the 10th on the dishonoured *hundi* already mentioned. In my opinion the plaintiffs have failed to prove by satisfactory evidence that they made any further advances to the defendants Nos. 1 to 4. They are not, therefore, entitled to retain the suit title-deeds as security for such advances. As to previous indebtedness, I think that no further advances being proved, the necessary inference which arises on the other facts of the case is that in receipt of the past indebtedness, the deposit was a voluntary conveyance made with a view of giving undue preference to these creditors. It was made on the eve and, in my opinion, in contemplation of the insolvency and there is no evidence of legitimate pressure or of other circumstances which could take it out of that character. It was argued on some of the old cases before the Bankruptcy Act of 1869 that the intention to prefer must be for the sole motive that actuated the debtor to bring the case within section 24 of the Indian Act which corresponded to the English decisions before the statutory provision as to undue preference introduced in the Act of 1869. The decision of the House of Lords in *Butcher* v *Stead* (1) and other cases show that in this respect the Act of 1869 made no difference and I think that the later decisions in England, which show that it is enough if the dominant view be to prefer, are applicable to cases arising under section 24 of the Act of 1848.

In this case, however, the further advances not being proved, there is no satisfactory evidence of any other motive unless it be that of obtaining in consideration of such preference, the assistance of the plaintiffs in depriving the creditors of the benefit of the residue of the security, that is to say of perpetuating a fraud on the Insolvency Law. While I consider that the finding that the further advances are not proved is sufficient to enable me to dispose of the case. I have no hesitation in going further and holding on a full consideration of the evidence and all the facts and circumstances of the case which as pointed out in Halsbury's Laws of England, Vol. 2 at page 287 are what the Court has to look to. That the transaction evidenced by the Exhibits H, J and K was a pretence and a sham devised in contemplation of the insolvency for the purpose of defrauding the general body of creditors. In the language used by Lord Justice Bowen in a much less flagrant case, *Ex-parte Hill, In re Bird* (2), an elaborate farce was devised to conceal the real truth, but the eyes of common sense can see through it ; cases such as, *In re McInnes, Ex-parte Bumstead* (3), *The Thomas*(4) in which a debtor in difficulties but hoping to struggle through, charged his assets to creditors in consideration of future advances have no bearing in the present case. Nor am I called on to discuss the ruling of Cave, J. *In re Arnot* (5), as I have found the further advances not proved or to refer to the many other cases cited before me on both sides. In my opinion, the suit fails and must be dismissed with costs—two counsels.

Suit dismissed.

(1) (1860) 7 H. L. 839; 11 L. J. Bk. 129; 33 L. T. 541; 21 W. R. 463.

(2) 23 Ch. D. 695 at p. 705.
(3) 8 T. L. R. 14; 6 Asp. M. C. 536.
(4) 63 L. T. 353.
(5) 6 Morr. 215.

(s. c. 1 M. W. N. 564.)

MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 40 OF 1907.

August 23, 1910.

Present:—Mr. Justice Munro and Mr. Justice Abdur Rahim.

PANDA VENKAMMA AND ANOTHER—DEFENDANTS—APPELLANTS

versus

PANDA PATTAYA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Alienation by a widow of her rights—Suit by reversioner—No cause of action.

Where a widow alienates her life-interest in the property, the reversioner has no cause of action as it in no way affects his rights.

Appeal against the decree of the District Court of Guntur, in Original Suit No. 3 of 1905.

Mr. *P. Nagabushnam*, for the Appellants.

Mr. *T. Prakasam*, for the Respondents.

Judgment.—It is contended that the plaintiff has no cause of action. The case in the plaint is that by Exhibit A, there was an alienation by the 1st defendant of the estate of her husband in favour of the 2nd defendant's husband Pichayya and that the alienation was invalid because it was made without any legal necessity. The prayer was that the alienation should be declared to be void except for the life of the 1st de-

fendant or till her marriage. Now if the alienation, if any, made by Exhibit A is such as to affect the plaintiffs' right as reversioner, the plaintiff has undoubtedly a cause of action to sue for the declaration sought. But from Exhibit A, it is clear that all that the 1st defendant relinquished in favour of Pichayya was whatever right she might possess in the family property and it cannot be denied that a widow may relinquish her own interest. See *Isri Dutt Koer* v. *Hansbutti Koerain* (1). The utmost, therefore, that the 1st defendant relinquished by Exhibit A was her life-interest and her relinquishment of that interest in no way affects the plaintiffs' rights as reversioner. The plaintiff has, therefore, no cause of action for a declaration that the alienation made by Exhibit A is void except for the life of the 1st defendant. On this ground we must reverse the decree of the District Judge and dismiss the suit with costs throughout.

Appeal dismissed.

(1) 10 C. 324 at p. 332; 13 C. L. R. 418; 10 I. A. 150.

(s. c. 1 M. W. N. 564.)

MADRAS HIGH COURT.

CIVIL SUIT No. 46 OF 1909.

August 26, 1910.

Present:—Mr. Justice Wallis.

GENTHEY SUBBIAH CHETTY—PLAINTIFF

versus

SONTHAFER ABDUL KARIM BAKER SAHIB—DEFENDANT.

Letters Patent (Madras), s. 12—*Leave to sue granted—Motion to revoke—Written statement.*

Where leave to sue was granted, as a major portion of the cause of action had arisen in Madras, a motion to revoke that leave should be made at once or the party should take an extension of time for filing his written statement on that ground. It is for the interest of the parties that the question whether leave is to be revoked or not should be decided at the outset before any costs are incurred.

Judgment.—As a major portion of the cause of action seems to me to have arisen in Madras, leave was given to file the suit here. A motion was put in to revoke that leave which came on before Mr. Justice Bakewell and it was directed by Mr. Justice Bakewell to be posted along with

the case. Personally in such a case I prefer that the party who seeks to revoke the leave should do so at once and should always be prepared to extend the time for filing his written statement on that ground because it is for the interest of the parties that the question whether leave is to be revoked or not should be decided at the outset before any costs are incurred. I see no reason whatever to revoke the leave to sue which was granted and dismiss the motion with costs.

Motion dismissed.

(s. c. 1 M. W. N. 566.)

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 553 OF 1909.

August 30, 1910.

Present:—Mr. Justice Sankaran Nair.

T. V. RAJARAM RAO—DEFENDANT—PETITIONER

versus

S. SUNDARAM AIYAR—PLAINTIFF—RESPONDENT.

Madras Estates Land Act (I of 1908), *s.* 3, *sub-s.* 2, *cl. (d) and s.* 8—*Jurisdiction of Civil Courts.*

The plaintiff was the receiver of the Tanjore Palace Estate which comprised a number of villages. These properties were taken possession of by the East India Company in the exercise of their Sovereign power and they were granted back in 1862 by the British Government to the *Ranees*. The land in question had been treated as a separate village. It was contended by the defendant that the land fell within the purview of clause (*d*) of section 3, sub-section 2 of the Madras Estates Land Act. It was conceded that the *Ranees* have been enjoying both the *varams*:

Held, that the land in question ceased to be part of the estate and fell within the exception to section 8 of the Act, and that the Civil Court had jurisdiction to try the suit in respect of the land.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the decree of the Subordinate Judge's Court of Tanjore, dated 3rd May 1909, in Small Cause Suit No. 1317 of 1908.

Mr. *T. R. Venkataramasastri*, for the Appellant.

Mr *S. Venkatachariar*, for the Respondent.

Judgment.—The defendant has taken a plea to the jurisdiction of the Civil Courts based on Act I of 1908, "Estates Land Act." There is no finding on that question.

The Subordinate Judge will return a finding on that question after taking evidence if tendered.

KOTTAPARAMBIL *v.* EMPEROR.

The finding will be returned within one week after the re-opening of the Subordinate Court. Seven days will be allowed for filing memorandum of objections.

[In compliance with the order contained in the above judgment, the Subordinate Judge of Tanjore submitted the following

FINDING.

The High Court has remanded this suit for a finding on the issue framed by it *viz.*, "Whether the jurisdiction of the Civil Courts to try the suit is barred by Act I of 1908, Estates Land Act."

2. After remand the defendant examined one witness and filed no documents. The plaintiff examined one witness and filed a number of documents.

3. Before proceeding to deal with the issue, I may state here that the objection to the jurisdiction taken rather vaguely and in general terms in the defendant's written statement was not at all brought to my notice by the defendant's pleader at the former trial. Much less was the point argued and pressed by him. Therefore, I did not state it as one of the points in controversy between the parties and give a finding on it.

4. The plaintiff is the Receiver of what is known as the Tanjore Palace Estate which comprises a number of villages, &c., These properties along with others had been taken possession of by the East India Company in the exercise of their sovereign power and trust for the British Government by an act of State in 1856 shortly after the death of Sivaji Maharaja Sahib. They were granted in 1862 by the British Government to the *Ranees*. The land in question is part of Vennar Ramasami Thottam which has been treated in the accounts as a separate village (See Exhibits R series, *Jamabandy* accounts from *Fasli* 1266, 1858 and also the evidence of the *Karnam*, defendant's 1st witness) and is one of the villages attached to the Palace Estate. The defendant's pleader contends that this land falls within the purview of clause (*d*) of sub-section 2 of section 3 of the Madras Estates Land Act. From Exhibit S series, it appears that the owners of the Palace Estate have been enjoying full rights in this village, and it is in fact conceded by the defendant's pleader that for a long time the *Ranees* have been enjoying both the *varams* in respect of the land in question. There is absolutely no evidence on defendant's side to show that the former owners were entitled only to *melvaram* in respect of this land and that the grant to the *Ranees* was only the right to collect the *melvaram*. Assuming for the sake of argument that it is so as the *Ranees* have been admittedly enjoying both the *varam* for a long time, it has to be presumed that they have acquired the *kudivaram* interest also. In that case, the land in question by virtue of exception to section 8 of the Act ceases to be part of the Estate. I hold that the land in question is not, or has ceased to be, part of "Estate" as defined in sub-section 2 of section 3 of the Estates Land Act, and that the jurisdiction of Civil Courts to try the suit is not barred by the said Act. I find the issue raised in the negative and against the defendant.]

This petition coming on for final hearing after return of the finding of the lower Court, the Court delievered the following

Judgment.—On the facts found, the Civil Court has jurisdiction.

I agree with the Judge that the amount remained with Arbuthnot at the petitioner's risk even after renewal. The petition is dismissed with costs.

Petition dismissed.

(s. c. 1 M. W. N. 567.)

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 473 OF 1910.

(REFERRED CASE No. 62 OF 1910).

September 15, 1910.

Present:—Mr. Justice Sankaran Nair.

KOTTAPARAMBIL KUNHAMMAD AND ANOTHER—ACCUSED

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 535—Notifying residence.

Where there is no previous conviction, the accused shall not be asked to notify his residence.

Case referred for the orders of the High Court, under section 438 of the Criminal Procedure Code, by the District Magistrate of Malabar in his letter, dated 24th August 1910, Ref. on C. No. 1327-M.-10.

The Public Prosecutor, Contra.

Order.—As there is no previous conviction, the order in so far as it directs

the 1st accused to notify his residence is set aside.

Order set aside.

(s. c. 1 M. W. N. 568.)

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 475 OF 1910.

(REFERRED CASE No. 64 OF 1910.)

September 15, 1910.

Present:—Mr. Justice Sankaran Nair.

S. K. Syed KHADI HUSSAIN—ACCUSED.

versus

EMPEROR—OPPOSITE PARTY.

Fugitive Offender's Act (44 *and* 45, *Vic. Chap.* 69) *s.* 13—*Warrant—Endorsement thereon—Extradition Act (XV of* 1903), *s.* 19 *cl.* (*c*)—*Jurisdiction of Magistrate—Discharge of sureties.*

Where a Magistrate failed to endorse a warrant after satisfying himself that it was properly issued under section 13 of the Fugitive Offenders Act, the arrest thereunder and the subsequent proceedings are not in accordance with law and, therefore, the amounts deposited by the sureties must be returned to them.

Section 19, clause (*c*) of the Extradition Act, empowers only a first class Magistrate or any Magistrate empowered by the Local Government in that behalf, to enforce the provisions of the Fugitive Offender's Act.

Case referred for the orders of the High Court, under section 438 of the Criminal Procedure Code, by the District Magistrate of Tanjore, in his letter, dated 22nd June 1910.

The *Public Prosecutor*, for the Crown.

Order.—I agree with the District Magistrate. The Sub-Magistrate failed to endorse the warrant after satisfying himself that it was properly issued under section 13, Fugitive Offender's Act (44 and 45 Vict. Chap. 69). Further it is only a first class Magistrate or any Magistrate empowered by the Local Government in that behalf who has been authorized by section 19, clause (*c*) of Act XV of 1903 to enforce the provisions of the Fugitive Offender's Act.

The arrest and the subsequent proceedings are not, therefore, in accordance with law. The amounts deposited by the sureties will, therefore, be returned to them.

Order set aside.

(s. c. 1 M. W. N. 616.)

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 262 OF 1909.

September 20, 1910.

Present:—Mr. Justice Munro and Mr. Justice Krishnaswami Aiyar.

TITTI BALAKRISHNAYYA NAIDU—DEFENDANT—APPELLANT

versus

DOODA RAJAMMA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Contract Act (*IX of* 1872), *s.* 74—*Penal interest.*

Where a document provided that on the expiry of two years if the principal was not paid, interest at the rate of 1½ per cent. per mensem should be paid: *Held*, that the stipulation was not penal.

Second appeal against the decree of the District Court of Ganjam, in Appeal Suit No. 61 of 1908, presented against the decree of the Court of the District Munsif of Sompeta, in Original Suit No. 610 of 1907.

Mr. *H. Balakrishna Row*, for the Appellant.

Judgment.—The provision in Exhibit A for enhanced interest is that, on the expiry of the period of two years if the principal was not paid, interest would be paid thereon at Rs. 1½ per cent. per mensem.

There is nothing penal in this provision and the rate is not exorbitant. We, therefore, allow interest at 1½ per cent. per mensem. The appellant will put in an account showing the amount due to him on this basis, and the case is set down for Friday next. [This second appeal again coming on for hearing, this day the Court delivered the following judgment.] The account called has been put in by the appellant. There will be a decree for redemption on the plaintiff paying Rs. 417-2-3 in 6 months from this date, the parties will bear their own costs throughout.

Decree modified.

(s. c. 1 M. W. N. 616).

MADRAS HIGH COURT.

CRIMINAL REVISION No. 253 OF 1910.

CRIMINAL REVISION PETITION No. 203 OF 1910.

October 11, 1910.

Present:—Mr. Justice Aiyling.

MAINA SERVAI AND OTHERS—PETITIONERS

versus

EMPEROR—

Penal Code (Act XLV of 1860), ss. 188 and 430—Overseer of the P. W. D. not a public servant lawfully empowered to promulgate an order—Disobedience thereto—No offence under s. 188.

The accused, *ryots* of a certain village, were convicted by the Deputy Magistrate of offences under sections 430 and 188, Indian Penal Code, for damming a certain *odai* and feeding the tank in contravention of an order issued by the P. W. D. Overseer. The Sessions Judge reversed the conviction under section 430 but confirmed the conviction under section 188, Indian Penal Code. It was contended on behalf of the accused that the Overseer's order did not come within section 188:

Held, that the contention was valid.

The order of the Overseer could not operate to make an act unlawful which was lawful before its promulgation.

Petition, under sections 435 and 439 of the Criminal Procedure Code, praying the High Court to revise the judgment of the Additional Sessions Court of Madura, in Criminal Appeal No. 25 of 1910 (C. C. No. 103 of 1909, on the file of the 1st class Deputy Magistrate of Madura).

Mr. *T. Rangachariar*, for the Petitioners.

The *Public Prosecutor*, for the Crown.

Order.—The petitioners, *ryots* of Vyravanatham village, were convicted by the Deputy Magistrate of Madura Division of offences under sections 430 and 188 of the Indian Penal Code for damming a certain "Odai" feeding their tank in contravention of an order issued by the P. W. D. Overseer (Exhibit B). The Sessions Judge reversed the conviction under section 430 of the Indian Penal Code on the ground that the appellants might, in good faith, have believed that they were entitled to take the "Odai" water to their tank; but confirmed the conviction under section 188 of the Indian Penal Code.

The main contention now advanced by the learned Vakil for the petitioners is that the Overseer's order does not come within the scope of section 188, Indian Penal Code, which speaks of "an order promulgated by a public servant lawfully empowered to promulgate such an order" and I think this must be allowed. Without endorsing the extreme

view put forward by him (*viz.*, that the section only contemplates orders passed under powers expressly conferred by a statute, such as orders of a Magistrate under the Criminal Procedure Code), I am certainly of opinion that this order of an Overseer cannot operate to make an act unlawful which was lawful (according to the finding of the Sessions Judge) before its promulgation: *vide* High Court Proceedings No. 106, dated the 18th January 1878 and Criminal Revision Case No. 82 of 1885 reported on pages 138, 139 and 141 of Weir's Criminal Rulings, Volume I. There is no question of the right of Government to control the distribution of water for irrigation purposes which is unquestionable; but of the operation of this order of a subordinate official under section 188 of the Indian Penal Code. The fact of its existence and communication to the accused might very well have been considered in connection with the charge under section 430 of the Indian Penal Code, in determining whether the accused were really acting in good faith in damming the stream: but it cannot be made the basis of the charge under section 188 of the Indian Penal Code.

The convictions and sentences are set aside and the bail bonds cancelled.

Conviction set aside.

(s. c. 1 M. W. N. 618.)

MADRAS HIGH COURT.

CIVIL SUIT No. 66 OF 1909.

September 27, 1910.

Present:—Mr. Justice Wallis.

ANGLO-INDIAN TRADING COMPANY

—PLAINTIFF

versus

G. F. BRIERLY—DEFENDANT.

Personal liability—Promissory-note—Plea of failure of consideration—One consideration can only support one contract—Relations between parties entered in document—Rights and liabilities only governed by it—Mortgage—Mortgagor's personal liability.

The defendant entered into an agreement reciting that S and the defendant had obtained a Manganese concession in Mysore and that they agreed to admit E to a share of the profits arising or to arise from the concern in consideration of E's causing the plaintiff company to undertake the management and development of the rights comprised in their license and to finance the concern. All three entered into an agreement with the plaintiff company on the same day reciting that at the request of E, the plaintiff company have undertaken to manage and develop the rights and advance the moneys form time to time. The

agreement further laid down that the said plaintiff company should find all monies required from time to time for working, prospecting and developing the lands and also all monies for the *kist* etc, and that all sums so paid or advanced by the said company as aforesaid shall bear interest at 2 per cent. above the current bank rate and *be paid or deducted from the sale proceeds* of the ores, as are disposed of or shipped, and the deed further provided a remuneration for their services. Under the agreement, the plaintiff company were making the advances to the parties one of whom was the defendant. The concern failed and the mine had to be closed and the defendant was called upon to pay his share of the expenses. He executed the plaint pro-note for this and some other indebtedness which is not in question in this suit: *Held*, that under the agreement above set out there was no personal liability on the part of the three members that entered into the agreement and, therefore, against the defendant.

It is well-settled that there is an implied covenant in all mortgage instruments making the mortgagor personally liable.

Yates v. *Aston*, (1868) 4 Q. B. 182; 12 L. J. Q. B. 160; 3 G. and D. 351, followed.

But where the mortgage instrument contains clear provisions making the mortgage-debt re-payable in a particular way, such provisions must be given effect to and in such cases there is no personal liability.

Mathew v. *Blackmore*, (1856) 1 H. N. 762; 26 L. J. Ex. 150; 5 W. R. 363, followed.

Where a contract is reduced to writing, in order to define and give evidence of a transaction between the parties, the writing should regulate their respective rights and liabilities.

Brandt's Sons Co. v. *Dunlop Rubber Co.*, (1905) A. C. 454; 74 L. J. K. B. 898; 93 L. T. 495; 11 Com. Cas. 1; 21 T. L. R. 710, relied upon.

An implied promise to pay does not follow where there is an express promise to pay in a particular manner and on a certain event happening.

It was contended on the facts above set forth that the defendant having given a promissory-note for the amount, he was not at liberty to plead that there was a failure of consideration: *Held*, that he was entitled to raise such a plea.

Firwane v. *Wright*, (1856) 11 C. B. 481, relied upon.

A consideration for a contract could operate only once and when it had operated as consideration for one contract it was spent. A single consideration cannot be made by force of the definition in the Indian Contract Act (as including past services at the request of the promisor also) to support an indefinite series of subsequent contracts.

The advance made by the plaintiff company, being in consideration of the first agreement, there was no consideration for the pro-note by the defendant.

Ramasamy Pandi Thaliavar v. *Authappa Chettiar*, 16 M. L. J. 422, relied upon.

Messrs. *Grant* and *Greatorex*, for the Plaintiff.

Messrs. *Short* and *Bewes*, for the Defendant.

Judgment.—This is a suit on a pro-note brought by the Anglo-Indian Trading Co., Ltd. against G. F. Brierly. The defendant pleaded partial failure of consideration and said as to Rs. 4,055 that if due this sum was "payable to the plaintiff company by W. J. Eales for and on whose behalf the plaintiff company acted and formed the consideration for the granting to the said W. J. Eales his one-fourth share." Now this written statement does not admit that anything was due even by Mr. Eales to the plaintiff company and to cover this ground, an issue was claimed at the settlement of issues and the issue was:—"Was there any failure of consideration in respect of the promissory-note sued on?" Now, the question arose in this manner. On the 17th February 1908, Messrs. Subba Row, Brierly and Eales "entered into an agreement reciting that Mr. Subba Row and Mr. Brierly had obtained a Manganese concession in Mysore and that they had agreed to admit Mr. W. J. Eales to a share of the profits arising or to arise from the concession in consideration of the said W. J. Eales causing the Anglo Indian Trading Company, Limited, Madras, to undertake the management and development of the rights comprised in the said license and to finance the concern." This so far as Mr. Eales is concerned is rather a curious agreement which his Directors might, if so minded, have taken exception to. However, they have not done so. Then on the same day an agreement was entered into between Subba Row, Brierly and Eales and the Anglo Indian Trading Company, Limited, which recites that whereas pursuant to the previous agreement of the 17th February, "the Anglo Indian Trading Company, Limited, at the request of the said John Eales, have undertaken to manage and develop the rights comprised in the said license and to advance monies from time to time for such purpose, now it is hereby agreed between the parties hereto as follows;" under this agreement certain advances were made by the Anglo-Indian Company to the other parties to the agreement one of whom is Mr. Brierly. It was contended on the part of the defendant that the recital that this agreement was entered into at the request of the said Eales is of itself sufficient to show that the advances made under this agreement were re-payable by Mr. Eales as the recital that they were made at his request raised an implied contract to pay. Now on the terms of this agreement, read with the previous agreement, to which I have referred, I

am quite clear that this recital is put in to evidence that Mr. Eales has given the consideration which was stipulated for in the other agreement as a condition of admitting him to a share in the concession and, therefore, it seems to me that its fair and obvious meaning is that it should be read to raise any further inference of any special implied contract on the part of Mr. Eales as opposed to Mr. Brierly & Mr. Subba Row to re-pay these advances. If Eales is not personally liable for this advance as distinct from Subba Row & Brierly, we have to see whether under the agreement any of these parties is personally liable. Now the agreement recites "that the said Anglo Indian Trading Company, Limited, shall find all monies required from time to time for working, prospecting and developing the lands comprised in the said license as also all monies for the *kist* or other charges and expenses of and in relation to the said prospecting license" and that it "shall maintain and keep proper books of account." And then in paragraph 4 which is the material paragraph for the purpose of this case, it is provided "that all sums so paid or advanced by the said Anglo Indian Trading Company, Limited, as aforesaid shall bear interest at 2 per cent. above the current Bank of Madras rate for the time being and shall be taken to account monthly and be paid or deducted from the sale proceeds of the ores as are disposed of or shipped." Further, the agreement goes on to stipulate that "the said Anglo Indian Trading Company, Limited, shall be entitled by way of remuneration for their services to a commission of one rupee per ton of ore despatched from the Masorahalle Railway Station and shall be paid immediately after shipment." Now the main question in this case is whether under this agreement there is any personal liability on the part of Subba Row, Brierly and Eales. It is well settled that ordinarily in a mortgage agreement the mortgage imports an implied covenant to pay, *i.e.*, there is an implied covenant making the mortgagor personally liable and the leading case on that point is the well-known case of *Yates* v. *Aston* (1). But it is equally well-settled even in mortgage agreements that these contracts are not an exception to the rule that the terms of the documents alone must be looked to, if there are clear provisions making the mortgage debt re-payable out of a certain fund, such provisions will be given effect to and the leading case on that point is the case of *Mathew* v. *Blackmore* (2) in which Chief Baron Pollock says :— "It was argued before us on behalf of the plaintiff that the fact of a loan involved in it a liability to pay and subjected the borrower to an action of debt and that the circumstance of a mortgage, a charge upon land being given to secure it, did not affect the right of the lender to sue the borrower and the case of *Yates* v. *Aston* (1) was cited. On the other hand, it was argued on behalf of the defendant that the lending and borrowing of money is like any other contract and that the right of the lender and the liability of the borrower depends upon the contract between them and that there was no reason why in the case of a loan of money the ordinary rule should not apply, *viz.*, that where the contract is reduced to writing, in order to define and give evidence of the transaction between the parties the writing and the writing alone should regulate their respective rights and liabilities." That is the principle which was adopted by the Court in that case and the same principle was adopted in the judgment of the Privy Council by Lord Davey in *Kalka Singh* v. *Paras Ram* (3), which laid down that although the unqualified admission of a debt implies a promise to pay it, this implication does not necessarily follow where there is an express promise to pay in a particular manner and on a certain event happening. "And accordingly in that case it was held that there was no personal liability. The agreement in this case is not a mortgage agreement. It is primarily an agreement for certain advances being made and it provides for the manner in which the sources out of which, and for the time at which, the advances should be re-paid because it says they should be taken into account monthly and be paid or deducted from the sale proceeds of the orders as disposed of or shipped." So that it provides, payment is not only to be made out of the proceeds of the ore but it is to be made when the ore is disposed of or shipped. As regards the

(1) (1868) 4 Q. B. 182; 3 G. & D. 351; 12 L. J. Q. B. 160.

(2) (1856) 1 H. N. 762; 26 L. J. Ex. 150; 5 W. R. 363.

(3) 22 C. 434; 22 I. A. 68.

expression "and be paid or deducted," it seems to me quite obvious that one or the other of the modes should apply according as the ore and the sale proceeds were or were not in the possession of the Anglo Indian Trading Company. In case they were not in the possession of the Anglo-Indian Trading Company there was to be a payment and in case they were in the possession of the Anglo-Indian Trading Company, there was to be a deduction. Now I cannot see any sufficient reason for refusing to give effect to the express terms of this agreement, especially as this is not primarily a mortgage agreement. No doubt on the principle laid down by the House of Lords in *Brandt's Sons, Co.*, v. *Dunlop Rubber Co.*, (4), the Court would read this clause as creating a charge in favour of the Anglo-Indian Trading Company, on the sale proceeds. But *prima facie* it is an express provision as to the method in which the advances are to be re-paid and I see no sufficient reason for departing from the written terms of the contract or for implying anything which is not provided for in the contract. I may observe further that the Anglo-Indian Trading Company is not only to get a very high rate of interest but also a remuneration of Re. 1 per ton of ore despatched, which, if this concession turned out like some other successful ores which were granted about the same time, would, of course, have been very considerable. Moreover, even if I were at liberty to go outside the terms of the written contract, which in this case I think I cannot, yet having regard to concession—knowledge as to what was thought of these Manganese concessions about the time this was granted—and having regard also to the part which Mr. Eales himself takes in both of these agreements, I should not come to the conclusion that it was intended even to make these parties personally liable. However, the conclusion I have come to is that they are none of them liable personally upon this contract.

Now to the facts of the case subsequently there is no evidence given in this case but it has been admitted and I will read the admission that Mr. Eales as director of the Anglo-Indian Trading Company, made a claim of Rs. 4,000 and odd in regard to this account on Mr. Brierly and he gave a pro-note for this and further indebtedness to the plaintiffs. All that is shown is that Mr. Eales, acting on behalf of the Anglo-Indian Trading Company, made a demand on Mr. Brierly to pay his share of expenses which had been incurred by the Anglo-Indian Trading Company, for this concession, (which afterwards failed and the mine had to be closed) and that Mr. Brierly executed the pro-note for this and some other indebtedness which, however, was discharged and is not in question in this suit. Mr. Brierly having given a promissory-note for this amount, is he now at liberty to plead that there was a failure of consideration? Looking to the English Law, I am of opinion that he is entitled to raise that plea and it is sufficient to refer to the case of *Firwane* v. *Wright* (5). The further question, however, arose—which I thought well to have discussed—as to whether the fact that under the definition of 'consideration,' under the Indian Contract Act past services at the request of the promisor constituted a consideration there was any difference in a case like this in India. Now, I find this question has been dealt with in a case which is referred in Mr. Bhashyam's and Adyga's useful work on Negotiable Instruments Act, *i.e.*, in the case of *Ramasamy Pandi Thaliavar* v. *Authappa Chettiar* (6), where it was held by Subramania Iyer and Moore, JJ., that a consideration for a contract could operate only once and when it had operated as consideration for one contract it was spent and that it could not have been intended by force of the definition in the Contract Act to make a single consideration for a contract sufficient to support an indefinite series of subsequent contracts. I am of opinion that in this case the advance was made by the Anglo-Indian Trading Company, in consideration of the agreement of the 17th February 1908 and it was consideration for that agreement and that being so, it cannot be treated as consideration for further agreements by Brierly and others to make payments to the Anglo-Indian Trading Company. On these grounds I am of opinion that the suit fails and must be dismissed with costs.

Suit dismissed.

(4) (1905) A. C. 454; 74 L. J. K. B. 898; 93 L. T. 495; 11 Com. C. 1; 21 T. L. R. 710.

(5) (1855) 11 C. B. 481.

(6) 16 M. L. J. 422.

BEGAM JAN *v.* QADAR KHAN.

(s. c. 85 P. R. 1910.)

PUNJAB CHIEF COURT.

CIVIL REVISION No. 344 OF 1910.

July 20, 1910.

Present:—Mr. Justice Ryves.

Musammat BEGAM JAN AND OTHERS—DEFENDANTS—APPELLANTS

versus

QADAR KHAN AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Custom—Alienation—Mokarridari *rights, creation of—Permanent alienation.*

The creation of *mokarridari* rights is equivalent to a permanent alienation.

Maya Das v. *Malik Aulia Khan*, 10 P. R. 1896, Rev., followed.

Petition, under section 70 (*b*) of Act XVIII of 1884, as amended by Act XXV of 1899, for revision of the decree of C. L. Dundas, Esquire, Divisional Judge, Rawalpindi Division, dated the 5th May 1909.

Mr. *Douglas*, for the Petitioners.

Mr. *Morrison*, for the Respondents.

Judgment.—The facts of the case are given in the judgments of the lower Courts. The parties come from the Rawalpindi Division.

The chief question for decision in this case is whether the creation of *mukarridari* rights is equivalent to a permanent alienation. Both the Courts below have concurred in holding that it is.

The status of a *mukarridar* in the Rawalpindi Division is described in *Maya Das* v. *Malik Aulia Khan* (1). A *mukarridar* can alienate without consulting his landlord, and the right is not extinguished at his death, but can be inherited by a collateral irrespective of whether the common ancestor occupied the land. This being so, it seems to me that for all intents and purposes the creation of a *mukarridari* right amounts to a permanent alienation. As shown in *Maya Das* v. *Malik Aulia Khan* (1), the grant of occupancy rights have in some cases been held to amount to permanent alienations.

The only other ground for revision challenges a finding of fact arrived at by the learned Divisional Judge, with which I do not think it is necessary to interfere.

The result is that the application fails, and is dismissed with costs.

Revision rejected.

(1) 10 P. R. 1896, Rev.

PERUMAL *v.* KADHIR IBRAHIM.

(s. c. 1 M. W. N. 626.)

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1196 OF 1909.

September 28, 1910.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Krishnaswami Aiyar.

PERUMAL NAIKER—PLAINTIFF—APPELLANT

versus

KADHIR IBRAHIM ROWTHER AND OTHERS—DEFENDANTS—RESPONDENTS.

Minor's property—Mortgage by maternal uncle not guardian of minor—Minor's benefit.

Where the maternal uncle of a minor obtained money on a pro-note and discharged debts due by the minor's father and five years afterwards executed a mortgage of the minor's properties to his creditor:—*Held*, that though the original disbursement was for the minor's benefit, yet as the uncle was not the legal guardian and as his remedy against the minor's estate was barred, the mortgage was not for the minor's benefit.

Second appeal against the decree of the District Court of Trichinopoly, in Appeal Suit No. 289 of 1908, presented against the decree of the Court of the District Munsif of Srirangam, in Original Suit No. 162 of 1907.

Mr. *K. Parthasarathi Iyengar*, for the Appellant.

Mr. *T. Ethirajulu Mudaliar*, for the Respondents.

Judgment.—It is argued that the mortgage was for the benefit of the minors. We may mention here that 1st defendant was apparently a major according to the Munsif at the date of the transaction in question and, therefore, the property of the minors is liable. No such issue was raised. Besides on the admitted facts it cannot be said that the transaction which the plaintiff is seeking to enforce was for the benefit of the minors. What happened was that the father of the minors left some debts, their maternal uncle borrowed the necessary amount on a pro-note and discharged the debts. Five years afterwards when Mahomed Mira's remedy against the minor's property was barred, he executed a hypothecation bond mortgaging the minor's property in lieu of the pro-note. These being the undisputed facts, the mortgage cannot be said to have been executed for the minor's benefit. It was executed by Mahomed Mira who was not the legal guardian to re-pay himself for certain disbursements which he had made no doubt for the minor's benefit but for

which at the date of the transaction in question his remedy against the minor's property was barred. The second appeal is dismissed with costs.

Appeal dismissed.

(s. c. 86 P. R. 1910.)

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 778 OF 1910.

July 12, 1910.

Present:—Sir Arthur Reid, KT., Chief Judge, and Mr. Justice Scott-Smith.

HARNAM SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SAJAWAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Muhammadan Law—Gift—Equity of redemption—Validity—Mortgage by conditional sale—Foreclosure—Notice—Necessity of notice to donee.

A gift, by a mortgagor of immovable property, of the equity of redemption, is valid under Muhammadan Law, and places the donee in the shoes of the donor.

Muhi-ud-din v. *Manohar Shah*, 6 B. 650; *Ismail* v. *Ramji*, 23 B. 682, dissented from.

Rahim Bakhsh v. *Muhammad Hussan*, 11 A. 1; *Ibrahim Goolam Ariff* v. *Saiboo*, 35 C. 1 (P. C.); 4 A. L. J. 572; 11 C. W. N. 973; 9 Bom. L. R. 872; 17 M. L. J. 408; 6 C. L. J. 695; *Mullick Abdul Guffoor* v. *Maleka*, 10 C. 1112; *Shahzadi Hazra Begum* v. *Khwaja Hussain Ali Khan*, 12 W. R. 498, relied upon.

Where the mortgagor of a mortgage by conditional sale gifts the equity of redemption, notice of foreclosure must be given to the donee, although the donor is alive.

Further appeal from the decree of S. W. Gracey, Esquire, Divisional Judge, Ferozepore Division, dated the 9th April 1907.

Pundit *Sheo Narain*, for the Appellants.

Lala *Lal Chand*, for the Respondents.

ORDER OF REFERENCE.

Reid, C. J. (15*th February* 1910):—

The question for consideration is whether a gift, by a mortgagor of immovable property, of the equity of redemption, the parties being Muhammadans, is valid and necessitates notice of foreclosure on the donee during the lifetime of the donor.

No authority of this Court more in point than *Partab Singh* v. *Fatta* (1), cited by the Court of first instance, was cited at the hearing, and no special custom was cited for either party, the learned Advocate for the respondents citing *Muhi-ud-din* v. *Manohar Shah* (2), followed in *Ismail* v. *Ramji* (3), as authority for the proposition that a gift by a mortgagor of land in possession of a mortgagee was invalid under Muhammadan Law. The parties to the gift dealt with in *Partab Singh* v. *Fatta* (1), were Hindus, and the Bombay cases cited have been usually treated as authority for the proposition set up by the learned Advocate for the respondents. At the same time doubt has been thrown on the correctness of the Bombay rulings in section 307 of Wilson's Digest of Anglo-Muhammadan Law, (Ed. II), and by Mahmud, J., at page 10 of *Rahim Bakhsh* v. *Muhammad Hussan* (4).

The question was raised in the Court of first instance and by the second ground of appeal below, and is, in my opinion, of sufficient importance for reference to a Division Bench for an authoritative ruling.

I refer this appeal to a Division Bench accordingly. Very early date.

Judgment.—The order of the 15th February 1910, referring this case to a Division Bench, will be read with this. As stated therein, the question for consideration is whether a gift, by one Muhammadan to another, of the equity of redemption of immovable property, is valid and necessitates notice of foreclosure on the donee during the life-time of the donor. Of the authorities cited the following are not strictly in point:—

1. *Ibrahim Goolam Ariff* v. *Saiboo* (5), in which it was held that the doctrine of *Mushaa* does not apply to shares in companies, or in free-hold property in a large commercial town. Their Lordships adopted the ruling laid down in *Muhammad Mumtaz Ahmad* v. *Zubaida Jan* (6), that the doctrine relating to the invalidity of gifts of *Mushaa* is wholly unadopted to a progressive state of society and ought to be confined within the strictest limits.

2. *Mahammad Bakhsh Khan* v. *Hosseini Bibi* (7), in which there was a gift by one woman of 24 villages to the infant children of another woman. The plea was that possession was not given. Their Lordships overruled this plea on the grounds that the gift was attended by the utmost publicity, that the deed of gift authorised the donees to take possession, and it appeared that they

(1) 45 P. R. 1906; 120 P. L. R. 1906.
(2) 6 B. 650.
(3) 23 B. 682.
(4) 11 A. 1.
(5) 35 C. 1 (P. C.); 4 A. L. J. 572; 11 C. W. N. 973; 9 Bom. L. R. 872; 17 M. L. J. 408; 6 C. L. J. 695.
(6) 11 A. 460 (P. C.); 16 I. A. 195.
(7) 15 I. A. 81; 15 C. 684.

did in fact take possession. Their Lordships cited a case, X, of Macnaghten's Precedents, to the effect that although the widows of late owners at the time of the execution by them of a deed of gift of immovable property are not seized of it, yet if agreeably to the donor's desire, the donee, in pursuance of a judicial decree, becomes subsequently seized of the property, the fact of the donor's having been out of possession at the time of making the gift is not sufficient to invalidate it.

3. *Muhammad Esuph Rawutan* v. *Pattamsa Ammal* (8) which dealt only with a *Hiba-bil-Iwaz.*

4. *Mehrali* v. *Tajudin* (9) which dealt with the case of a gift of a house for the use of *masjid*, and neither donor nor donee was ever in possession before gift. The house was in the possession of the donor's brother and descended to the donor's son.

In *Muhi-ud-din* v. *Manohar Shah* (2), two Judges of the Bombay High Court held that a gift was invalid if the donor, at the time of making it, was merely owner of the property which she purported to give, the possession being with the mortgagee of the same. It was held that a sale would be valid though the gift was invalid. Campbell, J., dissented and held that the gift was valid.

The decision of the majority was followed by a Division Bench in *Ismail* v. *Ramji* (3). The plea that the donor, having applied to the Revenue authorities to transfer the mortgaged property, subject to gift, into the name of the donee, had done all that she could to give possession to the donee, and that the requirements of the Muhammadan Law had been complied with, was overruled on the ground that the Muhammadan Law required that the donor should be in actual or at least constructive possession, and that he should give actual or at least constructive possession to the donee.

Mohi-ud-Din v. *Manohar Shah* (2) was dissented from in article 307 of Wilson's Digest of Anglo-Muhammadan Law, Edition II, and the learned author expressed the opinion that the question whether a Muhammadan mortgagor can make a valid gift of his equity of redemption, in property of which the mortgagee is, at the time, in possession, was not really in issue, the Court not being called upon to decide whether an equity of redemption, being a kind of property not susceptible of physical possession, could be validly transferred by appropriate words of gift.

8. In *Rahim Bakhsh* v. *Muhammad Hassin* (4), Mahmud, J., said that *Mohi-ud-Din* v. *Manohar Shah* (2) probably carried the law of seisin too far, as is suggested by Syed Amir Ali at page 70 of his Tagore Law Lectures, 1884. The learned Judge cited *Mullick Abdul Guffoor* v. *Muleka* (10) and *Shahzadi Hazra Begam* v. *Khwaja Hussain Ali Khan* (11).

In *Mullick Abdul Gaffoor* v. *Maleka* (10) Garth, C. J., said at page 1123 :—"We have been referred to several authorities and amongst others to *Durrul Mukhtar*, Book on Gifts, page 625, which lays down that no gift can be valid unless the subject of it is in the possession of the donor at the time when the gift is made. Thus when land is in the possession of an usurper (or wrongdoer), or of a lessee or mortgagee, it cannot be given away, because in these cases the donor has not possession of the thing which he purports to give. But we think that this rule, which is undoubtedly laid down in several works of more or less authority, must, so far as it relates to land, has relation to cases where the donor professes to give away the possessory interest in the land itself, and not merely a reversionary right in it. Of course, an actual seisin or possession cannot be transferred, except by him who has it for the time being." The learned Chief Judge, went on to say :—"What is usually called possession, in this country, is not actual or *khas* possession, but the receipt of rents and profits; and if lands let on lease could not be made the subject of a gift, many thousands of gifts, which have been made over and over again of *zamindari* properties, would be invalidated. If we were disposed to agree with this novel view of Muhammadan Law (which we are not), we think we should be doing a great wrong to the Muhammadan community, by placing them under disabilities with regard to the transfer of property, which they have never hitherto experienced in this country. Such a view of the law is quite inconsistent with several cases decided by the Sudder Dewani Adalat, (under the advice of

(8) 23 M. 70.
(9) 13 B. 156.
(10) 10 C. 1172.
(11) 12 W. R. 498.

the *Kazis*, and also by this Court; and it is directly opposed to the case of *Amirunnissa* v. *Abedoonissa* (12).

In *Shahzadi Hazra Begam* v. *Khwaja Hussain Ali Khan* (11) a Full Bench, including Peacock, C. J., held, that the existence, at the time at which an endowment is made, of a mortgage of the endowed property, does not render the endowment invalid under the Muhammadan Law, and that the *mutawalli* is entitled to the surplus proceeds of the sale of property in execution of the decree on the mortgage deed. The following was cited from page 453 of the *Fatawa Alamgeeri* :—

"If a man mortgages land, and then makes an endowment of it previous to redemption of the mortgage, the endowment shall be binding, and this shall not cancel the mortgage. If the mortgage is redeemed after the land has remained some years in the hands of the mortgagee, it shall revert to the purpose to which it was appropriated. Should he, the endower, die and leave sufficient assets for redemption, the redemption shall be effected, and the endowment shall be rendered effectual."

At page 61 of Amir Ali's Muhammadan Law, Edition II, the learned author expresses the opinion that the decision of the majority in *Mohi-ud-Din* v. *Manohar Shah* (2) is founded upon an erroneous apprehension of the Hanafi Law, under which seisin is requisite for hypothecation; the correct view of the Hanafi doctrine on the subject being that there is nothing in it to preclude the mortgagor from granting his equity of redemption to another. The learned author adds that under the law of *hawalat* the debtor may transfer his liability to another, with the result that, as the property forms the security for the debt, the transferee obtains the right to redeem the property subject to the payment of the debt. Endowment is practically on the same footing as gift, and we have great respect for the opinions of Mahmud, J., and of Amir Ali on questions of Muhammadan Law. The remarks of Garth, C. J., and of their Lordships of the Privy Council, in *Ibrahim Goolam Ariff* v. *Saiboo* (5) are strongly in point, though the facts dealt with are not identical.

On the authorities cited we have no hesitation in differing from the decisions in the cases of *Mohi-ud-Din* v. *Monohar Shah* (2), *Ismail* v. *Ramji* (3) and in holding that the gift was valid, placed the donee in the shoes of the donor and necessitated notice on the donee of foreclosure, although the donor was still alive.

For these reasons we dismiss this appeal with costs. The application, having been under section 70 (1) (*b*) of the Courts Act and having been admitted, became an appeal and should have been removed from the register of revisions.

Appeal dismissed.

(12) 23 W. R. 208.

(s. c. 8 M. L. T. 238.)

MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 226 OF 1905.

March 8, 1910.

Present:—Mr. Justice Munro and Mr. Justice Abdur Rahim.

THANDU PARAKAL KARALI KATTIL MUSSA KUTTI—DEFENDANT—APPELLANT

versus

RAGHAVACHARIAR'S SON RANGACHARIAR AND OTHERS—PLAINTIFFS AND DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), ss. 111, 116—Lease—Covenant for re-entry—Express—Non-payment of rent—Forfeiture.

If a clause in a lease is so expressed that it can only be read as reserving the right of forfeiture to the landlord in certain circumstances, that is sufficiently express within the meaning of the law.

Where there is a covenant for re-entry on breach of the conditions of the lease, the non-payment of rent operates as a forfeiture of the lease.

Appeal against the decree of the Subordinate Judge's Court of South Malabar at Calicut, in Original Suit No. 37 of 1903.

Judgment.

Munro, J.—As to issue No. 3 there can be no doubt that Exhibit III is not genuine and that the payment of Rs. 300 set up is not true. As to the question of forfeiture the last paragraph of the lease contains an express provision for re-entry on breach of the conditions of the lease, and at least the condition as to payment of rent has been broken. Forfeiture was, therefore, clearly incurred. It is contended, however, that the forfeiture was waived, and for this Exhibit D is relied upon. No such plea was raised in the Court below but even if it is allowed to be taken, Exhibit D does not waive the forfeiture for non-payment of rent. The utmost that can be said is that it implies that if the rent

due is paid the forfeiture will not be insisted on. The only other point taken is with regard to compensation for protecting trees. As the Subordinate Judge has properly pointed out there is no satisfactory evidence in support of the defendants' claim.

The appeal and the memorandum of objections are dismissed with costs.

Abdur Rahim, J.—The first question argued in the appeal is whether there is an express condition as to forfeiture in the Kaichit or lease Exhibit C. As to that, I think that paragraph 10 of the deed, though somewhat loosely expressed, lays down that for contravening the terms stated in the preceding paragraph or making default in regard thereto the tenant would be liable to be evicted within the period of the term. That paragraph is in the following words:—"Except for particular reason such as contravening the terms above stated or making default in regard thereto, we should not be evicted from the hills within the period of the term and permission should not be given to another man to carry on the works allowed to us." It seems to be impossible to construe these words otherwise than as meaning that in the event of breach of the covenants in the lease the landlord would be entitled to determine the lease. That being so, surely the provision for re-entry is express within the meaning of section 111 of the Transfer of Property Act. What is meant by an express condition is not that the wording of it should be in any particular form, but that the condition can be gathered from the words of the instrument giving to them their ordinary meaning so that the Court may be certain that such condition was part of the stipulation between the parties and was understood to be so by them. If a clause in a lease is so expressed that it can only be read as reserving the right of forfeiture to the landlord in certain circumstances that, in my opinion, is sufficiently express within the meaning of the law.

The next question is whether there has been a breach of any of the terms of the lease entailing forfeiture. As regards the clause prohibiting transfer of the term without the consent of the landlord, the latter has in fact recognized the transfer to the 3rd defendant and cannot, therefore, treat it as a ground for forfeiture. Then the Subordinate Judge finds that the lessee failed to plant trees and to dig elephant pits as contemplated in the lease but though the lessee was apparently expected to do these things there was no obligation imposed upon him to do them. But the lessee never paid any rent which according to the terms of the lease was payable annually. The plaint asks for a decree for possession, for payment of a sum of Rs. 2,280 due on account of arrears of rent with interest thereon from the 31st December 1895 to the 31st December 1902, and for a decree directing the defendants to pay Rs. 200 a year as rent in accordance with the provision in the Kaichit until surrender. Before the institution of the suit the plaintiff gave notice to the defendants first on the 27th July 1903 demanding payment of the rent due, and stated in that notice that if the defendants failed to come to terms a suit would be instituted against them and on the 17th November 1903, the plaintiff gave another notice to the defendants calling upon them to pay the arrears of rent and surrender the land. No rent was paid in response to these notices and the landlord having instituted a suit in ejectment must *prima facie* be taken then—if not at the date of the last notice—to have elected to determine the lease if he was entitled to do so. Under the terms of the lease the landlord was entitled upon a default being made in payment of the rent when it became due at the expiry of each year to put an end to the tenancy and I am inclined to think that if instead of exercising his right of forfeiture the landlord allowed the tenant to continue in possession of the premises and treated him as tenant, he must be held to have waived the forfeiture already incurred. But though there would be waiver of forfeiture incurred for default in respect of years other than the year last preceding the institution of the suit there was no such waiver with respect to the year ending the 31st December 1902. It is true that a decree for rent is asked for in the plaint until the defendants surrender possession at the rate stipulated for in the Kaichit but the plaintiff is entitled to ask for such a decree under section 116 of the Transfer of Property Act. This prayer in the plaint cannot under the circumstances be taken to indicate that the plaintiff elected to treat the defendants as tenants when one of the principal objects of the suit is to recover

possession of the land. For these reasons, I agree that the Subordinate Judge is right in giving a decree for ejectment and would dismiss the appeal with costs. I should like to mention here that it was contended on behalf of the respondents that we were not entitled to consider any question of waiver as it was not pleaded nor any issue framed raising the question. But if upon the facts stated in the plaint we found that the forfeiture if any incurred had been waived, I think it would be open to us to refuse to give any relief to the plaintiff on the ground of forfeiture. I also agree that the memorandum of objections should be dismissed with costs.

Appeal dismissed.

(s. c. 87 P. R. 1910.)

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 260 OF 1910.

July 21, 1910.

Present:—Sir Arthur Reid, KT., Chief Judge, and Mr. Justice Scott-Smith.

Chaudhri KHUSHI RAM—PLAINTIFF—APPELLANT

versus

ASU RAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Punjab Pre-emption Act (II of 1905), s. 11, proviso —Aroras—Khatris—Members of the same tribe—Burden of proof.

Aroras are not a sub-division of Khatris. Aroras and Khatris are not members of the same tribe within the meaning of section 11 of the Punjab Pre-emption Act. The burden of proving that Aroras are a sub-division of Khatris is on the pre-emptor.

Further appeal from the decree of S. S. Harris, Esquire, Divisional Judge, Multan Division, dated the 27th October 1909.

Mr. *Balwant Rai*, for the Appellants.

Mr. *Devi Dial*, for the Respondents.

Judgment.—This judgment disposes also of Appeal No. 261. The plaintiff-respondent's suits for pre-emption have been dismissed on the ground that he is not a member of an agricultural tribe and does not belong to the same tribe as the vendor.

Plaintiff is an Arora and the vendor is a Khatri, and the sole question for decision before us is whether Aroras are a sub-division of Khatris and members of the same tribe within the meaning of the proviso to section 11 of the Punjab Pre-emption Act.

The parties belong to Shujabad in the Multan District, and the lower Courts have based their decision upon the Gazetteer of that district compiled in 1901-02 by Mr. E. D. Maclagan, Settlement Collector. The various tribes and castes are tabulated and noticed in pages 125 to 128 of the Gazetteer. The Khatris and Aroras are classed as separate tribes and there is no mention of any claim on the part of the latter to be a sub-division of the former.

In Volume XVII of the Census of India, 1901 (Report by H. A. Rose, I. C. S., Census Superintendent) at page 302 we find a heading "castes of Khatri type." The Khatris, Aroras and Bhatias are treated of under this heading and the fact that Aroras claim to be of Khatri origin is referred to. Mr. Rose, however, does not state his own opinion, but says at page 303:—"This is one of the numerous points which require further investigation in connection with the history of the Punjab castes."

Mr. Bhattacharji in "Hindu Castes and Sects" at page 142 says "The Aroras claim to be Keshettris but other classes of Keshettris neither eat with the Aroras nor inter-marry with them."

We are not prepared to hold from the above that Aroras are Khatris, apparently some of them claim to be Khatris, but they do not appear to have definitely established their claim. Mr. Rose says (page 302 of his report) that they inhabit the south-west of the Punjab, where Khatris are hardly to be found at all, and the Gazetteer of the Multan District is a clearly authority against the contention that they are of the Khatri tribe.

The *onus* was upon the plaintiff to prove that he was of the same tribe as the vendor and we consider that he has not discharged it. His appeals are dismissed with costs.

Appeals dismissed.

ABHOY CHETTY *v.* DASIKA CHARIAR.

(s. c. 8 M. L. T. 241; 1 M. W. N. 625.)

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 562 OF 1908.

March 11, 1910.

Present:—Mr. Justice Benson and Mr. Justice Krishnaswami Aiyar.

ABHOY CHETTY *alias* AUTHIAPPA CHETTY—DEFENDANT—APPELLANT

versus

K. C. DESIKA CHARIAR AND ANOTHER—PLAINTIFFS AND DEFENDANTS—RESPONDENTS.

Irrigation—Continuous easement—Sale of land—Common acquisition of easement.

Where the right to irrigation in respect of some lands is an apparent and continuous easement, the acquirer of the lands is entitled to the continuance of the easement.

On a severance of land from common ownership, the owner of the tank claimed a right to insist on the purchaser of the land to keep the tank in good repair, and to restrict the cultivation at the tank bed:

Held, that the sale of the land did not in any way enlarge the right of the owner beyond that which he was entitled to on its severance.

Second appeal against the decree of the District Court of Madura, in Appeal Suit No. 339 of 1907, presented against the decree of the Court of the District Munsif of Dindigul, in O. S. No. 548 of 1905.

Judgment.—The plaintiff is the owner of two-thirds of 25 *Mukkams* of land under the Sallivadam tank. The tank and the lands belonged to the *zamindar* originally. They were sold by him to the 1st defendant. The lands were being irrigated with the water of the tank. When the plaintiff acquired his right to the two-thirds of 25 *Mukkams*, the right to irrigation was an apparent and continuous easement. He is, therefore, entitled to the continuance of the easement. Neither Exhibit B, the agreement of the *zamindar* with the 1st defendant nor Exhibit I, the agreement between the *zamindar* and certain other tenants can in any way enlarge the plaintiff's rights beyond what he is entitled to on the severance of his lands from the common ownership of the 1st defendant. He cannot insist upon any restriction of the 1st defendant's mode of enjoyment of the tank or its bed except in so far as such enjoyment may affect his accustomed user of the water for irrigation. The plaintiff cannot ask that there should be no tank bed cultivation, provided it does not interfere with or reduce the customary flow to the plaintiff's lands. Nor is the plaintiff entitled to insist as dominant owner that the 1st defendant should keep the tank in good repair. There is no finding that the tank bed cultivation will at all seasons affect the usual supply of water to the plaintiff's fields. We must, therefore, modify the District Judge's decree as follows. Omit all the words from "plaintiff" in line 8 of the printed decree to 'attached' in line 12 and insert "defendant is not entitled to do anything to the Sallivadam tank marked A in plaintiff's plan." Omit "not" in line 12.

Again omit all the words from "be" in line 15 up to "and" in line 18 and insert "do" before "close" in line 18.

As regards the damages, the plaintiff's lands were on lease during *Fasli* 1311. He is not entitled to claim any for that *Fasli*. The decree of the lower appellate Court will also be modified by deducting Rs. 146-4-0 from the amount awarded.

Each party will bear his own costs throughout.

Decree modified.

DEVI DIAL *v.* MUHAMMAD AMIN.

(s. c. 89 P. R. 1910.)

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 780 OF 1909.

July 11, 1910.

Present:—Mr. Justice Ryves and Mr. Justice Scott-Smith.

DEVI DIAL—DEFENDANT—APPELLANT

versus

MUHAMMAD AMIN AND ANOTHER—PLAINTIFFS—DEFENDANTS—RESPONDENTS.

Punjab Pre-emption Act (II of 1905), s. 3 (2)—Village immovable property—"Village site," meaning of—Parao *Lala Musa, not a town—Extensions to inhabited portion of village—New buildings on unoccupied land.*

Parao Lala Musa is not a town. The houses standing on the *Parao* constitute village immovable property.

Ram Narain Singh v. *Sewak Ram*, 21 P. R. 1906; 110 P. L. R. 1906; *Muhammad Din* v. *Shah Din*, 90 P. R. 1907, distinguished.

If extensions are made to the existing *abadi* of a village, or if a hitherto unoccupied site within the boundaries of a village is built over and settled on, such new buildings would become "village immovable property" and as such would come within the operation of sub-section (2), section 3 of the Pre-emption Act.

"Village site" does not mean only the original *abadi deh*. It includes new buildings or *bazars*, which spring up on the village lands, even though separate from the original *abadi deh*.

Per *Ryves, J.*—

The definition in section 3 (2) applies to all immovable property within the limits of the village; it

is not confined to immovable property actually within the existing *abadi* of a village. The word 'village' in this section does not mean a collection of houses but means the whole estate or *mauza*, and includes everything within the boundaries of the village area.

Per *Scott-Smith, J.*—

The expression "village site" cannot be considered synonymous with "village" or "estate". It means the inhabited part of the village or "*abadi deh*". Sub-section (2) of section 3 does not apply to all immovable property within the limits of a village.

Further appeal from the decree of Khan Bahadur Maulvi Inam Ali, Divisional Judge, Jhelum Division, dated the 14th January 1909.

Mr. *Sangam Lal*, for the Appellant.

Mr. *Fazal-i-Hussain*, for the Respondents.

Judgment.

Ryves, J.—This appeal raises a novel point in the law of the pre-emption applicable to this Province.

On the 27th April 1906, one Imam-ud-din sold his house situate in the *abadi* known as *Parao* Lala Musa to the defendant-appellant.

The plaintiff-respondent is the vendor's son, and he brought this suit against the vendee (defendant-appellant) for possession of the house, by pre-emption, alleging that the *abadi* where this house was situated was part of a "village" as it had been built on lands partly within the limits of *mauza* Dhaman and partly within the limits of *mauza* Said Gul.

The chief defence to the suit was that *Parao* Lala Musa was a town and that the custom of pre-emption did not exist in it.

In both the lower Courts the point at issue was "Is *parao* Lala Musa a town or not"? Both the Courts have held that it is not a "town," and having regard to sub-section (2) of section 3 of the Punjab Pre-emption Act of 1905, it certainly is not a "town."

Now it is admitted that *parao* Lala Musa is not a "village" within the meaning of the said Act. It appears that many years ago Government established a halting ground or *parao* in the immediate vicinity and constructed a number of shops. Since then the *bazar* has increased and a number of houses have been built close by, so that at the time of suit, this *abadi* contained 143 residential houses and 110 shops. The land occupied by the *parao* belonged to *mauza* Dhaman and the *abadi* or *bazar* includes land within the limits of that village as well as of the village of Said Gul.

The plea that this house is situated in "a town" and is, therefore, "urban immovable property" has been abandoned in this Court. But it is argued, for the first time here, that nevertheless the house is not "village immovable property" and is, therefore, not subject to pre-emption. The argument turns entirely on the meaning to be given to the words "within the limits of village sites" in sub-section (2) of section 3 of the present Punjab Pre-emption Act. It is said that "village site" means the *abadi*. And inasmuch as "*abadi parao* Lala Musa" lies at a distance from what is generally known as the *abadi* of *mauza* Dhaman and of *mauza* Said Gul, it is argued that the "*abadi*" in suit does not come within the definition. This argument suggests that there may be within the area of a village immovable property which is incapable of being pre-empted and which falls neither within the definition of "agricultural land" nor "village immovable property," or in other words that the definitions in section 3 of the Act are not exhaustive. In my opinion to give such a limited construction to the term "village immovable property" would be against the scope of the Act.

I think the definition in sub-section (2) applies to all immovable property within the limits of a village and that it is not confined to immovable property actually within the existing *abadi* of a village. To hold otherwise would be to imply that the right of pre-emption would be confined to existing areas, and would not apply to any extension of buildings outside such areas, and that the Legislature purposely so limited its operation. I think the word "village" in this section does not mean merely a collection of houses, but means the whole estate or *mauza*, and includes everything within the boundaries of the village area.

In many villages the populated portions, *i.e.*, portions which are *abad*, are situated at a distance from each other either for topographical reasons of convenience or for reasons of caste, yet I think it cannot be doubted that if extensions are made to the existing *abadi* of a village, or if a hitherto unoccupied site within the boundaries of the village is built over and settled on, such new buildings would become "village immovable property," and as such, would come within the operation of sub-section (2). Two rul-

ings, *i.e.*, *Ram Narain Singh* v. *Sewak Ram* (1) and *Muhammad Din* v. *Shah Din* (2), have been quoted in support of appellant's arguments, but neither has much application to this case. In the first place both of them were decided with reference to the repealed sections of the Punjab Laws Act of 1872. In the case in *Muhammad Din* v. *Shah Din* (2), the decision turns on its own facts as expressly stated in the judgment. The learned Judges say:—

"We may assume that to a considerable extent the quarter known as Killa Gujar Singh, even to this day constitutes a village and contains a village community."

"There is within its boundaries a fairly large area of agricultural land which is assessed to land revenue, and there are also the ordinary village *abadi*, ordinary village proprietary body, the ordinary village officers, a record-of-rights, etc. It may, therefore, be that Killa Gujar Singh in part at all events, retains its former character as a village community. It may be so, but upon this point we are not called upon to give any definite opinion as we decided this case purely on its own facts. Upon these facts we are satisfied that the present land in suit does not in reality now form part of the old village of Killa Gujar Singh."

And they go on to find that the area in question has been absorbed within the limits of Lahore City, and it was on this view of the case, that it was held that no presumption arose in favour of plaintiff's claim and that it was for him to prove that in the Sub-Division in question of Lahore City the custom of pre-emption existed and that he had failed to establish this.

The case in *Ram Narain Singh* v. *Sewak Ram* (1), is still less applicable. There it was held that a particular *chak* in the Canal Colony had not yet become a village within the meaning of section 10 of the Punjab Laws Act. As in that case it was held that it was possible for the *chak* in question to become a village at some future date, so in the present case it is quite possible that *parao* Lala Musa may in the future become a town within the meaning of the present Punjab Pre-emption Act, but we must hold that at present, until *abadi parao* Lala Musa has been separated from, and ceased to be a part of, the estate of *mauzas* Dhaman and Said Gul, it remains a part of those villages.

I would, therefore, dismiss the appeal with costs.

Scott-Smith, J.—The question at issue in this case is whether a shop situated in a *bazar* at the Lala Musa camping ground is subject to the right of pre-emption.

In the lower Courts the defendant's contention was that the property in dispute was "urban immovable property," Lala Musa being a town. The Courts, however, found it to be not a town, and this finding has not been contested before us.

Here for the first time it has been contended that the property, though not "urban immovable property" is also neither "agricultural land" nor village "immovable property" as defined in section 3 of the Punjab Pre-emption Act. In other words it is argued that the definitions in this section do not include every kind of immovable property.

The Legislature may have intended the definitions to be exhaustive, but the only question we have to decide at present is whether the property in dispute is "village immovable property" within the definition as given.

Mr. Shadi Lal in his Commentary on the Pre-emption Act says at page 13 in regard to sub-section (2) of section 3:—"This definition is very simple. Every immovable property within the limits of a village, which is not agricultural land, shall be called village immovable property."

The definition, however, refers to immovable property within the limits of "village sites" and not within the limits of "villages." I do not think that the expression "village site" can be considered synonymous with "village" or "estate." It is not defined in the Act, but I take it to mean the inhabited part of the village or "*abadi deh*." The latter are the words used in the Urdu translation of the Act. As at present advised, I am, therefore, unable to agree with my learned brother that the definition in sub-section (2) applies to all immovable property within the limits of a village. It is, however, not necessary for the purposes of this case to decide this question definitely for I agree with my brother in holding that the *bazar*, where the property is situated is part of the village sites of Dhaman and Said Gul villages. I see no good ground for holding that village site means only the

(1) 21 P. R. 1906; 110 P. L. R. 1906.
(2) 90 P. R. 1907.

original "*abadi deh*" and does not include new buildings or *bazars* which spring up on the village lands, even though separate from the original "*abadi deh*."

I concur in the proposed order dismissing the appeal with costs.

Appeal rejected.

(s. c. 8 M. L. T. 242.)

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1409 OF 1908.

March 14, 1910.

Present:—Mr. Justice Benson and Mr. Justice Krishnaswami Aiyar.

TUMMALA NAGABHUSHANAM—PLAINTIFF—APPELLANT

versus

MADUNURU VENKATARATNAM AND ANOTHER—DEFENDANTS—RESPONDENTS.

Malicious prosecution—Prosecutor.

It is not necessary for a case of malicious prosecution that the name of a particular person should appear as prosecutor.

Gaya Prasad v. *Bhagat Singh*, 30 A. 525; 12 C. W. N. 1017 (P. C.), referred to.

If a prosecution is really initiated by the defendant and he keeps himself in the back ground leaving it to the Police to have the formal conduct of the case or even if the prosecution having been started by the Police, the defendant subsequently assumes the conduct of it, he must be deemed to be a prosecutor for the purpose of malicious prosecution.

Second appeal against the decree of the District Court of Kistna, in A. S. No. 497 of 1906, presented against the decree of the Court of the District Munsif of Gudivada, in O. S. No. 422 of 1905.

Judgment.—It is alleged in the plaint that the defendants gained over the police and that the 1st and 2nd defendants engaged a Vakil to conduct the case before the Magistrate. It is not necessary for a case of malicious prosecution that the name of the particular person should appear as that of the prosecutor. The question is, as pointed out by the Privy Council in *Gaya Parasad* v. *Bahagat Singh*, (1), one of fact whether the defendant did substantially act the part of Prosecutor even though it was the police that formally prosecuted. If a prosecution is really initiated by the defendant and he keeps himself in the background leaving it to the police to have the formal conduct of the case or even if prosecution having been originally started by the police the defendant subsequently assumes the conduct of it, he must be deemed to be a prosecutor for the purpose of the action for malicious prosecution. It is said that the plaintiff offered no evidence. But we are satisfied that the Munsif shut out the evidence on his view of the law.

We reverse the decrees of the Courts below and remand the case as against defendants Nos. 2 and 3 (the 1st defendant being now dead) to the Court of first instance for disposal according to law.

The costs hitherto incurred will be provided for in the revised decree.

Decree reversed.

(1) 30 A. 525 at p. 532; 12 C. W. N. 1017 (P. C.).

(s. c. 90 P. R. 1910.)

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 581 OF 1910.

May 26, 1910.

Present:—Mr. Justice Scott-Smith.

BAIJ NATH AND OTHERS—DEFENDANTS—APPELLANTS

versus

GULAB DIN AND ANOTHER—PLAINTIFFS—DEFENDANTS—RESPONDENTS.

Custom—Alienation—Khokhars of Gujrat not following agriculture as their occupation—Presumption against unrestricted power of alienation.

Khokhars, who live in the town of Gujrat and who do not live by agriculture, are not governed by agricultural custom in matters of alienation.

The presumption against an unrestricted power of alienation of ancestral property, as laid down in *Gujar* v. *Sham Das*, 107 P. R. 1887, applies only to members of agricultural tribes, who are members of village communities and whose main occupation is agriculture, and not to those who have altogether drifted away from agriculture as their main occupation, and have settled for good to urban life and have adopted trade, industry or service as their principal occupation and means of livelihood.

Jamiat-ul-Nisa v. *Hashmat-ul-Nisa*, 124 P. R. 1908 *Muhammad Hayat Khan* v. *Sandhe Khan*, 55 P. R 1908; 105 P. W. R. 1908, relied upon.

Further appeal from the decree of Khan Bahadur Maulvi Inam Ali, Divisional Judge, Jhelam Division, dated the 10th June 1909.

Mr. *Nanak Chand*, for the Appellants.

Mr. *Abdul Qadir*, for the Respondents.

Judgment.—This has been admitted as a further appeal under section 70 (1) (*b*) of the Punjab Courts Act. The important question involved is whether Khokhars who live in the town of Gujrat and who do not live by agriculture are governed by custom in

matters relating to alienation.

I note that the application for revision was also under clause (*a*) of section 70 (1), but there is no ground for holding that the lower Courts have acted with material irregularity and I decline to consider the application as under clause (*a*).

The lower Court's findings on the questions of plaintiff's relationship to Nawab, deceased, husband of *Musammat* Fateh Biti and of necessity must, therefore, be accepted.

The Courts have, however, assumed that because the parties are Khokhars, they must of necessity follow the customs of agriculturists. It was held in *Jamiat-ul-Nisa* v. *Hashmat-ul-Nisa* (1) that Awans of Ludhiana City, who were for generations past dependent upon service or other independent means of livelihood were governed in matters of succession by Muhammadan Law and not by custom. In *Muhmamad Hayat Khan* v. *Sandhe Khan* (2) it was laid down that the presumption against an unrestricted power of alienation of ancestral property as laid down in *Gujar* v. *Sham Das* (3) applies only to members of agricultural tribes, who are members of village communities, and whose main occupation is agriculture and not to those who have altogether drifted away from agriculture as their main occupation, have settled for good to urban life and have adopted trade, industry or service as their principal occupation and means of livelihood.

This is a very important ruling and its provisions are applicable to the present case, where the parties are not agriculturist or members of a village community, but live in a city and earn their livelihood by service. There is thus no ground for holding that the parties follow the customs of agriculturists in matters of succession, alienation and so on.

It was urged that according to strict Muhammadan Law *Musammat* Fateh Bibi would not have succeeded as an heir to the whole of the property in dispute. That, no doubt, is true. At the same time her husband died 15 years ago and she has been ever since in possession as owner, and her possession has been adverse to the whole world. As the parties are not bound by custom, the plaintiff has no *locus standi* to contest the alienation made by her. The presumption is that she is in possession as absolute owner of the property and cannot be controlled in matters of alienation.

I, therefore, accept the appeal and setting aside the orders of the Courts below dismiss plaintiff's suit with costs throughout.

Appeal accepted.

(1) 124 P. R. 1908.
(2) 55 P. R. 1908; 105 P. W. R. 1908.
(3) 107 P. R. 1887.

(s. c. 8 M. L. T. 243.)

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 142 OF 1908.

March 16, 1910.

Present:—Mr. Justice Benson and Mr. Justice Krishnaswami Aiyar.

K. K. NILAKANDHAN NAMBUDRIPAD AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

P. K. SANKARAN NAMBIAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Lunatic—Uraler—*Whether divested of rights.*

Lunacy does not divest the estate already vested or the right of management though it may be a ground for removal of the lunatic from the office of trusteeship which is hereditary.

Vidyapurna Tirtha Swami v. *Vidyanidhi Thirthaswami*, 27 M. 443 at p. 446; 14 M. L. J. 105, followed.

Second appeal against the decree of the District Court of South Malabar, in A. S. No. 153 of 1907, presented against the decree of the Court of the District Munsif of Ottapalam, in O. S. No. 431 of 1905.

Judgment.—The suit is by two Uralers to redeem a kanom. The 1st defendant pleads a renewal by the Uralers. The plaintiffs impeach the validity of the renewal on the ground that the 1st plaintiff was not consulted. But the 1st plaintiff was not an Uraler at the time of the renewal. His karnavan was the Uraler. But the plaintiffs contend that he was a lunatic and that the 1st plaintiff was by operation of law the Uraler in his place. The observations of Subramaia Iyer and Bashyam Iyengar, JJ., in *Vidyapurana Tirtha Swami* v. *Vidyanidhi Thirthaswami* (1) are against this view. Lunacy does not divest the estate already vested or the right of management though it may be a ground for removal of the lunatic from the office of trustee which is hereditary. The 1st plaintiff not being a trustee at the time of the renewal, the renewal cannot be deemed to be invalid because he was not consulted.

It is now argued for the first time in

(1) 27 M. 443 at p. 446; 14 M. L. J. 105.

second appeal that the 2nd plaintiff has not signed the renewal deed though it purports to be in his name also, and that it is bad on that account. The document purports to be in the name of the 2nd plaintiff as well, though it is signed only by the 13th defendant. It may be the latter had authority to sign for the 2nd plaintiff. We cannot allow the question of the absence of the 2nd plaintiff's signature to be raised now, when the 1st defendant may be in a position to explain it as due to the 13th defendant having been clothed with due authority to act for all.

We dismiss the second appeal with costs.

Appeal dismissed.

(s. c. 91 P. R. 1910.)

PUNJAB CHIEF COURT.

CIVIL REVISION No. 727 OF 1909.

May 2, 1910.

Present:—Mr. Justice Scott-Smith.

MADHO RAM—DEFENDANT—PETITIONER

versus

BADR-UD-DIN—PLAINTIFF—RESPONDENT.

Contract Act (IX of 1872), s. 25—Dastoori or commission—Public policy—Immoral custom.

An agreement to pay *dastoori* or commission on purchases is unlawful, being immoral and opposed to public policy.

An immoral custom cannot be recognized by the Courts.

Petition, under section 25 of Act IX of 1887, for revision of the order of Khawaja Tassudduq Husain, Judge Small Cause Court, Delhi, dated the 21st January 1909.

Mr. *Sohan Lal*, for the Petitioner.

Mr. *Abdul Qadir*, for the Respondent.

Judgment.—This was a suit for Rs. 68 2-0 as "*dustoori*" or commission due to plaintiff on purchases of mortar from the defendants.

No specific agreement was proved though alleged in the plaint, but the Court found that by custom *dustoori* was payable and decreed the claim.

I am quite unable to regard an agreement to pay *dustoori* as lawful, for I consider it to be immoral and opposed to public policy. If dealers choose to submit to the payment of *dustoori* that is their own business, but I do not think the Courts should help persons to recover sums claimed as such.

The custom is an immoral one which cannot be recognised by the Courts. I, therefore, accept the revision and setting aside the lower Court's order, dismiss plaintiff's claim, but as the plea of the agreement or custom being not enforceable was not raised in the Court below, I leave the parties to bear their own costs.

Revision accepted.

((s. c. 8 M. L. T. 244.)

MADRAS HIGH COURT.

CRIMINAL REFERENCE No. 21 OF 1909.

January 18, 1910.

Present:—Mr. Justice Benson and Mr. Justice Sankaran Nair.

In re RAMA MUPPAN—ACCUSED.

Dacoity—Conviction of accused—Evidence.

The evidence of a person, who knew the accused previously and who had ample opportunity of observing the accused at the dacoity and who immediately named him to the villagers and the Police as one of the dacoits, is entitled to credit.

Reference under section 307 of the Code of Criminal Procedure by the Additional Sessions Judge of the Coimbatore Division, in Case No. 95 of the Calendar for 1909.

Judgment.—We think that the prosecution evidence clearly establishes that the accused, Rama Muppan was one of those who committed dacoity in Ganapathi Palyam on the night of the 26th May 1908. There is no reason to doubt the evidence of Anga Koravan (1st Prosecution witness) who knew the accused previously and who had ample opportunity of observing him at the dacoity and who immediately named him to the other villagers as one of the dacoits and also named him to the Police some few hours after the dacoity.

The offence was a serious one and the other dacoits have been sentenced to five years' rigorous imprisonment each. We convict the accused, in this case, Rama Muppan of the offence of dacoity under section 395 of the Indian Penal Code charged against him and sentence him to five years' rigorous imprisonment.

Accused convicted.

BEHARI LAL *v.* KALU.

(s. c. 92 P. R. 1910.)

PUNJAB CHIEF COURT.

CIVIL REVISION No. 1702 OF 1908.

May 4, 1910.

Present:—Mr. Justice Johnstone.

BEHARI LAL AND OTHERS—PLAINTIFFS—PETITIONERS

versus

KALU—DEFENDANT—RESPONDENT.

Limitation Act (XV of 1877), Sch. II, art. 178—Limitation Act (IX of 1908), Sch. I, art. 181—Revision—Right to apply—Period of limitation—Starting point.

On April 25, 1905, the Small Cause Court, Sialkot, dismissed plaintiff's suit for Rs. 25 on account of *birt*. Appeal was made to the District Judge, who remanded the case. On re-trial the Small Cause Court decreed for plaintiff but on appeal the District Judge dismissed the suit. The Chief Court held that no appeal lay to the District Judge and restored the order of the First Court dismissing the suit. More than three years after the April 25, 1905, the plaintiff applied to the Chief Court for revision of the order of the first Court:

Held, that the application was barred, as the period of limitation was three years from the time when the right to apply for revision arose, that is, from April 25, 1905.

Petition, under section 25 of Act IX of 1887, for revision of the order of Lala Maya Ram, Munsif, 2nd Class, empowered as a Judge, Small Cause Court, Sialkot, dated 25th April 1905.

Mr. *M. N. Mukerjee*, for the Petitioners.

Mr. *Dhanpat Rai*, for the Respondent.

Judgment.—On the 25th April 1905, the Small Cause Court, Sialkot, dismissed plaintiffs' suit for Rs. 25 on account of *birt*. Appeal was made to the District Judge, who remanded under section 562, Civil Procedure Code (old). On re-trial the Small Cause Court again decreed for plaintiff, but on appeal the District Judge dismissed the suit. Plaintiff then came here on revision against the District Judge's order, and this Court held that no appeal lay to the District Judge and restored the order of the first Court, *i. e.*, the first decision dismissing the suit.

Plaintiff now comes up on revision as against the order of the first Court as restored, and is met by the objection that the revision is long barred by time. The situation is an anomalous one, but I fear the law is against the petitioner. Article 178 of the old Limitation Act and article 181 of the new are quite clear and give three years from the time when the right to apply for revision arose, which was, of course, on 25th April 1905. No provision of law helps the petitioner here Section 5 of the Act applies only to appeals and reviews, and section 14 allows only of deduction of time spent in making other applications in good faith, whereas here the application was one for revision and the time sought to be deducted is the time spent in appeals. No doubt in the course of the proceedings there was a previous revision in Chief Court but it was not an application for the same relief as asked for here.

It is also said that one petitioner was and is a minor and so section 7 saves him; but Suraj Bhan, his predecessor, was alive in April 1905 and so time began to run and could not stop at his death.

I dismiss the petition with costs.

Revision rejected.

MANIKKA VEERA *v.* EMPEROR.

(s. c. 8 M. L. T. 246.)

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 15 OF 1910.

CRIMINAL REVISION PETITION No. 12 OF 1910.

April 15, 1910.

Present.—Mr. Justice Miller.

MANIKKA VEERA RAGHAVA CHARIAR—ACCUSED

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 426—Mischief—Ploughing bona fide on widowed daughter's husband's land—Criminal intent presumed but not based on evidence—No injury to anybody proved—Legality.

Where the father of a widowed daughter ploughed on land belonging to her husband and he was prosecuted by the deceased's brother and convicted on the presumption of criminal intent: *Held*, that the conviction was bad as there was no evidence that the entry on the land was with intent to commit an offence or to intimidate, insult or annoy any person.

Petition under sections 435 and 439 of the Criminal Procedure Code, praying the High Court to revise the judgment of the Head Assistant Magistrate of Ranipet, in Criminal Appeal No. 94 of 1908, presented against the judgment of the 3rd Class Magistrate of Wallaja, in C. C. No. 521 of 1909.

Facts.—The accused is charged with Criminal Trespass on the lands of the complainant by ploughing them without right in the first week of this month. The accused is the father of the sonless widow of the deceased's brother of the complainant. He admits that he entered the lands and that he had a right to do so as they belonged to his daughter * * * Evidently

the accused as the guardian of the poor widow has taken the law in his own hands to secure her maintenance instead of resorting to Civil Court and seeking the desired remedy. * * (Extract from the Sub-Magistrate's judgment dated 2nd June 1909.) On appeal, the 1st Class Magistrate of Ranipet observed as follows:— * * The second ground urged is that the appellant's action was *bona fide* and that he had no criminal intent. I consider that the lower Court was right in presuming criminal intention. If a man ploughs another man's land, he must take the responsibility of his act. He obviously in fact does mischief. * *

Order.—Neither Court decides on the evidence that the entry on the land was with intent to commit an offence or to intimidate, insult or annoy any person, for I cannot take the statement of the 1st Class Magistrate that ploughing is obviously 'mischief' as a finding on the evidence. No witness says that the ploughing was in any way injurious to any one. I set aside the conviction and direct refund of the fine, if paid.

Conviction set aside.

(s. c. 95 P. R. 1910.)

PUNJAB CHIEF COURT.

CIVIL MISCELLANEOUS APPEAL NO. 89 OF 1910.

March 19, 1910.

Present:—Mr. Justice Rattigan.

KISHEN CHAND—PETITIONER

versus

E. D. SASSOON AND CO.—RESPONDENTS

Insolvency Act (III of 1907), ss. 13, 16 (2)—Power of Insolvency Court to order release prior to adjudication—Right of decree-holder to proceed against the person and property of debtor.

An Insolvency Court has no jurisdiction, prior to an order of adjudication, to direct the release of a judgment-debtor who has been imprisoned rightly or wrongly by an order of the Court executing the decree.

In re Quarme, 8 M. 503, relied upon.

Prior to adjudication, the right of the decree-holder to proceed against the person and the property of his debtor remains unaffected.

Application under Order XLVII, Rule 1 by the respondent for review of the order of the Hon'ble Mr. Justice Rattigan, dated the 15th February 1910.

Mr. *Pestonji Dadabhai*, for the Petitioner.

Mr. *Beechey*, for the Respondents.

Judgment.—The judgment-debtor Kishen Chand, has applied for a review of my order, dated the 15th February last, which was passed *ex parte*, as neither he nor any person representing him was present on that occasion. He explains that he intended to travel to Lahore by the Bombay mail from Delhi to Lahore on the night of the 14th February, but that by accident he missed that train and was, therefore, unable to arrive in Lahore on the last date of hearing. I am by no means satisfied with this explanation as it is obvious that he could, had he taken any trouble in the matter, have caught the later Calcutta mail. But as the question involved is one of some importance, I decided to re-open the case and to hear what his learned counsel had to argue on his behalf. I have now had the advantage of hearing Mr. Beechey's arguments in support of the views of the Divisional Judge, but I confess I can see no reason for setting aside my former order.

Mr. Beechey argues that the order of the District Judge, dated the 25th November directing the imprisonment of the judgment-debtor, was illegal. He points out that on the 11th August the judgment-debtor, when brought under arrest before the District Judge (who was executing the decree) expressed his intention of applying to be made an insolvent. Upon this the District Judge directed the release of the judgment-debtor, and on the 30th August the latter actually presented an application to the Insolvency Court. This application was, however, not presented and was eventually dismissed in default, and it was not until the 18th November that the judgment-debtor again applied to the Insolvency Court. This application was admitted on the 23rd November and the petitioner was called upon by the said Court to furnish security under section 13 of Act III of 1907. Meanwhile the decree-holder had applied to the District Judge to have the judgment-debtor arrested, and as a result, the latter was arrested and imprisoned on the 25th November.

Mr. Beechey argues that once the judgment-debtor applied to be made an insolvent, (as he did on the 30th August) all prior proceedings in the District Judges' Court must be regarded as having terminated, and that it was consequently not open to the District Judge to order the imprisonment of the judg-

In re KARUPPANAN SERVAI.

ment-debtor on the 25th November without giving him a fresh opportunity to apply to the Insolvency Court, and in support of this argument the learned counsel relies upon section 15 and Order XXI, Rule 37, of the Civil Procedure Code. I find it quite unnecessary to deal with this aspect of the question, as the sole point before me is whether the Insolvency Court acting under the provisions of Act III of 1907, had jurisdiction to order the release of a judgment-debtor who had been imprisoned under the orders of the Court executing the decree. For the sake of argument, it may be conceded that the latter order was illegal. Assuming it was, what power had the Insolvency Court to set it aside and to direct the release of the judgment-debtor? There is no provision in Act III of 1907, which confers this very extraordinary power upon the Insolvency Court, and there can be no doubt that under the law obtaining prior to the enactment of the said Act, the Insolvency Court had no such jurisdiction, *In re Quarme* (1). But not only is there no provision in the Act to that effect, there are certain provisions in it which conclusively show that, *prior to adjudication*, the right of the decree-holder to proceed against the person and property of his debtor remains unaffected. It is, for example, clear from the provisions of section 16 (2) of the Act that is only when an order for adjudication is made, that (1) the insolvent, if in prison for debt, shall be released, and (2) *thereafter* no creditor to whom an insolvent is indebted in respect of any debt payable under the Act, shall during the pendency of the insolvency proceedings have any remedy against the property or person of the insolvent in respect of the debt. Obviously, therefore, before any order of adjudication is made, the ordinary rights of the creditor are not taken away. Mr. Beechey's argument goes to the extent of claiming for the Insolvency Court a jurisdiction to set aside all orders of other Courts, (no matter what those Courts might be) as soon as the insolvent has preferred his application to be declared an insolvent. I cannot find anything in the Act which lends support to this argument whereas the provisions of section 16 of the Act appear to me to be entirely opposed to it.

The judgment-debtor may or may not have the right to contest the legality of the order of the District Judge, dated 25th November 1909, but that question is not now before me. I have only to consider whether it is open to the Insolvency Court, acting under the provisions of Act III of 1907, to direct the release of a judgment-debtor who has been imprisoned (rightly or wrongly) in execution of decree by an order of the Court executing the decree, and this, too, prior to the Insolvency Court's order of adjudication under section 16 of the Act. Upon this question I have no doubt that the Insolvency Court has no such jurisdiction. I accordingly set aside my *interim* order, dated the 28th February 1910, and restore my order, dated 15th February 1910.

The judgment-debtor must pay the costs of these proceedings in this Court.

[*See* further in this connection 7 Ind. Cas. 351, *Ed.*].

(1) 8 M. 503.

(s. c. 8 M. L. T. 246.)

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 503 OF 1909.

(CRIMINAL REVISION PETITION No. 379 OF 1909.)

July 27, 1910.

Present:—Mr. Justice Munro and Mr. Justice Abdur Rahim.

In re E. V. KARUPPANAN SERVAI—ACCUSED—PETITIONER.

Criminal Procedure Code (Act V of 1898), s. 110—Bad character—Whether sufficient for an order to enter into bond.

Mere proof of bad character does not bring the case within section 110 of the Code.

Petition, under sections 435 and 439 of the Criminal Procedure Code, praying the High Court to revise the decisions of the Additional District Magistrate of Madura, in Criminal Appeal No. 10 of 1909, presented against the order of the 1st Class Deputy Magistrate Devakotta, in Miscellaneous Case No. 27 of 1908.

Order.—From the judgment of the District Magistrate, we gather that all he considered the evidence proved was that the petitioner was a man of bad character. Such a finding does not bring the case within section 110 of the Code of Criminal Procedure.

We, therefore, cancel the bond.

Bond cancelled.

RAMAN CHETTY *v.* ALAGAPPA CHETTY.

MADRAS HIGH COURT.
CIVIL APPEAL No. 173 OF 1907.
September 9, 1910.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Ayling.

RAMAN CHETTY *alias* CHOCKALINGAM CHETTY AND OTHERS—APPELLANTS

versus

P. M. P. A. ALAGAPPA CHETTY AND OTHERS—RESPONDENTS.

Merchant Shipping Act (57 and 58 Vic. Chap. 60), s. 24—Vendee of a share in a ship—Absence of bill of sale in his favour - Right to be registered as owner.

A person, who is only the beneficial owner of a ship and in whose favour there is no bill of sale, is not entitled to be registered as owner.

First defendant, who owned a ¼th share in a ship, executed a nominal sale-deed in favour of his agent, the 4th defendant. Subsequently he sold the ¼th share to plaintiff. Plaintiff sued, among other things, for a declaration that he was entitled to be registered as owner of ¼th share in the ship:

Held, that plaintiff was not entitled to be registered as owner.

Appeal against the decree of the Subordinate Judge's Court of Madura (East), dated 3rd July 1907, in Original Suit No. 44 of 1902.

Facts are sufficiently clear from the following judgment of the Subordinate Judge:—

Plaintiff states that 1st defendant and his brother Nachiappa Chetty owned one-half share of a ship (each quarter of a share) and defendants Nos. 2 and 3 the other half, that they traded under the name and style of M. P. M. R. M. at Jaffna through their agent the 4th defendant in whose name 1st defendant had executed a nominal sale-deed and allowed the ship to be registered, that on 25th November 1899, the 1st defendant conveyed his ¼th share to plaintiff and directed 4th defendant to get his name also registered and to make good ¼th share of the profits to him but that he failed. Hence the suit for a declaration of plaintiff's right to ¼th share of the ship, to recover his ¼th share of profits and to have his name registered as owner of the ¼th ship jointly with that of the 2nd defendant.

2. The defendants Nos. 1, 2, 3 and 4 state among other things that the plaintiff's suit for a mere declaration of title is not maintainable, that this Court has no jurisdiction in respect of a ship registered in the Port of Jaffna, that the alleged sale to plaintiff is invalid under the provisions of the Merchant Shipping Act of 1894 and for want of consent of the other partners; that the plaintiff ought to have sued for the dissolution of the partnership, that the suit is bad for non-joinder of other partner Nachiappa Chetty; that the plaint is not properly stamped and that plaintiff is not entitled to claim mesne profits without paying his share of the advance of Rs. 600 made for the expenses of the ship when left for Arakkan.

Fifth defendant, who was subsequently added adopts the defence of defendants Nos. 1 to 4.

3. The issues were raised by my predecessor:—

(1) Whether this Court has jurisdiction to try this suit?

(2) Whether the plaintiff is entitled to ask for the consequential relief of possession, and, if so, is the suit for mere declaration bad for not asking it?

(3) Whether the plaint is properly stamped?

(4) Whether the suit is bad for non-joinder of 1st defendant's brother Nachiappa Chetty?

(5) Whether the sale of the 1st defendant's interest in the plaint mentioned ship to the plaintiff is invalid, the same not conforming to the provisions of the Merchant Shipping Act of 1894?

(6) Whether the 1st defendant is incompetent to sell his share of the plaint-mentioned ship when he is not the registered proprietor of the ship?

(7) Whether the letter referred in para. 6 of the plaint is genuine, and if so, whether the defendant No. 4 had authority to write the said letter and even if he had authority to write the letter, does the said letter confer any right on the plaintiff to the ship in question?

(8) Whether defendants Nos. 2 and 3 are bound to register the ship in the name of the plaintiff?

(9) Whether there is any cause of action against defendants Nos. 2 and 3?

(10) Whether the sale to plaintiff is invalid, the same having been made without the consent of the other partners of the ship?

(11) Whether plaintiff is entitled to ask for accounts and profits without seeking for the dissolution of the partnership?

(12) Whether the plaintiff is entitled to the injunction sought for?

(13) What is the amount of profits to which the plaintiff is entitled?

(14) Is the plaintiff liable to bear his portion of the expenses as per para. 16 of the written statement of defendant Nos. 2 and 3?

(15) Whether the 4th defendant is a necessary party to the suit?

(16) What relief or reliefs, if any, is the plaintiff entitled to?

4. Fifth and 16th *Issues*:—The plaintiff who claims to have purchased from 1st defendant a share of a ship, brought this suit for a declaration of his right to the ship and for profits and to have the registry effected in his name jointly with that of 2nd defendant.

5. The defendants contended *inter alia* that the sale even if true "is invalid since the provisions of the Merchant Shipping Act of 1894 have not been complied with" and the contention is sound.

6. There is no doubt that the ship in question is a British ship, and it is agreed that the Merchant Shipping Act applies. Section 24 of the Merchant Shipping Act provides that a registered ship or a share therein shall be transferred by a bill of sale and admittedly there was no bill of sale in the present case as required under the Act. In *Ramanandan Chetty* v. *Nagooda Marakayar* (1), it was held that in such cases no property passes unless the requirements of the above section are met.

7. It is contended on plaintiff's side that 1st defendant, from whom plaintiff purchased, had only an equitable interest, that under sections 57 and 58 beneficial ownership may be created, and that as regards sale of such interest, no sale-deed is necessary, but the contention seems to me not sound. Section 58 defines the liability of a beneficial owner and section 57 defines the beneficial interest referred to in section 58. Beneficial interest is said to include interest arising under contract and other equitable interest and the subsequent part of the section declares the policy to be that such interest may be enforced by or against owners or mortgagees in respect of their interest in the same manner as in respect of any other personal property. The previous section 56 having prevented notice of trusts, section 57 declares that beneficial interest may be created without prejudice to that prevention and without prejudice to the powers of disposition. There seems to be nothing in these sections to support the contention that there may be an equitable ownership as distinguished from a legal ownership. Such a contention was in fact held to be untenable in the case in *Ramanandan Chetti* v. *Nagooda Marakayar* (1), where the case of *Ward* v. *Beck* (2) was followed. The present case is even stronger, because the plaintiff wants a declaration that he is entitled to be registered as owner.

8. In the case in Volume III, Law Reports Appeal Case No. 127, cited on plaintiff's side, this question did not arise. There the substantial question was whether the Registrar was bound to register as owner of a barque the purchaser under the award of the master. I find that there was no valid sale to plaintiff.

9. Another contention of the plaintiff's Vakil was that as regards the profits claimed at least, the suit is maintainable, but even this contention is not tenable. The right to profits depends upon the title to the property. It is claimed on the footing that the plaintiff is the owner of the ship and not on any other ground.

10. It is unnecessary to go into the other issues as the plaintiff failed to make out a title.

11. Suit is dismissed with costs. One set.

Plaintiff appealed to the High Court, and the High Court (Subramanya Aiyar and Benson, JJ.,) remanded the case to the lower Court for a finding on all the issues. The following is the High Court's order of remand:—

In this case the suit was dismissed without trial on the ground that the plaintiff, upon the allegations in his plaint, was not

(1) 21 M. 395.

(2) 32 L. J. C. P. 113; 13 C. B. (N. S.) 668; 9 Jur. (N. S.) 912.

entitled to rely on his alleged right to a share of the ship referred to in the plaint in consequence of the provisions of the Merchant Shipping Act of 1894 (57 and 58 Victoria, Chapter 60). The ship in question was owned in shares by the defendants Nos. 1, 2, 3, and the brother of the 1st defendant. The ship is registered under the Act in the name of the 4th defendant who, however, has no proprietary interest in the vessel, being merely the agent of defendants Nos. 2 and 3. The plaintiff claims to have purchased from the 1st defendant his one-fourth share of the ship. There was no bill of sale, nor any registry to the name of the plaintiff. He sues for a declaration of his right to be registered and for recovery of his share of certain profits said to have been derived from the ship. Following the decision in *Ramanandan Chetti* v. *Nagooda Marakayar*(1),the Subordinate Judge held that in the absence of registration as required by section 24 of the Act, the plaintiff was disentitled to set up any right to an interest in the ship. No doubt that case supports the view taken by the Subordinate Judge, but in the present case we allowed the question of the soundness of that view to be argued as it appeared that certain authorities opposed to that view were not cited or considered by the Court. In that judgment it was assumed that the case of *Ward* v. *Beck* (2), which was decided in 1863, was a decision under the Merchant Shipping Act of 1854, as modified by the Act of 1862, and that it, therefore, applied the decision in *Liverpool Borough Bank* v. *Turner* (3), which was a decision under the Act of 1854, prior to amendment to provisions of the Act as it stood after the Act of 1862 was passed. The transaction which was in question in *Ward* v. *Beck*(2) was, however, in fact, a transaction governed by the Act of 1854 before the amendment enacted in 1862. The references to the amendments introduced in 1862 made by Willes, J., in the course of his judgment, were only by way of argument in support of the view which he held as to the true construction of the Act of 1854 with reference to the matter in dispute before him.

In these circumstances, *Beck* v. *Ward* (2) nor the case reported in *Ramanadan Chetti* v. *Nagooda Marakayar* (1), can be relied on with reference to the construction of the present Act which contains new provisions admitting of the recognition of equitable interests including those arising under contract. Section 57 of the Act declares that the intention of the Act is that "interests arising under contract or other equitable interests may be enforced by or against owners and mortgages of ship in respect of their interest therein in the same manner as in respect of any other personal property" without prejudice, however, to three classes of cases specified in the sections, no one of which has any application to the present case. It is not necessary for us to discuss the decision of Grove, J., in *Bathyany* v. *Bouch*(4), in which the learned Judge dissents from the earlier decision of Wood, V. C. in the *Liverpool Borough Bank* v. *Turner*(3) already referred to, since the matter so far as the Courts in India are concerned is practically concluded by the observations of the Judicial Committee in the case of *Chasteauneuf* v. *Capeyron* (5). The Judicial Committee there dealt with the Act as amended in 1862 and after referring to the state of the law up to the decision in the *Liverpool Borough Bank v. Turner* (3), they pointed out that the law had been altered by the amendment made in 1862 and that the effect of the amendment made was to allow the recognition of equitable interests, subject only to the three classes of cases specifically excepted by the Act. The provisions of the Act of 1894, now in force, are practically identical, so far as concern the present case, with the provisions of the law which the Judicial Committee had before them.

In the present case if the plaintiff's allegations are true, the interest of his vendor was only equitable, and it is competent to him to establish his alleged right to the share in the ship and its income without any registered bill of sale.

We, therefore, set aside the decree of the Subordinate Judge and remand the case for disposal according to law. Costs in this Court will be provided for in the decree of the lower Court.

In compliance with the High Court's order,

(3) 29 L. J. Ch. 827; 1 Jhons. & H. 159; affirmed 30 L. J. Ch. 379; 7 Jur. (N. S.) 150; 3 L. T. 494; 9 W. R 292.

(4) 50 L. J. Q. B. 421; 44 L. T. 177; 29 W. R. 665; 4 Asp. M. C. 380.

(5) L. R. 7 A. C. 127; 51 L. J. P. C. 37; 46 L. T. 65; 4 Asp. M. C. 489.

the Subordinate Judge passed the following decree:—

1. That the plaintiff be, and hereby, is declared entitled (*a*) to one-fourth share in the ship in the plaint mentioned, as purchaser thereof; (*b*) to joint registry in his name as a co-proprietor of the ship to the extent of one-fourth as aforesaid; and (*c*) to have accounts taken against the defendants Nos. 2 to 4 as regards the incomes and expenses of the ship aforesaid, since the date of his purchase *viz.*, 29th November 1899, and also in respect of the amounts due to him for his said one-fourth share in the ship in the plaint mentioned, since the said date of his purchase. And it is further ordered and decreed:—

2. That the defendants be, and hereby are, enjoined and restrained from obstructing the plaintiff from obtaining the transfer of the registry as a co-proprietor of the ship to the extent of one-fourth share as aforesaid.

3. That accounts be taken in respect of the incomes and also expenses of the ship as aforesaid and the amounts due to the plaintiff for his one-fourth share in the ship in plaint mentioned, since the date of his purchase as aforesaid.

4. That for the purpose of taking the said accounts, the defendants Nos. 2 to 4 shall, within one month from this date, file in Court, their account of the several matters in the preceding paragraph mentioned; from the said date (29th November 1899) up to date of such filing of accounts, verified by the affidavit of themselves or some duly qualified person or persons; and the plaintiff shall, within a week of the filing of the accounts by the defendants Nos. 2 to 4 as aforesaid, file in Court a statement of his objections thereto; and all parties shall be entitled to inspect all books of account and papers connected with the matters in suit and the said statements of account and objections.

5. That the said accounts be taken by a Commissioner to be appointed for the purpose or in such other way as may then be decided upon.

6. And that the defendants Nos. 2 and 3 do pay the plaintiff's costs of the suit which shall be taxed on the amount to be allowed under the final decree herein.

And the further consideration of this suit is adjourned to 28th March 1907 for passing a final decree.

Given under my hand and the seal of the Court, this 22nd day of February 1907.

Defendants appealed to the High Court.

Judgment.—The first contention is that, as the plaintiff is only a beneficial owner and there is no bill of sale in his favour, he is not entitled to be registered as owner and, therefore, no injunction should have been issued. We think the contention is right.

Under section 10 of the Merchant Shipping Act, which deals with the first registry of a ship, the applicant, if a purchaser of a ship, has to produce his bill of sale for registry; under section 24 a share in a registered ship shall be transferred by a bill of sale and section 26 provides that for registry of transfer such bill of sale shall be produced to the Registrar, and thereon the Registrar shall enter the name of the transferee in the register and endorse on the bill the fact of such entry. There are special provisions in the act for registry in cases of transmission of property on death, bankruptcy &c., of a registered owner or sale by order of Court. Section 56 shows that no trust in any form is to be entered in the register. These provisions show, in our opinion, that though the sale in favour of the plaintiff created a beneficial interest in him, it is not such an interest as entitled him to call upon the Registrar to register him as a part owner.

The next question is as to the profits that ought to be awarded to the plaintiff. The Subordinate Judge awarded Rs. 1,500 to the plaintiff for his share of the income in 1900, and for the subsequent years he gives Rs. 2,000 for each year. The Advocate-General relies upon the evidence of the plaintiff's witnesses to show that the plaintiff's share of the income is less than the sum awarded. But the oral evidence is vague. The defendants do not produce their own accounts, and in the absence of any better evidence, we are unable to say that the Subordinate Judge is wrong in relying upon Exhibit E, and giving the plaintiff the sum awarded. As to the years 1901 and 1902 the Subordinate Judge states that Exhibit E is not clear as regards the gross receipts and expenses, and as Exhibit E, itself does not show that the plaintiff's share is Rs. 2,000 or above Rs. 2,000, there is no reliable evidence that the plaintiff is entitled to that sum.

We accordingly reduce the sum awarded to the plaintiff for each of these two years also to Rs. 1,500.

For the subsequent years the Subordinate Judge has accepted the rates awarded for 1901 and 1902. As we have reduced the sums awarded for those years, we award Rs. 1,500 for these years also.

The decree will be modified by omitting in the decree dated the 22nd February 1907 the declaration of the plaintiff's right to joint registry and by the omission of clause (2).

In other respects the decree is confirmed. There will be proportionate costs in this Court.

Decree modified.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 105 OF 1910.
(CRIMINAL REVISION PETITION No. 84 OF 1910.)
September 27, 1910.

Present:—Mr. Justice Ayling.

GILES SEDDON—PETITIONER—COMPLAINANT

versus

S. J. LOANE AND OTHERS—COUNTER-PETITIONERS—ACCUSED.

Penal Code (Act XLV of 1860), s. 409—Cheating—Directors of a Loan and Deposit Society—Issue of false balance-sheets — Balance-sheet containing incorrect entries—Presumption of guilty knowledge—Wrong classification of bad debts—Failure to include Director's loans as a separate item—Position of auditors—Auditor's certificate about the existence of securities—Criminal liability.

The mere fact that the Directors of a Deposit and Loan Society passed an incorrect balance-sheet, is not sufficient to justify the framing of a charge of cheating against them and placing them on their defence. The guilty knowledge of each Director cannot be presumed from the mere fact that he authorised the issue of a balance-sheet containing false entries, but must be decided in view of all the circumstances of the case, *i. e.*, the nature of the false statements, the ease or difficulty with which their truth or falsity could be ascertained, the course of business of the society, the position, experience and attainments of individual Directors, etc.

Queen-Empress v. *Moss*, 16 A. 88, distinguished.

Mistakes and omissions in the classification of debts as 'doubtful' or 'bad', cannot, in the absence of positive evidence of guilty knowledge, be taken to afford any presumption of cheating on the part of the Directors of a limited Company. Nor does the omission by Directors to show their debts as a separate item afford any presumption of guilt.

The above acts and omissions, though by themselves would entail strong civil liability on the part of the Directors, will not make them criminally liable.

Where an Auditor, who does not happen to be a trained Accountant, certifies to the existence of securities and states that the balance-sheet is correct and according to law, he cannot be held liable criminally for failure to detect mistakes which would have revealed the financial unsoundness of the Company.

In re London and General Bank, (1895) 2 Ch. App. 673; 64 L. J. Ch. 866, referred to.

Petition, under sections 435 and 439 of the Criminal Procedure Code, praying the High Court to revise the Order of the Chief Presidency Magistrate, dated the 14th February 1910, in Calendar Case No. 6518 of 1909.

Messrs. *J. C. Adam* and *K. U. Shama Rao*, for the Petitioner.

The *Crown Prosecutor*, in support of the order of the Presidency Magistrate.

The Hon'ble Mr. *T. Richmond*, for Accused Nos. 1 to 8, 10 and 11.

Mr. *E. R. Osborne*, for Accused Nos. 2 to 9 and 11.

Mr. *A. E. Rencontre*, for the 7th Accused.

Mr. *M. K. Narayanaswami Aiyar*, for Accused Nos. 7, 10 and 11.

Order.—This is a revision petition filed by Mr. Giles Seddon, Complainant in Calendar Case No. 6518 of 1909, on the file of the Chief Presidency Magistrate against the order of discharge passed therein.

The accused were directors of the East Indian and Anglo-Indian Deposit and Loan Society, Limited, at the end of 1905 and the complaint was of cheating and criminal breach of trust (sections 418 and 409, Indian Penal Code). The former consisted in issuing a false balance-sheet for the half year ending the 31st December 1905 and thereby inducing the complainant to renew his deposits. The latter consisted in ordering the distribution of Directors' fees and dividends or shares for the same half year to themselves and others in knowledge of the fact that no profits had been made, from which the same could be met.

The charge of criminal breach of trust appears to have dropped into the back ground in the Presidency Magistrate's Court and is barely referred to in the judgment.

It is stated that it was arranged that evidence on the cheating charge should be taken first. As a matter of fact, however, both charges depend on the same factor, the knowledge of the true state of the society's finances possessed by the accused.

The judgment of the Chief Presidency Magistrate is couched in very general terms: it gives little indication of the nature of the misstatements found in the balance-sheet, and makes no attempt to distinguish the case of the individual accused. Nevertheless, after a careful consideration of the case, I see no reason to differ from the Magistrate's conclusion: and must hold that the evidence on record does not show that any of the accused acted dishonestly or fraudulently in the matters in question.

The balance-sheet referred to in Exhibit D was adopted at a Directors' meeting on the 20th January 1906 at which all the accused were present. It is drawn up in form E appended to the Society's Memorandum of Articles of Association; and follows with some modifications that given in the first Schedule, Table A of the Indian Companies Act (VI of 1882). The misstatements alleged to be contained in it are as follows:—

(*a*) The debts due to the society are wrongly classified with reference to the nature of the security, unsecured debts being shown as secured.

(*b*) The bad debts are not fully shown.

(*c*) The debts due by directors and officers are not shown at all.

(*d*) The interest remaining due to depositors is largely under-stated.

(*e*) The amount shown as realised in the shape of interest on loans contains a large amount, which was not really collected during the half year under report.

This is a formidable list of indictments and, if established, it would certainly follow that the balance-sheet gave a very misleading view of the position of the society, and was calculated to deceive to their prejudice intending depositors and investors. The question whether the directors, or any of them, knew or had reason to suppose the statements to be false would still remain. The learned counsel for the petitioner contends that the mere fact that the Directors have passed an incorrect balance sheet is sufficient to justify framing a charge of cheating and placing them on their defence. No authority is adduced for such a position, which certainly receives no support in the leading Indian Case [*Queen Empress* v. *Moss*, *The Himalaya Bank Case* (1)] or in the various English cases quoted, although the latter relate simply to civil liability. It appears to me that the guilty knowledge of each Director cannot be presumed from the mere fact that he authorised the issue of a balance-sheet containing false entries; but must be decided in view of all the circumstances of the case, *e.g.*, the nature of the false statements, the ease or difficulty with which their truth or falsity could be ascertained, the course of business of the society, the position, experience and attainments of individual directors, etc The falsity of the balance-sheet in the particulars above indicated is sought to be established mainly on the evidence of Messrs. D'Sena and Lewis (Prosecution Witnesses Nos. 2 and 6) who were respectively secretary and auditor of the society at subsequent periods. Another witness who might have been valuable is Mr. Lyons (Prosecution witness No. 3) who was one of the official liquidators of the society, but as he died during the trial before being cross-examined, little or no reliance can be placed on his evidence. As regards D'Sena and Lewis, the remarks of the Chief Presidency Magistrate in paragraph 4 of his judgment are not undeserved. Without suggesting anything against the good faith of either witness, the record seems to me to show that each was very largely in the hands of others in his analysis and check of the accounts, and that their statements must be accepted with great caution and reserve.

Generally it may be stated that a consideration of the whole evidence shows that the misstatements were much less flagrant than might at first appear, and in at least one instance was not a misstatement at all. The society was undoubtedly in a very bad way at the end of 1905, not to say practically insolvent: this seems to have been largely due to previous bad management and in particular to the way in which interest on loans had been allowed to accumulate

(1) 16 A. 88.

until they far exceeded the security originally furnished, while the nature and value of the latter had originally received inadequate consideration. But the actual misstatements, except as regards bad debts—and that by way of omission, were not of importance.

As regards A, the balance-sheet groups debts due to the society into two heads—those owing on mortgage (Rs. 7,81,6-2) and those owing on personal security (Rs. 17,541). This classification has admittedly been followed in successive balance-sheets for many years; but it is not in accordance with the form in the Act which gives the following classification:

(1) Debts considered good for which the company hold bills or other securities.

(2) Debts considered good for which the company hold no security. This form is reproduced in the company's Memorandum of Articles of Association (with an obvious error) and there is nothing to indicate how it came to be varied. The difference of form is, however, of no practical importance. Admittedly the practice has been to class as "mortgage" debts, all loans secured by mortgages, pledge of jewels, deposits, life policies and possibly other forms of security, while loans secured only by pro-notes went into the other class: and the complainant himself admits as Prosecution Witness No. 1 that he understood that moneys advanced on jewels and deposits as well as on mortgages went into the first class. As regards loans on life policies he says nothing: and the question, whether such loans should be regarded as secured, is not one to be decided off-hand and without reference to the circumstances of each case. I need say no more on this point because the gravamen of the charge in this connection is that debts to the extent of Rs. 65,737, based on nothing but pro-notes, were included as "mortgage" loans both in the ledger and in the balance-sheet. A list of such loans is given in Exhibit XI prepared by Lewis. Unfortunately for the prosecution, Lewis' cross-examination absolutely shatters his credit on this point. Apart from all questions of the extent to which he was in the hands of his assistant Dias, who has not been cited as a witness, he admits that in 50 per cent. of the cases he was guided simply by the personal knowledge of one of the society's clerks, Arulananda, Prosecution Witness No. 5. Arulananda distinctly says that what Lewis classed as personal loans were not personal loans at all; and says he (Arulananda) told him so. As far as one can see, Lewis fell into the error of classifying every loan for which there was a pro-note as an unsecured loan irrespective of whether there was other security in the shape of a deposit or not. This appears from his own deposition. I have carefully considered his evidence and have come to the conclusion that although it is *possible* that some individual loans not properly secured may have been wrongly entered in the "mortgage" or secured register, there is no trustworthy evidence that this was done on any scale calculated to attract attention or to suggest deliberate deceit: and that Lewis' lists and his evidence regarding them cannot be trusted for a moment.

I now pass to B.—the failure to show bad debts. The form appended to the Companies Act requires all "debts considered doubtful or bad" to be separately shown: and this is re-produced in the society's rules. In the balance-sheet, there is no such entry: but a sum of Rs. 818 is shown as "written off for bad debts". Here also the variation in the form is not new: but there is nothing to show when or by whom it was first introduced.

As already indicated there is no doubt that we have here a misstatement (by omission) which rendered the balance-sheet a very misleading guide to the state of the society's finances. A rigid scrutiny of the securities, records and accounts at the end of 1905 would, in all probability, have shown that many of the loans were not fully secured and were of doubtful recovery. But serious as this omission is, it is one which must not be too hardly pressed against the present accused. The classification of a debt as "doubtful or bad" is a matter in which experts might differ. I do not find anything to warrant me in holding that the attention of the Directors was drawn to the point; and I may as well state here that the general defence set up by the accused that they left matters to their secretary in whom they had implicit confidence finds support even in the prosecution evidence. This secretary, Gardiner, who was dismissed in March 1906, and died six months later, certainly appears to have been the moving spirit of the society; in fact, even petitioner's counsel practically confines himself to arguing that certain of the ac-

cused must have been "in the swim" with him. D'Sena himself says that Gardiner was "the director of the directors and the society itself." He adds that the society was well-known in Madras as the "one man" fund. I may add that, with one unimportant exception, the accused are all elderly men, six of them being Government Pensioners and two others retired employees of the Madras Municipality and Railway Company, so that such reliance is not so unnatural as it would be in the case of men of a different class. On the whole while recognizing the gravity of the omission to properly record all bad and doubtful debts, I do not feel prepared to hold that this omission was necessarily connived at by the Directors.

C. is another case of misrepresentation by omission. Of course, such misrepresentations may be just as serious and just as dishonest as if effected by insertion of a false statement but it is more difficult to say that those who passed the balance sheet must have been aware of them. It is said that the accused in this case deliberately omitted to show separately debts due by the directors as they were legally bound to do. According to the prosecution, these debts reached the amazing total of Rs. 1,85,490, as spoken to by D'Sena. This figure appears to be another mistake, the real figure being Rs. 1,00,854, which includes Rs. 6,471 due by Gardiner and nearly Rs. 40,000 due by the 1st accused Loane, regarding which there is a serious dispute. Such a large liability by Directors is a serious matter, even taking the smallest figure; but the question is whether the accused can be presumed to have known that it ought to be shown in the balance-sheet. A reference to the correct form appended to the Companies Act leaves it far from clear whether it is intended that all debts by directors should be separately entered: or only where they are considered doubtful or bad. Probably the former was the intention, but it is certainly not free from doubt. In the form printed in the Society's memo. previously referred to, by the insertion of a colon, and the substitution of a small for a capital letter, it is made to appear clearly that this proviso for separate entry of Director's debts is only intended to apply to bad or doubtful debts. It is to this memo. of rules (Exhibit A) that any director would turn for reference in case of doubt. The present copy was printed in 1901, and even if it be assumed that the slight alteration was designedly effected, it is impossible to hold that it was done with the connivance or cognizance of even such of the accused as were then on the Board of Directors. As a matter of practice, it is admitted that Directors' debts have not been separately entered since 1892, when a petty sum of Rs. 95 was so shown. Subsequently there has never been even a nil entry in any of the balance-sheets to draw attention to the point. I consider it very unlikely that the necessity of showing director's loans separately was present to the minds of the Directors when passing the balance sheet; and almost certain that even if attention had been drawn to it a reference to Exhibit A would have left them under the impression that such debts need only be shown when "bad or doubtful." If so the question would arise whether any of the debts were doubtful. It may be suggested that two of them, Loane and F. Rodgers, should have known that their own debts were doubtful and should be separately shown. Rodgers compounded with the liquidations, two years later paying 10 annas in the rupee. Loane has only paid up Rs. 10,000, but it is not certain that his failure to pay the balance is due to insolvency. I should certainly hesitate to hold that either of these men knew, in January 1906, that the debts due from them to the society were irrecoverable; still less that the other Directors were so aware. Practically all the debts by the other accused have been realised.

The next point (D) is practically abandoned. It arises out of another mistake by D'Sena. He took the entry of Rs. 1,779-3-9, entered to "interest account" on the debit side of the balance-sheet to represent interest due to depositors but unpaid. He subsequently admitted in cross-examination that it was a different matter altogether and that the entries in the balance-sheet regarding interest on deposits were quite correct. The point is only of importance as illustrating the value of his evidence.

The last point (E) relates to the entry of interest received on loans. It is admitted by the defence that the entry of Rs. 35,939 under this head includes Rs. 22,884 which had not been actually realised during the half-year, but was deemed absolutely safe. It appears to have been Gardiner's habit to

prepare at the end of every half year in a special book a list of such sums: and to include them in the balance-sheet as if actually received. In the next half year so much of such sums as were collected, would be deducted from actual collections, and only the difference *plus* a fresh addition arrived at in the same way entered in the balance-sheet. Such a system certainly seems very bad book-keeping and likely to end badly sooner or later: but it had been carried on for many years without being exposed by the society's auditors, of whom one was an Accountant in the Bank of Madras, and another an official of the Government Accounts Department. It is difficult to say that men of the class of the present accused *must* have detected and realised its impropriety.

I have now considered in detail each of the misstatements said to be contained in the balance sheet: it is only as regards B and C that the balance sheet can be regarded as materially defective or misleading. I have referred to the doubt regarding the liability to disclose Directors' loans (C) and there remains only the failure to classify and schedule bad and doubtful debts which was the real cause of the society's downfall but for which it is difficult to hold the Directors criminally liable. I do not find any of them to be of such nature as to necessarily imply bad faith or dishonesty on the part of the directors who passed it. In fact in the case of two of the accused, Bond and Wilcox, their position with reference to the society is the strongest evidence of their good faith. Bond appears to have had Rs. 18,000 on fixed deposit and Wilcox Rs. 10,000 which he renewed in January 1906, the very month when the balance-sheet was passed. Against this, Bond had drawn only a small loan since discharged, and Wilcox nothing at all. In justice to these accused, I place these facts on record. Against them and also against the 3rd accused Bower, and the 9th accused Bullmore, it is now stated that the case is not pressed.

As regards the remaining accused, the petitioners' counsel emphasizes the fact that Loane, F. Rodgers, Dunhill and Rodgers were large borrowers from the society, while Loane was President, Dunhill, Vice-President and J. Rodgers, Auditor, for the half year. The mere existence of loans in the case of individual accused really adds nothing to the case against them unless it can be shown that they knew themselves unable to pay at the time of the balance-sheet: and there is no evidence of this even in the case of Loane and F. Rodgers. The others paid up all or practically all they owed. The composition effected by F. Rodgers two years later included payment of the whole of the principal and Rs. 6,119 on account of interest. Loane's case is peculiar as there seems reason to suppose there is a *bona fide* dispute as to the amount due by him. His counsel points to unexplained entries of Rs. 10,000, Exhibit XIV (*b*), extract of his account. I should certainly not be prepared to say that either man knew his debts to be bad or doubtful in January 1906. Nor do I think the office of President or Vice-President is a matter of particular moment. The only man, whose case stands on a special footing and presents real difficulty, is the 11th accused James Rodgers, who audited the accounts before the balance-sheet and signed the following certificate at the foot of the latter:

"I have examined and checked the books and vouchers from which the above accounts are compiled, and I have also satisfied myself as to the *existence* of the securities for loans to the amount stated, and hereby certify that this balance-sheet is *correct* and *according to law*". The 11th accused in the discharge of his duties of auditor must be presumed to have acquired a much more intimate knowledge of the society's accounts and business than would be possessed by an ordinary director. The question is whether his special knowledge was of such a nature that he must have been aware that the balance-sheet was calculated to deceive the outside public as to the society's financial position. No Indian case bearing even remotely on the point has been quoted by either side: and the English case referred to, *In re London and General Bank* (2), though laying down the general duties of auditors, is of little assistance inasmuch as it only deals with the civil liability of an auditor for any failure to bring the true financial position of a company to the knowledge of the share-holders. In the present case dealing with the much more serious question of criminal liability, I do not think it safe to travel beyond the terms of the auditor's certificate above set out and rule 68 of the Articles of Association which deals

(2) (1895) 2 Ch. App. 673; 64 L. J. Ch. 866.

with the auditor's position. It must also be borne in mind that the accused, James Rodgers, was not a trained Accountant, but only a retired Government clerk, with apparently no special qualification for the post: this point is of great importance in gauging his criminal liability as bearing on the amount of knowledge he would be likely to have acquired.

In the present case the balance-sheet admittedly was in exact accordance with the books, which were themselves in perfect consistency of the five points dealt with above. Only B, C and E. call for consideration. The inclusion of uncollected interest is certainly a defect which one would expect an auditor to detect: but as it had escaped exposure at the hands of two previous and better qualified auditors, a similar failure on the part of the accused must not be pressed too hardly against him. His liability for points B and C depends entirely on whether he should be presumed to be aware of the fact that many of the debts due to the society were doubtful and bad on account of defective and insufficient security. The same remark applies to C, for it would be too much to expect this man to refer to the Companies Act itself to see if the form printed in Exhibit A was correct. The extent, to which it is an auditor's duty to examine the adequacy of security for debts, does not appear to be free from doubt: and in this, as in other respects, some latitude must be allowed. As remarked by Lindley, L.J. in the case above quoted: "Where there is nothing to excite suspicion, very little enquiry will be reasonably sufficient and in practice I believe business men select a few cases at haphazard, see that they are right, and assume that others like them are correct also. Where suspicion is aroused more care is obviously necessary, but still an auditor is not bound to exercise more than reasonable care even in a case of suspicion."

These remarks are made with reference to the Civil liability of a trained Accountant.

I think any Court would hesitate to pronounce that J. Rodgers must have become aware of the inadequacy of the security in any individual case: his certificate merely says that he satisfied himself as to the existence of the securities: and I do not find any ground for holding that this was untrue. Nor on the whole, do I feel justified in presuming that James Rodgers' work as an auditor placed him in such a special position as to justify his being held criminally liable for such misrepresentation as the balance-sheet contained.

I do not consider that a *prima facie* case of cheating is made out against any of the accused in respect of the balance-sheet in question: nor does the evidence disclose such a knowledge of the society's financial position on the part of the accused as would be required to uphold a charge under section 409.

There is no reason to order further enquiry. The petition is dismissed.

Petition dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 1195 TO 1207, 1271 TO 1347 AND 1349 TO 1384.

September 21, 1910.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Ayling.

ARMUGAM CHETTY AND OTHERS—APPELLANTS

versus

Raja JAGAVEERA RAMA VENKATESWARA ETTAPPA MAHARAJA AIYAR AVERGAL—RESPONDENT.

Landlord and tenant—Tenant raising garden crop on dry lands by means of well sunk by him—Enhancement of rent—Custom — Implied contract — Consideration, necessity for—Madras Rent Recovery Act (VIII of 1865), s. 11 (3)—*District Manuals, statements in, evidentiary value of.*

A landlord is not entitled to impose enhanced rent on his tenant for the latter's cultivating lands, originally dry, with garden crops by means of wells sunk at the tenant's expense, by virtue of a subsisting custom, as such a custom, even if established, would be unenforceable as conflicting with Madras Act VIII of 1865.

Armugam Chetty v. *Raja Jaga Veera Rama Venkateswara Ettappa*, 28 M. 444, 15 M. L. J. 292, *Paramasawmy Iyengar* v. *Pusala Tevan*, 20 M. L. J. 142; 8 M. L. T. 115; 5 Ind. Cas. 911 and Letters Patent Appeals Nos. 35 to 61 of 1905, referred to.

Such an enhancement is permissible, however, by virtue of a contract, express or implied. If implied contract is relied on as the basis for the enhancement, consideration for the same must be proved. Such consideration may be of the same implied nature as the covenant to pay.

Natesa Gramani v. *Venkatrama Reddi*, 30 M. 511; 2 M. L. T. 455; 17 M. L. J. 518, *Suppa Pillay* v. *Nagayasami Thambichi Naicker*, 31 M. 19; 17 M. L. J. 511; 3 M. L. T. 103, *Armugam Chetti* v. *Raja Jaga Veera Rama Venkateswara Ettappa*, 28 M. 444; 15 M. L. J. 292, referred to.

The payment of a uniform rate for dry lands for a period, prior to the sinking of wells by the tenant, is

evidence of an implied contract to pay rent at that rate, and not that the charge was variable according to the crop raised.

If the landlord had a right, which should be proved, to revert to the *varam* system when the tenant began to cultivate the more valuable crop with the aid of well water sunk by him, the landlord's abstention from exercising that right may be viewed as consideration for the implied contract to pay enhanced rent for the garden crop.

Statements in District Manuals as to custom prevailing in certain *taluqs*, while they may be referred to in corroborating or contradicting evidence in any particular case, cannot take the place of such evidence, or be made the sole basis for a finding thereon.

Second appeals against the decrees of the District Court of Madura, in Appeal Suit Nos. 388, 389, etc. etc. etc. of 1904, respectively.

Judgment.

Aiyling, J.—The sole question for determination in these appeals is the right of the respondent, the *zemindar* of Gantamanaicknur, to charge rent at the enhanced rate of eight *fannams* a *guli* on lands originally dry, but cultivated with garden crops by means of wells sunk at the tenant's sole cost. This right was originally based (1) on an alleged custom and (2) on an implied contract. With the former we have now nothing to do. As pointed out by Subramania Iyer, J., in his judgment in this case when it first came before this Court, *Armugam Chetti* v. *Raja Jaga Veera Rama Venkataswara Ettappa* (1), such a custom even if established would be unenforceable as conflicting with section 11 of Mad. Act VIII of 1865; and in Letters Patent Appeal Nos. 35 to 61 of 1905, the judgment, in upholding the order of remand,—specifically lays down that the question of custom could not be re-opened. [*Vide* also *Paramasami Iyengar* v. *Pusala Tevan* (2).] It has, therefore, only to be considered whether there is a valid and enforceable contract for the payment of enhanced rate. The learned District Judge, reversing the decision of the Sub-Collector, has found that there was an implied contract (agreement) in every case, and that it is not void for want of consideration.

The existence of an implied agreement is deduced mainly from the payment of the enhanced rate by the litigating tenants (appellants) for a number of years varying from 2 to 40. The corroborative evidence is meagre; but I am not prepared in second appeal to set aside the District Judge's finding in this respect.

The second point stands on a different footing. The necessity for consideration of some sort for an implied contract to pay enhanced rent, has been pointed out by Subramania Iyer, J., in the clearest manner in his judgment above referred to, and I do not understand it to be seriously disputed by the learned Advocate-General. Nothing to the contrary is contained in either of the judgments referred to by the District Judge *Netesa Gramani* v. *Venkatarama Reddi*(3) and *Suppa Pillai* v. *Nagayasami Thumbichi Naicker* (4). The suggestion that the word contract in the section is loosely used in the sense of "agreement" cannot possibly be accepted. Of course, the consideration may be of the same *implied nature* as the covenant to pay, but consideration of some kind, there must be, if the latter is to be treated as an enforceable contract.

Now what is the consideration in the present case? The learned District Judge says that there was "ample consideration", but it is very difficult to see, from a perusal of his judgment, what form he considers it to have taken. He agrees with the Sub-Collector that the landlord's permission was not necessary for the tenant to sink a well: so that such consent was not the consideration. The only consideration, which I can find indicated in paragraphs 14--16 of his judgment, is in the shape of abstention on the part of the landlord from exercising his right to revert to the *varam* system when the tenant began to cultivate the more valuable crop with the aid of the well water. Of course, if the landlord really had such right, his abstention from resorting to it might be viewed as consideration. But the District Judge appears to me to have assumed the existence of such a right without any evidence whatever.

The right in question is conferred by clause 3 of section 11 of the Rent Recovery Act and applies only to cases where there is no contract, express or implied, regulating the rate of rent. In the present suits, it is admitted that prior to the construction of the wells, the tenants had always been paying

(1) 28 M. 444; 15 M. L. J. 292.
(2) 20 M. L. J. 142; 8 M. L. T. 115; 5 Ind. Cas. 911.
(3) 30 M. 511; 2 M. L. T. 455; 17 M. L. J. 518.
(4) 31 M. 19; 17 M. L. J. 511; 3 M. L. T. 103.

at the uniform *punja* rate of four annas a *guli* for the suit lands: a circumstance which justifies the inference of an implied contract to continue to pay at that rate [*vide Venkatappa* v. *Rengappa* (5)].

The learned Advocate-General, however, seeks to meet this objection by arguing that, in these cases, the money rents were fixed with reference to the particular crop raised, and not on the holding itself, that the payment of four annas a *guli* was only for so long as a dry crop was raised, that on the tenant raising a garden crop, the implied contract ceased to apply, that a new rate had then to be determined, and that, in the absence of a contract regulating it, clause 3 became applicable and the landlord was entitled to claim *varam* and that his abstention from so doing forms the real consideration for the tenant's agreement to pay the higher rent.

This is precisely the kind of case referred to as conceivable by Hutchins, J. in *Venkatagiri Raja* v. *Pitchana* (6) and if the existence of such a system were established, the argument would be perfectly sound. But it is certainly not established here, any more than it was in the case last quoted. In *Suppa Pillai* v. *Nagayasami Thambichi Naicker* (4), there was a distinct finding in support of it and the case of *Natesa Gramani* v. *Venkataramana Reddi* (3) simply lays down that such a system is not illegal and remands the case for evidence as to its existence.

In the present case, the District Judge has certainly not found in favour of such a system. All he says is this: "Under clause 3, the local usage would have to be ascertained, and it might very well prove that the local usage was, as appellants originally alleged, to pay different rates according to the crops raised, and not according to the classification of the land."

And indeed, there is absolutely no evidence in the case to support the existence of such a system. I have already referred to the fact that the tenants were admittedly, prior to the sinking of the wells, paying at a uniform dry rate as far back as can be traced. There is nothing to indicate that this charge was variable according to the crops raised, and the evidence of the respondent's own manager (defendants' 7th witness) is incompatible with such a suggestion. He says not a word of any variable charge according to the nature of the crop, but speaks of the dry lands being assessed at a uniform rate of four annas a *guli*. In fact, the learned Advocate-General has to rely solely on passages quoted from the Madura District Manual tending to show that a system of the kind he alleges formerly prevailed in the Dindigul *Taluq*. It is impossible to accept it as established by such means. The passages quoted are of a general nature without reference to this particular village or *zemindari* and while remarks in a District Manual may legitimately be referred to and are of great service in corroborating or contradicting evidence recorded in any individual case, they cannot take the place of such evidence, or be made the sole basis for a finding on a point of this nature.

I am, therefore, constrained to hold that the finding of the learned District Judge that the agreements to pay the enhanced rent were supported by consideration is unsupported by any evidence, and cannot be upheld.

There is no reason for remanding the suits for a fresh finding after taking further evidence. The question of consideration was most prominently put forward when the suits were last remanded and if the respondent has not adduced proper evidence, he has only himself to thank.

The decrees of the District Judge must, therefore, be set aside and those of the Sub-Collector restored. The respondent will be liable for the appellant's costs throughout.

Abdur Rahim, J.—I agree.

Appeal allowed

(5) 7 M. [illegible].
(6) 9 M. 27.

MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 48 OF 1907.

September 13, 1910.

Present:—Mr. Justice Miller and Mr. Justice Sankaran Nair.

MUTHUSAWMY NAICK—APPELLANT

versus

BANGARAMMAL AND OTHERS—RESPONDENTS.

Hindu Law—Impartible Zemindari—Will—Disposition of impartible Zemindari—Validity.

An impartible *Zamindari* may be disposed of by the Will of the *Zamindar*, whether the heir-at-law is his son or his brother.

Siva Subramania Naicker v. *Krishnammal*, 18 M. 287, referred to.

Appeal against the decree, dated the 29th day of October 1906, of the Subordinate Judge's

Court of Madura (West), in Original Suit No. 42 of 1904.

Facts of the case are sufficiently clear from the following extracts from the judgment of the lower Court

This is a suit to recover possession of the *zemindari* of Thevaram with all its appurtenances together with Rs. 15,000 being the net mesne profits of *Fasli* 1313, and future mesne profits and costs.

2. The plaint, which was presented on the 20th September 1904, sets forth that the *zemindari* of Thevaram is an ancient impartible estate, the succession to which is regulated by the law and custom of primogeniture and is subject to the custom of inalienability obtaining in this and other similar Kambala *zemindaris*, that the late Konda Bomma Naik, who was the *zemindar* of the estate till 23rd October 1876, left two legitimate sons, (1) Shanmuga Valla Konda Bomma Naik who succeeded to the *zemindari* on his father's death and died on the 21st January 1901 having an only daughter the 1st defendant herein, (2) Kandasami Naik who pre-deceased his elder brother in 1881 without any issue, and (3) an illegitimate son, the present plaintiff, that they belong to the (Sudra) Kambala caste governed by the *Mitakshara* Law, that although the plaintiff herein sued in Original Suit No. 25 of 1898 on the file of his Court, the aforesaid Shanmuga Valla Konda Bomma Naik, while he was *zemindar* and his brother's widow Thangammal for his share of the partible properties of the *zemindari* and got a decree for his one-fifth share which was confirmed by the High Court on 20th November 1900 in Appeal Suit No. 226 of 1899, wherein the plaintiff's status as the half-brother of the aforesaid Shanmuga Valla Konda Bomma Naik has been established, yet both of them constituted and continued as undivided coparceners with reference to the impartible estate of Thevaram, that the plaintiff is, by the law of survivorship, entitled to succeed to the *zemindari* with all its appurtenances after the death of his said half brother Shanmuga Valla Konda Bomma Naik on 21st January 1901, that the *zemindari* in question is inalienable according to the law and custom prevailing in this and other similar Kambala *zemindaris*, that the 1st defendant is in wrongful possession of the *zemindari* claiming under a Will, dated 9th December 1900, alleged to have been executed in her favour by her father, the undivided co-parcener of the plaintiff, that the said Will is not genuine and is void and inoperative and could not confer any right on the 1st defendant as against the plaintiff, that it is also opposed to the ordinary Hindu Law, and to the special custom of inalienability, that independently of the inalienability, according to law and custom of the *zemindari* of Thevaram, the plaintiff is entitled to the *zemindari* as the surviving co-parcener of the deceased Shanmuga Valla Konda Bomma Naik, that the defendants Nos. 2 and 3 hold a lease of the *zemindari* under a deed alleged to have been executed by the 1st defendant in 1904 and that the said lease is illegal, invalid and not binding on this plaintiff, that the defendants Nos. 4 to 6 claim to have some charge on the *zemindari* in respect of debts contracted by the deceased Shanmuga Valla Konda Bomma Naik, that there was no legal necessity for contracting the debts, and that the debts are not binding either on the estate in question or on the plaintiff inasmuch as the deceased Shanmuga Valla Konda Bomma Naik succeeded to the estate with about Rs. 36,000 in cash and Rs. 50,000 worth of other properties in addition to a large annual income of about Rs. 20,000 from the impartible estate.

3. The 1st defendant admits that the plaint mentioned *zemindari* of Thevaram is an impartible estate and also that the allegations contained in paras. 3 (*a*), 3 (*b*) and 3 (*e*) of the plaint are correct but denies that the succession to the *zemindari* is regulated by the law and custom of primogeniture in the male line only or that it is subject to any custom of inalienability as alleged in paragraph 3 of the plaint. She states, further, that the plaintiff and the late *zemindar* never constituted and continued as members of an undivided Hindu family as regards the impartible estate of Thevaram, that plaintiff could not in law claim to be a co-parcener of the late *zemindar* and that he could not claim the benefit of the law of survivorship on the death of the late *zemindar* on 21st January 1901, that the custom of inalienability set up by the plaintiff is not a valid one, but is vague and indefinite, and is opposed to the fundamental principles of the law of property, that she is not in wrongful possession of the *zemindari* as alleged in paragraph 3 (*g*) of the plaint but has been placed in rightful

possession of the same after full enquiry by the Revenue authorities, that the late *zemindar* bequeathed all his properties to this defendant under a duly registered Will, dated 9th December 1900, that the said Will has been acknowledged and acted upon by the plaintiff, soon after the death of the *zemindar* in January 1901 with full knowledge of its contents and legal effect in various Court proceedings, that the plaintiff has also dealt with this 1st defendant to her prejudice and to the prejudice of third parties on the basis of the genuineness, validity and binding character of the said Will, that the Will is not opposed either to the ordinary Hindu Law or to any custom actually obtaining in the *zemindari* in question, that the plaintiff is estopped and precluded, by his conduct from the date of the death of the late *zemindar* until the institution of Original Suit No. 32 of 1903 on the file of this Court, from contesting the genuineness or validity of the said Will, that even apart from the Will itself, the plaintiff would not be preferential heir to succeed to the suit *zemindari* either by survivorship or by inheritance, that the defendants Nos. 2 and 3 are now in possession of the *zemindari* as lessees of this defendant under a registered deed, that the said lease was given by her so as to enable her the more successfully to discharge certain debts contracted by the late *zemindar* and thus to protect the estate, that the lease is, therefore, legal, valid and not liable to be questioned by the plaintiff that this defendant knows nothing personally about the allegations in paragraphs 5 and 6 of the plaint although they formed a substantial portion of the defence of this plaintiff as 10th defendant in Original Suit No. 32 of 1903 of this Court, who also set up therein the custom of inalienability of the *zemindari* in question, that the plaintiff failed to substantiate his grounds of defence in the said suit Original Suit No. 32 of 1903 and that the matter of this suit is wholly *res judicata*, that the plaintiff is not entitled to claim any mesne profits as the same have been actually paid through Court towards the claim of the creditors in Original Suit No. 32 of 1903 to which this plaintiff was also a party, that the plaintiff's suit to avoid the Will and get possession of the *zemindari* is barred by limitation, that the plaintiff is not entitled to claim possession of the palace at Thevaram which is worth about rupees forty thousand without paying proper Court-fees on its value, that the plaintiff is not in any event entitled to claim possession and management of the *chatram* at Theni and of the properties attached thereto, that the said *chatram* and properties are worth more than Rs. 80,000 and Court-fees should have been paid therefor also, and that the plaintiff has instituted this suit speculatively.

4. The defendants Nos. 2 and 3 deny the plaint allegations about the succession to the *zemindari* of Thevaram and the alleged custom of inalienability set up, and state that the said *zemindari* is alienable both under law and in fact, that the plaintiff and 1st defendant's late father never constituted or were members of an undivided Hindu family as regards the said *zemindari*, that, under the Hindu law applicable to illegitimate offspring, the plaintiff cannot claim the estate of the 1st defendant's father either by right of survivorship or of collateral succession, that the plaint allegations about the Will referred to in para. 3 (*g*) of the plaint are totally false, that the said Will is a genuine document duly executed by the testator and legally binding on the plaintiff, that the plaintiff has in several proceedings and other documents accepted its genuineness and binding character as against him, and the validity of the dispositions under it in 1st defendant's favour, that the defendants Nos. 4 and 5 herein had sued the 1st defendant and others in O. S. No. 32 of 1903 on the file of this Court and had applied for the appointment of a Receiver pending its disposal, and the 1st defendant had undertaken to pay Rs. 15,000 towards that claim, that the 1st defendant being unable to raise that sum, negotiated in December 1903 with these defendants for the said sum agreeing to grant a lease of the said *zemindari* with all its appurtenances including *pannai* lands, etc., that these defendants accepting the proposal examined the title of the 1st defendant to the *zemindari* and satisfied themselves that the *zemindari* had been bequeathed in 1st defendant's favour by a registered Will, and that she had been put in possession of the same by the Revenue authorities, that acting upon plaintiff's acts and declarations tending to show that the 1st defendant got the *zemindari* under the Will, these defendants got a lease from the 1st defendant on 16th March 1904 for a

period of 9 years, that they (defendants Nos. 2 and 3) are accordingly in possession of the *zemindari*, that they have been making payments of money and, otherwise, acting up to the terms of the bond, that these defendants have spent about Rs. 3,000 on the repairs and improvements of the said property under the provisions of the lease deed, that the plaintiff should not now be permitted to deny the 1st defendant's right to grant the said lease or its legality or validity, he having by his aforesaid acts and declarations intentionally caused these defendants to believe that the 1st defendant was the owner of the *zemindari* under the Will and had power of alienation thereof, that the plaintiff is not entitled to any mesne profits and that the amount claimed is excessive, and that even if it be found that the plaintiff is entitled to a decree for possession, he must be made liable to pay the amount which these defendants have advanced under the lease deed.

5. The defendants Nos. 4 and 5 state that they are unnecessarily impleaded in the suit as the plaintiff has not asked for any relief in the plaint as against them, that they instituted O. S. No. 32 of 1903 on the file of this Court against the plaintiff who was 10th defendant, the 1st defendant herein and some others, for the recovery of principal and interest due under three deeds of simple mortgage executed by Shunmuga Valla Konda Bomma Naiker, the late *zemindar* mentioned in paras. 3 (*a*) and 3 (*b*) of the plaint, for sums properly borrowed by him on 4th May 1896, 16th April 1898, and 27th February 1899 respectively, mortgaging the plaint-mentioned *zemindari* of Thevaram and all its appurtenances, that the said O. S. No. 32 of 1903 was opposed and contested by plaintiff on the grounds, among others, set out in paras. Nos. 5 and 6 of the plaint, that plaintiff having failed to substantiate any of the grounds relied on by him, a decree was passed in the said suit ordering the present plaintiff and others to pay these defendants within six months from the date thereof, the sums therein mentioned, and that, in default, the hypothecated properties be sold, that, by reason of the decree in the said O. S. No. 32 of 1903, the plaintiff is estopped from contesting the validity and binding nature of the mortgages aforesaid or from bringing this suit as against these defendants, that they (defendants Nos. 4 and 5) deny that the plaint *zemindari* of Thevaram is inalienable by law or custom as falsely alleged in the plaint and that the plaintiff is bound to prove the same, that, as the holder of an impartible *poliem* descendible to a single heir, the late *zemindar* was perfectly competent to execute the mortgages aforesaid, in favour of these defendants, that plaintiff claiming as the surviving coparcener of the late *zemindar*, has no right to question the validity of the same assuming that it is open to him to do so in this suit, that the only right that plaintiff can have, should he be found entitled to succeed to the *zemindari*, is to redeem the said mortgages, and that the plaintiff having failed to sue to set aside the aforesaid mortgages or the Will mentioned in the plaint within the time allowed by law, the suit is barred by limitation.

6. The 6th defendant is the divided brother of the 5th defendant and, substantially, adopts his defence claiming an interest in the hypothecation bonds referred to by him in his written statement.

7. The 5th defendant died subsequent to the suit, and his legal representatives the defendants Nos. 7 to 11 adopt the statement of the defendants Nos. 4 and 5.

8. The following issues were framed:—

1. Whether plaintiff was a member of a joint family with the late *zemindar* of Thevaram, and whether he could succeed to the *zemindari* in question by right of survivorship?
2. Whether the Will relied on by 1st defendant is true and valid?
3. Whether plaintiff is estopped from contesting the genuineness and validity of the Will relied on by the 1st defendant?
4. Whether the *zemindari* of Thevaram is, by custom, inalienable as alleged in the plaint?
5. Whether the debts relied on by defendants Nos. 4, 5 and 6 are true and binding on the *zemindari* in question?
6. Whether the 5th issue is *res judicata* by reason of the decision in Original Suit No. 32 of 1903?
7. Whether the institution fee is proper?

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8. Whether defendants Nos. 2 and 3 are liable for past mesne profits ?
9. Whether the suit is barred by limitation ?
10. Whether there is any custom in the *zemindari* by which illegitimate issue are shut out from succession to it and whether such custom is valid ?
11. What relief is plaintiff entitled to, if any ?

The lower Court found as follows on the validity of the Will:—

2nd issue, latter part :—It will now be convenient to deal with the question of the legal validity or otherwise of the testamentary disposition made by the late *zemindar*. For the purposes of dealing with this question, I shall assume that the plaintiff was an undivided co-parcener with the late *zemindar* in respect of the *zemindari*, although he was only his illegitimate brother. Although the rule continued to be in this Presidency, that an impartible *zemindari* was inalienable by its holder before the decision in *Beresford* v. *Ramasubba* (1), which followed the Privy Council decision in the *Sartaj Kuari* v. *Deoraj Kuari* (2), the law, as since laid down in the above cases and in the Pittapur case reported in *Sri Raja Rao Venkata Surya Mahipati Rama Krishna Rao Bahadur* v. *The Court of Wards and Venkata Kumari Mahipati Surya Rao* (3), has clearly established the propositions that the question of alienability of an impartible *zemindari* must be governed by the rules laid down in the *Mitakshara* unless those rules are displaced by custom, that in an impartible estate which has become so by custom, there being no joint ownership, the right to interdict alienations which arises from such joint ownership is wanting, that a junior member of the family to which the *zemindar* belongs is, therefore, not entitled to question the validity of the alienation made by the *zemindar* and that this alienation may be either by a deed *inter vivos* or by a testamentary disposition and will be binding not merely upon the undivided son but upon any undivided co-parcener of the family. The effect of the decided cases as formulated above is also stated in a recent decision of the Madras High Court reported in *Nachiappa Chettiar* v. *Sivasubramaniapindia Chinnasamy Naicker* (4). Although in this last case, an attempt was made by the appellant therein to push the doctrines laid down by the Privy Council to what was contended to be their logical development, *viz.*, that an impartible *zemindari* not being the self-acquired property of the previous holder, which has descended from the last holder to his undivided brother, must be treated as *assets* in the hands of his brother so as to be liable for even the personal debts of the *zemindar* and although this attempt failed to succeed notwithstanding that Mr. Justice Sankaran Nair felt the difficulty of their Lordships of the Privy Council not having explained how there can be any survivorship where there is neither co-parcenary nor joint tenancy, the course of decisions, which recognized the right of the holder of an impartible *zemindari* for the time being to alienate it *inter vivos* or by Will, was pointed out again and the above point was even assumed in the course of the arguments of the Vakils on both sides which are reported in extenso in the report. It is clear, therefore, on the authorities that the Will left by the late *zemindar* in favour of his daughter the 1st defendant is valid even assuming that the plaintiff was an undivided co-parcener of the late *zemindar*. I decide, therefore, even the latter part of the 2nd issue against the plaintiff.

Judgment.—Three points are argued in appeal.

(1) Whether the Will of the late *zemindar* is genuine ?

(2) Whether by custom the *zemindari* is inalienable ?

(3) Whether, if genuine, the Will is valid ?

On the first question, we have no doubt that the Subordinate Judge's conclusion is right. There is no reason to disbelieve the Sub-Registrar, and his evidence, if accepted, makes it clear that the *zemindar* duly authorised and understood the provisions of the Will.

On the second question also, we agree with the conclusion of the Subordinate Judge. The only evidence of custom adduced is the depositions given by the late Teva-

(1) 13 M. 197.
(2) 10 A. 272; 15 I. A. 51.
(3) 22 M. 383.
(4) 16 M. L. J. 339; 1 M. L. T. 272; 29 M. 453.

ram *zemindar* and certain other *zemindars* in another case in which in regard to another *zemindari* a similar question was raised. In that case these witnesses alleged that the *zemindari* there in question and other *kambala* Palayams—the Thevaram *zemindari*—now in dispute is one of such Palayams as are inalienable as against male *dayadis*. We do not know whether that evidence was accepted in that case, and we are unable to accept it as sufficient to prove the custom alleged. It is almost entirely mere allegation and instances of alienations challenged and set aside are almost entirely wanting.

On the 3rd question, the contention is that though an impartible *zemindari* may be disposed of by the Will of the *zemindar* when the heir-at-law is his son, such disposition is invalid when the heir is his brother. This contention was raised in the Ammayanayakanur case *Siva Subramania Naicker* v. *Krishnammal* (5) and rejected by both the learned Judges who decided that case. There is no authority in its favour and we are not prepared to accept it.

We dismiss the appeal with two sets of costs.

Appeal dismissed.

(5) 18 M. 287.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1483 OF 1907.

September 28, 1910.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Krishnaswami Aiyar.

NAGALLA KOTAYYA AND ANOTHER—APPELLANTS

versus

NAGALLA MALLAYYA AND ANOTHER—RESPONDENTS.

Civil Procedure Code (Act XIV of 1882), ss. 540, 584—Suit for partition—Decree for plaintiff—Reduction of some defendants' share in consequence—Appeal by such defendants, whether lies—Civil Procedure Code (Act V of 1908), O. XLI, R. 33 – Relief to party not filing appeal or cross-objections.

An appeal lies by a party against whom no decree has been passed if the effect of the decree is to make that person aggrieved by it.

It is competent to a Court of appeal, under Order XLI, Rule 33 of the Civil Procedure Code of 1908, to give a relief to the respondent who has not filed cross-objections to that portion of the decree of the lower Court which is against him.

Letters Patent Appeal No. 105 of 1908, referred to.

Plaintiff sued for a third share alleging that defendants Nos. 1 and 2 were each entitled to a third share and 3rd defendant to no share. The Munsif gave decree as prayed for. On appeal the Sub-Judge granted plaintiff a fourth share, holding that the 3rd defendant was entitled to a fourth:

Held, on appeal by 1st and 2nd defendants, that it was competent to 1st and 2nd defendants to appeal as they were 'aggrieved' by the decree of the Sub-Judge.

Somasundra Mudali v. *Kuladaivelu Pillai*, 28 M. 457, *Yusuf Sahib* v. *Durgi*, 30 M. 447; 17 M. L. J. 260; 2 M. L. T. 468, *Jamna Das* v. *Udey Ram*, 21 A. 117, referred to.

Second appeal against the decree of the Subordinate Judge's Court of Ellore, in Appeal Suit No. 106 of 1905, presented against the decree of the Court of the District Munsif of Ellore, in Original Suit No. 158 of 1904.

Judgment.—A preliminary objection is raised that defendants Nos. 1 and 2 are not entitled to maintain this second appeal. The facts are as follows:—The plaintiff sued for a third share of family property alleging that the defendants Nos. 1 and 2 were each entitled to a third and that the third defendant, who claimed to be an equal sharer with the plaintiff and the other defendants, was not entitled to a share in the family property, being only the sister's husband of the defendants Nos. 1 and 2. The Munsif held the 3rd defendant disentitled to a share and gave the plaintiff a decree for a third share on a division with the defendants Nos. 1 and 2. The 3rd defendant appealed. The Subordinate Judge on appeal was of opinion that the father of the defendants Nos. 1 and 2, who was also the grandfather of the plaintiff, had introduced the 3rd defendant into his family by giving him a daughter in marriage and promising an equal share with his sons in the family property. He held the 3rd defendant entitled to a share and modified the Munsif's decree by reducing the plaintiff's share to a fourth of the family property. The defendants Nos. 1 and 2 have preferred this second appeal. It is argued for the 2nd respondent that the defendants Nos. 1 and 2 cannot be aggrieved by the Subordinate Judge's decree which merely reduced the plaintiff's share from a third to a fourth and said nothing about the share of any of the defendants. This contention is, we think, unsound. Sections 540 and 584 of the old Code of Civil Procedure say nothing

as to who may prefer an appeal. All that these sections lay down is that appeals may be preferred from Original and Appellate decrees. Of course, there must be something, by which a person is aggrieved, to warrant an appeal and it lies only against the decree and not against a mere finding. But the decree in this case that the plaintiff shall have a fourth share necessarily involves the allotment of a share to the 3rd defendant and that allotment has the force of *res judicata* between the 3rd defendant and the defendants Nos. 1 and 2. The decision of the Full Bench in *Somasundara Mudali* v. *Kulandaivelu Pillai* (1) does not affect this view. In that case it was held that a co-sharer defendant who did not appear could not claim the benefit of *res judicata* by reason of the decision between the plaintiff's co-sharers and other defendants, in a subsequent suit between himself and the other defendants. This case has been distinguished in *Yusuf Sahib* v. *Durgi* (2), which, following *Kandiyil Cheriya Chandu* v. *The Zamorin of Calicut* (3), holds that a question *contested* between co-defendants in one suit is *res judicata* between them in a subsequent suit. But whether the decision has the force of *res judicata* or not, we think there is nothing in the Code to prevent an appeal by the defendants Nos. 1 and 2 against the decree of the Subordinate Court which gives the plaintiff a fourth share involving an adjudication in favour of the 3rd defendant's claim. The question is fully discussed by Woodroffe, J. in *Krishna Chandra Goldar* v. *Mohesh Chandra Saha* (4) and the conclusion arrived at by him is accepted by this Court in *Yusuf Sahib* v. *Durgi* (2). We may refer to *Jamna Das* v. *Udey Ram* (5), as in support of the same view. We must, therefore, overrule the preliminary objection.

Dr. Swaminadhan for the 2nd respondent also took the objection that no relief could be given to the plaintiff in this case as he has preferred no second appeal. The judgment in L. P. Appeal No .105 of 1908 has been quoted to us. There a Bench of three Judges held that on the appeal of a one-third sharer against a decree for the whole property in the plaintiff's favour, it was not competent to the Court under the old Code to give relief to another defendant who did not appeal for his share. We do not think the present case comes within the scope of that ruling. The plaintiff's share was cut down by the Appellate Court to a fourth share. The defendants Nos. 1 and 2 appeal saying that this was wrong. Order XLI, Rule 33 enables us to give full relief. We see no objection to our doing so in this case.

On the merits we must come to the conclusion that the Subordinate Judge is wrong in holding that the 3rd defendant is entitled to a share by the mere agreement to give him one. Such an agreement cannot necessarily bind the 1st and 2nd defendants or the plaintiff. The Subordinate Judge's remark that the property was the self-acquisition of the 1st and 2nd defendants' father is unsupported by the evidence of the witness he refers to. There was no plea in the case that the property was self-acquired and the statement of the witness that it was acquired by the father of defendants Nos. 1 and 2 does not constitute its self-acquisition under the Hindu Law. It is not known when the agreement to give the 3rd defendant a share was entered into, or whether at that time any of the sons was born, nor is it stated that the 3rd defendant was actually given the share and that he participated in the enjoyment of the property.

The Subordinate Judge must return findings on the following issues:—

(1) Whether the agreement relied on by the 3rd defendant was valid?

(2) Was it carried out and in case it was invalid, did he enjoy the property in common with other sharers for over the statutory period?

Fresh evidence may be taken. The findings should be submitted within *eight* weeks and ten days will be allowed for filing objections.

In compliance with the order contained on the above judgment, the Subordinate Judge of Kistna at Ellore submitted the following

FINDINGS.

The High Court framed two issues:—

I. "Whether the agreement relied on by the 3rd defendant was valid?"

II. "Was it carried out and in case it was invalid, did he enjoy the property in common with other sharers for over the statutory period?

(1) 28 M. 457.
(2) 30 M. 447; 17 M. L. J. 260; 2 M. L. T. 468.
(3) 29 M. 515.
(4) 9 C. W. N. 584.
(5) 21 A. 117.

and directed me to submit my findings thereon.

1. The plaintiff sued to recover a third share in the family house, 1st and 2nd defendants being the other sharers. The 3rd defendant intervened and said that the grandfather of plaintiff, who is also father of defendants Nos. 1 and 2, agreed to give him one-fourth share in the property. The first point I am directed to decide is whether such an agreement was valid. It is now proved by the only witness examined as this trial that the house in question is ancestral property. There is no evidence for the 3rd defendant to contradict this. The presumption also is that it is ancestral. Even assuming that it was the self-acquisition of the father of defendants Nos. 1 and 2, still it is joint family property of himself and his sons. In any case it is property in which defendants Nos. 1 and 2 and plaintiff have acquired rights by birth. Any agreement by late Lakshmanna to give share to a stranger cannot be valid. In fact the pleader for the 3rd defendant did not press this point before me.

2. The next question for consideration is whether the said agreement was carried out (first part of issue No. 2). There is no evidence that such an agreement was ever carried out. The house was never divided. The agreement under Exhibit I was that the 3rd defendant would be given a share at the time of partition. Exhibit I, as found in the translation made in the High Court ran, thus:—"By the time Kotayya would be separated, we have beyond all doubts determined to give him a fourth share of the movable and the immovable properties (riches, gold, jewels and vehicles)." The time of that separation never came. Further Exhibits II*a* and II*b* showed that the agreement in question was never carried out. In the year 1901 Lakshmanna by aforesaid letters gave a share to the 3rd defendant in certain business of his. If by the plaint agreement the 3rd defendant had acquired a right in the properties of Lakshmmanna, why was any letter like Exhibit II*a* or Exhibit II*b* required to create an interest in the 3rd defendant? Had 3rd defendant become a member of the family and entitled to a fourth share in the family house, such letters creating fresh rights in the family business need not have come to existence. On this part of the second issue, I hold that the agreement was not carried out.

3. The third question for consideration is whether the 3rd defendant enjoyed the suit property for over the statutory period, that is whether he acquired any right by prescription (2nd portion of issue No. 2). The 3rd defendant let in no evidence. He relied on the evidence of defendants Nos. 1 and 2 who said that 3rd defendant was living in the house ever since he went over to Ellore. They stated that he was living by permission. He never exercised any acts of ownership over this property. He had no possession of it to the exclusion of the owners. He did not enjoy it as of right. He was in the house like so many others. His two brothers were also in this house, as also his sister. There is direct evidence that the possession was permissive and there is no evidence to the contrary. It cannot, therefore, be said that the 3rd defendant ever enjoyed the suit property in common with other sharers. Further the 3rd defendant under the agreement was to enjoy only from the time of separation. Such a separation never came about. So there was never any enjoyment. The 3rd defendant, therefore, did not acquire any right by prescription.

This second appeal coming on for final hearing after return of the finding of the lower appellate Court, the Court delivered the following

Judgment.—The objection to the finding is not pressed. We accept the findings and allow the appeal. The decree of the Subordinate Judge is set aside and that of the Munsif will be restored. The 3rd defendant, who is found to have no right to the property, will bear the costs of the 1st and 2nd defendants in this Court and in the lower appellate Court.

Appeal allowed.

MADRAS HIGH COURT.

CIVIL APPEAL NO. 156 OF 1906.

October 10, 1910.

Present:—Sir Arnold White, KT., Chief Justice, and Mr. Justice Sankaran Nair.

MADDUR VEERA REDDI AND ANOTHER—APPELLANTS

versus

MADAM SUBBANNA SETTI ROW BAHADUR AND OTHERS—RESPONDENTS.

Interest—Mortgage decree—Interest after decree and

TULJARAM ROW *v.* ALAGAPPA CHETTY.

up to date fixed for payment—Contract rate—Transfer of Property Act (IV of 1882), s. 86—Compound interest, stipulation for—Penalty.

A stipulation in a mortgage bond as to payment of compound interest in default of compliance with the terms of the bond is not a stipulation by way of penalty and is enforceable.

A mortgagee decree-holder is entitled to be awarded interest at the contract rate, stipulated in the bond, after decree and up to the date fixed therein for payment of the decretal amount.

Subbaraya Ravuthaminda Nainar v. *Ponnusawmi Nadar*, 21 M. 365, referred to.

Appeal against the decree of the District Court of Kurnool in Original Suit No. 7 of 1905.

Facts.—Suit to recover Rs. 75,912 with future interest and costs due on a mortgage bond. The bond stipulated for interest at 1 rupee per cent per mensem and also for compound interest.

Defendant pleaded *inter alia* that the stipulation for compound interest was a penalty.

On this point, the District Judge found as follows:—

"Compound interest is not as such illegal. It only becomes illegal when, either alone or in combination with other circumstances, it renders the transaction hard and unconscionable. I am clearly of opinion that the transaction now in question is not such a one. I hold that plaintiffs are entitled to the compound interest claimed."

The District Judge passed a decree for plaintiffs as prayed for. Interest at six per cent was allowed from date of decree.

Judgment.—We are of opinion that the stipulation as to the payment of compound interest in default is not a stipulation by way of penalty and that the plaintiff is entitled to recover the compound interest. The appeal is dismissed. The plaintiff has filed a memorandum of objections against that portion of the decree which awards only six per cent. from the date of the decree up to day of payment. It is contended on his behalf that he is entitled to the contract rate. Under the decision in *Subbaraya Ravuthaminda Nainar* v. *Ponnusawmi Nadar* (1), the plaintiff is entitled to the stipulated rate of interest for the period within which payment is ordered by the decree. Interest subsequent to that period is within the discretion of the Court. In his argument before us, the appellants' counsel did not deny that the rate of interest subsequent to the date fixed for payment is not within our discretion.

As to the rate or interest between the date of the decree and the date fixed for payment, the defendant's pleader contends that this also is within the discretion of the Court as the concluding words of the first paragraph of section 86 of the Transfer of Property Act declaring "the amount so due at the date of such decree" referred to the amount due to the mortgagee at the date of the decree itself while the plaintiffs' counsel contends that they only enable the Court to declare at the date of the decree itself the amount that will be due on the day to be fixed for payment within six months as provided for in the next paragraph.

We think it is unnecessary to decide this question. For it is not denied that even if section 86 does not bind the Court to award the contract rate of interest, the Court may in its discretion award that rate and as the mortgagee cannot enforce payment before the time fixed, we do not think the contract rate excessive in the circumstances of this case. We modify the decree accordingly by awarding the contract rate up to the date fixed for payment and confirm the decree as to the interest subsequent to that date.

The appeal is dismissed with costs.

There will be no order as to the costs of this memorandum of objections.

Decree varied.

(1) 21 M. 365.

MADRAS HIGH COURT.

FULL BENCH.

ORIGINAL CIVIL SIDE APPEAL NO. 43 OF 1909.

September 29, 1910.

Present :—Sir Arnold White, KT., Chief Justice, Mr. Justice Krishnaswami Aiyar and Mr. Justice Ayling.

T. V. TULJARAM ROW—APPELLANT,

versus

M. K. R. V. ALAGAPPA CHETTIAR—RESPONDENT.

Letters Patent (Madras), s. 15—'Judgment,' meaning of—Interlocutory order—Order on Original side of the High Court—Judge declining to frame an issue—Appeal.

An order of a Judge, on the Original side of the High Court, declining to frame an issue, asked for by one of the parties to the suit, is not appealable.

Per *White, C. J.*—In determining what is a judgment, the test is not what is the form of the adjudication, but what is its effect in the suit or proceeding in which it is made. If its effect, whatever its form

may be and whatever may be the nature of the application on which it is made, is to put an end to the suit or proceeding so far as the Court, before which the suit or proceeding is pending, is concerned, or if its effect, if it is not complied with, is to put an end to the suit or proceeding, the adjudication is a judgment with in the meaning of the clause. An adjudication on an application, which is nothing more than a step towards obtaining a final adjudication in the suit, is not a judgment within the meaning of the Letters Patent.

An order on an independent proceeding, which is ancillary to the suit (not instituted as a step towards judgment, but with a view to rendering the judgment effective, if obtained), *e.g.*, an order on an application for an *interim* injunction, or for the appointment of a Receiver, is a judgment within the meaning of clause 15 of the Letters Patent. The decision may be a judgment for the purpose of the section, though it does not affect the merits of the suit or proceeding and does not determine any question of right raised in the suit or proceeding.

Pre *Krishnaswami Aiyar, J.*

The word 'judgment' in section 15 of the Letters Patent covers a 'preliminary or interlocutory judgment' as well as a 'final' judgment and it does not include an 'interlocutory order'; and the interpretation is uncontrolled by any provisions of the Code of Civil Procedure.

Somasundram Che'ty v. *The Administrator- General*, 1 M. 148, distinguished.

R. v. *R.*, 14 M. 88, *Veerabadram Chetty* v. *Nataraja Desikar*, 28 M. 28, *Maratha Mathu Pillai* v. *Krishnama Chariar*, 30 M. 143, *Appasawmy Pillai* v. *Somasundra Mudeliar*, 26 M. 437 and *Chinnasawmi Mudeley* v. *Armuga Gounden*, 27 M. 432, dissented from.

De Souza v. *Coles*, 3 M. H. C. R. 384, *Srimantu Raja Yarlagadda Durga Prasada Nayuda* v. *Srimantu Raja Yarlagadda Mallikarjuna Prasada Nayadu*, 24 M. 358, *Musammat Brij Coomare* v. *Ramrick Das*, 5 C. W. N. 781, *Commercial Bank of India* v. *Sabju Saheb*, 24 M. 252, *Vyasachary* v. *Keshavachariya*, 25 M. 654, *Justices of the Peace for Calcutta* v. *Oriental Gas Co.*, 8 B. L. R. 433, *Hurrish Chunder Chowdhry* v. *Kali Sundari Debi*, 9 C. 482 ;12 C. L. R. 511 ; 10 I. A. 4, *Howard* v. *Wilson*, 4 C. 231, *Toolsee Money Dassee* v. *Sudevi Dossee*, 26 C. 361, *Gopinath Pati* v. *Maheswar Pradhan*, 35 C. 1096, *Vaghaji* v. *Camaji*, 29 B. 249, *Atlas Assurance Co., Ld* v. *Abmedbhoy Habibhoy*, 34 B. 1 ; 11 Bom. L. R. 1 ; 1 Ind. Cas. 14 referred to.

Ebrahim v. *Fuckhrunissa Begam*, 4 C. 531; 3 C. L. R. 311, followed.

Appeal from the order of Mr. Justice Wallis, dated 14th September 1909 in Original Suit No. 117 of 1909,

ORDER OF REFERENCE TO A FULL BENCH.

In this case an objection has been taken that no appeal lies against the order of a Judge on the Original Side declining to frame additional issues for which one of the parties asked. We are disposed to uphold this objection on the ground that such an order is not a judgment within the meaning of section 15 of the Letters Patent.

Ebrahim v. *Fuckhrunnissa Begum* (1) is an authority which supports this view. As regards this High Court, however, the authorities would seem to preclude us from so holding. The ground of the decision in *Maruthamuthu Pillai* v. *Krishnamachariar* (2), is applicable to the present case. We may also refer to *R.* v. *R.* (3); *Sabhapathi Chetti* v. *Narayanasami Chetti* (4); *Commercial Bank of India Limited* v. *Sabju Sahib* (5); *Vyasachary* v. *Keshavacharya* (6); *Seshagiri Row* v. *Nawab Askur Jung Aftab Dowla* (7).

We refer to a Full Bench the question whether an appeal lies to this Court from an order of a Judge on the Original Side declining to frame an issue which is asked for by one of the parties to the suit.

The Honourable Mr. *T. V. Seshagiri Aiyar* and Mr. *V. Masilamani Pillai*, for the Appellant.

Messrs. *P. R. Sundara Aiyar*, *C. V. Anantakrishana Aiyar* and Mr. *C. P. Ramaswami Aiyar*, for the Respondent.

Opinion.

White, C. J.—The question we have to determine in this case turns on the meaning of the word 'judgment' in clause 15 of the Letters Patent. I find it impossible to reconcile the decisions on the point.

I do not think the word 'judgment' is used in contradistinction to the words "sentence" or 'order' which immediately follow it. The words "not being a sentence or order passed or made in any Criminal trial", as it seems to me, were introduced in order to exclude all criminal proceedings from the operation of the section and that it is not to be inferred from the introduction of these words that the Legislature intended that the word 'judgment' should include all orders in civil proceedings.

Further, I am not prepared to infer, from the fact that in sections 39 and 40 of the Letters Patent a distinction is drawn between final judgments, decrees or orders, and interlocutory judgments, decrees or orders, that the word 'judgment' in section 15 is to be deemed to include any order in any interlocutory proceeding.

The test seems to me to be not what is the

(1) 4 C. 531 ; 3 C. L. R. 311.
(2) 30 M. 143. (3) 14 M. 88.
(4) 25 M. 555 ; 11 M. L. J. 346.
(5) 24 M. 252. (6) 25 M. 654. (7) 26 M. 502.

form of the adjudication but what is its effect in the suit or proceeding in which it is made. If its effect, whatever its form may be, and whatever may be the nature of the application on which it is made, is to put an end to the suit or proceeding so far as the Court before which the suit or proceeding is pending is concerned, or if its effect, if it is not complied with, is to put an end to the suit or proceeding, I think the adjudication is a judgment within the meaning of the clause. An adjudication on an application which is nothing more than a step towards obtaining a final adjudication in the suit is not, in my opinion, a judgment within the meaning of the Letters Patent.

I think, too, an order on an independent proceeding which is ancillary to the suit (not instituted as a step towards judgment, but with a view to rendering the judgment effective if obtained)—*e. g.*, an order on an application for *interim* an injunction, or for the appointment of a Receiver, is a 'judgment' within the meaning of the clause.

Speaking generally I think the word 'judgment' means any "final order, decree or judgment" within the meaning of those words as used in section 12 of the English Judicature Act, 1875. An order made on an application which is interlocutory in point of form may be a judgment within the meaning of section 15 of the Letters Patent. On the other hand, I am not prepared to say, as was held in *The Justices of the Peace for Calcutta* v. *The Oriental Gas Company* (8) and in *Sonbai* v. *Ahamedbai Habibhai* (9), it must be a decision which affects the merits by determining some right or liability. I think the decision may be a judgment for the purposes of the section though it does not affect the merits of the suit or proceeding and does not determine any question of right raised in the suit or proceeding.

As regards the authorities, I will deal with the Madras cases first. With all respect, I think the definition of judgment given by Bittleston, J., in *DeSouza* v. *Coles* (10) as "any decision or determination affecting the rights or the interest of any suitor or applicant" is too wide, and I cannot accede to the proposition that it is "impossible to prescribe any limits to the right of appeal founded upon the nature of the order or decree appealed from." I agree, however, with the actual decision in the case which seems to me to satisfy the test which I have ventured to lay down.

The order in *Somasundaram Chetti* v. *Administrator-General* (11) was an order under the Administrator-General's Act giving the Administrator-General commission at a certain rate. I think the order may be regarded as an order which put an end to a proceeding in which the Administrator-General claimed commission at a certain rate, and was, therefore, appealable.

I am unable to agree with the decision in *R*—v. *R.* (3), that an order fixing a date for the hearing of a suit is appealable. This case does not appear to have been cited with approval in this Court, and was expressly disapproved in *Srimantu Raja Yarlagadda Durga Prasada Nayadu* v. *Srimantu Raja Yarlagadda Mallikarjuna Prasada Nayadu* (12) and in *Musammat Brij Coomaree* v. *Ramrick Das* (13).

The decisions in *Commercial Bank of India Limited* v. *Sabju Saheb* (5) (an order dismissing an application by the assignee of a plaintiff to be brought on the record held appealable) and in *Vyasachary* v. *Keshavacharya* (6) (an order dismissing a petiton to receive a sum of money as security for costs of an appeal held appealable), in my opinion, satisfy the test I have suggested. I should be prepared to hold that an appeal lay from an order refusing a stay of execution (the application for a stay being an ancillary proceeding), though a contrary view was taken in *Srimantu Raja Yarlagadda Durga Prasada Nayadu* v. *Srimantu Raja Yarlagadda Mallikarjuna Prasada Nayadu* (12).

With all respect, I find myself unable to agree with the decisions in *Veerabadran Chetty* v. *Nataraja Desikar* (14) and in *Marutha Muthu Pillai* v. *Krishnama Chariar* (2), that an order for evidence to be taken on commission or an order refusing a commission is an appealable order. As regards the latter case I entirely agree with the observation of the learned Judges that the fact that the making of the order was a matter of discretion does not affect the appealability of the order. This fact may be a good reason for refusing to exercise the appel-

(8) 8 B. L. R. 433.
(9) 9 B. H. C. R. 398.
(10) 3 M. H. C. R. 384.
(11) 1 M. 148.
(12) 24 M. 358.
(13) 5 C. W. N. 781.
(14) 28 M. 28.

late jurisdiction, but, as it seems to me, it is no reason for holding that the appellate jurisdiction does not exist.

I am unable to agree with what I understand to be the principle of the decision in *Appasami Pillai* v. *Somasunder Mudaliar* (15) and I think that the adjudication based on a refusal to exercise discretion, if the effect of the adjudication is to dispose of the suit so far as the Court making the adjudication is concerned, is appealable. This being my view, I must hold, though I do so with considerable reluctance, that the decision in *Chinnasami Mudali* v. *Arumuga Goundan* (16) is not, in my opinion, good law.

As regards the Calcutta cases, I have already referred to *The Justices of the Peace for Calcutta* v. *The Oriental Gas Company* (8), in connection with the grounds of the decision in that case. As regards the actual decision I should feel some difficulty in following it and I should be disposed to hold such an order was appealable. In *Hurrish Chunder Chowdhry* v. *Kali Sunderi Debi* (17), the Privy Council held, on the facts of that case, that an order refusing to transmit for execution an order of the Privy Council was appealable. Their Lordships do not discuss the general question of the meaning of the word 'judgment.'

I am of opinion that an appeal lies from a refusal to confirm an award [*Howard* v. *Wilson* (18)] or a refusal to set aside an award [*Toolsee Money Dassee* v. *Suderi Dassee* (19)].

I think an appeal would lie from an order refusing to extend the time for giving security for costs, as the effect of the order would be to put an end to the appeal. [In *Kishen Pershad Panday* v. *Tiluckdhari Lall* (20), the Calcutta High Court took a different view]. In *Gopinath Pati* v. *Moheshwar Pradhan* (21), an order was made setting aside a judgment and a decree and ordering a remand, and this order was held to be appealable. I agree. The learned Judges observe:—"We think, it is a 'judgment' because it disposes of the suit."

As regards the Bombay authorities, I may refer to *Vaghoji* v. *Camaji* (22) where it was held 'that an appeal lay from an order dismissing a Judge's summons to show cause why leave granted under clause 12 of the Letters Patent should not be rescinded and the plaint taken off the file.' Here the adjudication asked for, if made, would have disposed of the suit. So also would an order made on an application to revoke a submission to arbitration. I think such an order is appealable. See *Atlas Assurance Company, Limited* v. *Ahmedbdoy Habibhoy* (23).

I agree with the view expressed by Garth, C. J. in *Ebrahim* v. *Fuckhrunnissa Begum* (1) on the point which has been referred to us and I think our answer to the question referred should be in the negative.

Krishnaswami Aiyar, J.—In this case the defendant in O. S. No. 117 of 1909 on the file of the High Court (Original Side) moved upon Judge's summons for certain additional issues before Mr. Justice Wallis. The learned Judge dismissed the summons and the defendant appeals under clause 15 of the Letters Patent of 1865. The question has been referred to the Full Bench whether the order in this case is a judgment within the meaning of that clause. The meaning of the word 'judgment' has often come up for consideration in this Court and the cases show a considerable diversity of opinion. Apart from the question of the true signification of that word in clause 15 there has also been considerable difficulty in the application of the definition to the facts of individual cases. It is perhaps to be regretted that the question was not set at rest earlier so far as this Court was concerned by the authoritative pronouncement of a Full Bench. Having regard to the contrariety of opinion, it is inevitable, whatever view we may take of the meaning of the term 'judgment,' that some decisions of this Court at all events will be found to be at variance with it.

What then does the word 'judgment' mean in clause 15 of the Letters Patent? In Daniels' Chancery Practice, Volume I, page 625 the following definition occurs: "A judgment is a sentence or order of the Court, pronounced on hearing and understanding all the points in issue, and determining the right of all the parties to the cause or matter. It is either interlocutory or final." These judicial pronouncements are known as 'judgments' at Common Law and as 'decrees' in Chancery. See page 321, Introduction to Seton on 'Decrees.' A more accurate defini-

(15) 26 M. 437.
(16) 27 M. 432.
(17) 9 C. 482; 12 C. L. R. 511; 10 I. A. 4.
(18) 4 C. 231.
(19) 26 C. 361.
(20) 18 C. 182.
(21) 35 C. 1096.
(22) 29 B. 249.
(23) 34 B. 1; 11 Bom. L. R. 1; 1 Ind. Cas. 14.

tion is to be found in Black on 'Judgments' at page 2 where the author says:—"We may define a 'judgment' as the determination or sentence of the law pronounced by a competent Judge or Court as the result of an action or proceeding instituted in such Court affirming that upon the matters submitted for decision a legal duty or liability does or does not exist." Again at page 3, "the term which, in equity practice, corresponds to 'judgment' at common law is 'decree.' A 'decree' is a determination or sentence of equity pronounced by a competent Court upon the controversies submitted for decision." At page 32 the author proceeds to define an interlocutory judgment. "A 'judgment' which is not final is called 'interlocutory,' *i. e.*, an 'interlocutory judgment' is one which determines some preliminary or subordinate point or plea or settles some step, question or default arising in the progress of the cause but does not adjudicate the ultimate rights of the parties or finally put the case out of Court. Thus a judgment or order passed upon any provisional or accessory claim or contention is in general merely 'interlocutory' though it may finally dispose of that particular matter." Distinguishing between judgments and orders, the learned author says at page 5, "an 'order' is the mandate or determination of the Court upon some subsidiary or collateral matter arising in an action, not disposing of the merits but adjudicating a preliminary point or directing some steps in the proceedings." It is unnecessary to refer to other definitions some of which are collected in *Chinnasami Mudali* v. *Arumuga Goundan* (16). But these citations are hardly sufficient for defining the meaning of the term 'judgment' in the Letters Patent though they render us substantial assistance in arriving at the exact signification intended by the framers of the Letters Patent. We find the terms judgment, sentence, order, decree and preliminary or interlocutory judgment employed in the Letters Patent. It is necessary to understand the use of the term 'judgment' in clause 15 in such a manner as to give effect to the several words above noted that are employed in the Letters Patent. When the terms final, preliminary, and interlocutory judgment occur in other parts of the Letters Patent, it is only reasonable to assign to the word 'judgment' standing by itself in clause 15 an interpretation which will cover the various kinds of judgments specifically dealt with in other clauses of the Letters Patent. Clauses 39 to 42 of the Letters Patent of 1865 as well as the corresponding clauses of the Letters Patent of 1862, deal with appeals to the Privy Council. They contemplate an appeal from a final judgment, decree or order as a matter of course, provided certain requirements as to value or certificate of fitness are satisfied. An appeal to the same tribunal is allowed from any preliminary or interlocutory decree, judgment, order, or sentence with the leave of the Court. If an interlocutory judgment is appealable to the Privy Council with the leave of the Court, it can only be when it is a decision of the High Court on appeal or in its original jurisdiction if the Bench passing the interlocutory judgment is composed of the majority of the Judges of the Court. It would be a strange result to hold that from an interlocutory judgment from the original side leave may be given to appeal to the Privy Council under section 40, even though it is a pronouncement of a single Judge, there being no appeal to the High Court itself under clause 15. The proper view, therefore, to take of the meaning of the word 'judgment' in section 15 is to understand it as covering an 'interlocutory or preliminary judgment.' But a preliminary or interlocutory judgment is not the same thing as an interlocutory order. And whatever width of interpretation the term 'judgment' may be capable of, it ought not to be so understood as to cover 'interlocutory orders.' It was contended by Mr. Seshagiri Aiyar that as clause 15 speaks of a 'judgment' not being a 'sentence' or 'order' passed and made in a criminal trial, all orders other than those that are made in a criminal trial should be held to be comprised within the term 'judgment.' This argument appears to me to be inadmissible. An order in a criminal trial does not correspond to the interlocutory order in a civil cause but ordinarily to an order of discharge or acquittal which terminates a criminal proceeding in favour of a prisoner as a sentence does the other way. The phrase "not being a sentence or order passed or made in any Criminal trial" was not in clause 14 of the Letters Patent of 1862, which corresponded to clause 15 of the later Letters. It appears to have been inserted in

clause 15 of the Letters Patent of 1865, mainly to indicate the exception dealt with in clause 25 later, though it is not confined to a sentence or order in the exercise of Original Criminal Jurisdiction as clause 25 is.

It was suggested in the course of the argument that Act VIII of 1859, which was in force at the time of the issue of the Letters Patent, would be a valuable guide to the meaning of the word 'judgment' though the provisions of the Act were not binding as to what should be held to be appealable judgments. Having regard to the language of clause 37 of the original Letters Patent and of the later Letters, the view appears to have been entertained that the class of appealable judgments must be confined to those that were appealable under the Code of Civil Procedure. Both in *The Justices of the Peace for Calcutta* v. *The Oriental Gas Company* (8), and in *Sonbai, widow of Fazul Habibhai* v. *Ahamed Bhai Habibhai* (9), the opinion was expressed that as section 363 of Act VIII of 1859 prohibited appeals from interlocutory orders in the course of the suit and the only appeals from orders were under sections 36, 76, 85, 95, and 119, the word 'judgment' in section 15 of the Letters Patent should receive a restricted interpretation so as not to allow an appeal in cases where no appeal lay under the Code. This view was obviously open to exception. The rules to be made under clause 37 for regulating proceedings in Civil cases though the Court was to be guided as far as possible by the provisions of the Code of Civil Procedure could hardly include a provision regulating the right of appeal already determined by section 15 and as pointed out by the Full Bench of this Court in *Chappan* v. *Moidin Kutti* (24), the provision as to appeals in the Code applies to cases in which appeals lie from one Court to another and not from one member of a Court to other members of the same Court. Having arrived then at the conclusion that the word 'judgment' covers a 'preliminary or interlocutory judgment' as well as a 'final' judgment, that it does not include an 'interlocutory' order and the interpretation is uncontrolled by any provision of the Code of Civil Procedure; though having regard to the reference to the Code, in section 37 radical divergence from it is hardly to be expected, we may proceed to further delimit the exact boundaries of the field covered by the term as used in clause 15.

The definitions with which we started will hardly suffice to mark the boundary accurately. There is no doubt that the adjudication of a right or liability which determines a suit or appeal is a judgment. Even a refusal to adjudicate which puts an end to a particular suit or appeal must equally amount to a 'judgment.' This has not always been borne in mind as we shall find later on in dealing with the case of *Chinnasami Mudali* v. *Arumuga Goundan* (16). A decision on the merits of the controversy between the parties is not essential to the termination of a suit or appeal. Even though the proceeding is not a suit or appeal as technically understood, but is only what may be called an original petition like an application for a succession certificate or the appointment of a guardian, the pronouncement which terminates the proceeding has the characteristics of a judgment, though there is a formal difference in the designation of the proceeding (see Rule 4, Moffussil Rules of Practice). But the right or liability, with reference to which the Court adjudicates or declines to do so, must be the substantive claim or liability and not, as Mr. Seshagiri Aiyar tried to maintain, a right to a particular judicial procedure or a detriment suffered in being denied the benefit of a rule of procedure. But I do not think we shall be justified in confining the term 'judgment' to final disposal of suits, appeals or original petitions or proceedings in execution. Preliminary or interlocutory judgments, which ascertain rights and direct further inquiries, which determine liabilities though further directions are given for ascertaining the measure of those liabilities, must be deemed to fall within clause 15. See, however, *Rahimbhoy Hibibhoy* v. *Turner* (25), and *Syed Muzhar Husein* v. *Bodha Bibi* (26), as to final judgments under section 595 of the Civil Procedure Code of 1882.

The Common Law Procedure Act, 15 & 16 Victoria, Chapter 76, recognised the distinction between interlocutory and final judgments. See sections 27 and 140. But they were both 'judgments' as distinguished from 'interlocutory orders' under sections 52, 54 and 222. I am unable to agree with Mr. Sundara Aiyar that interlocutory judgments which

(24) 22 M. 68.

(25) 18 I. A. 6; 15 B. 155.
(26) 22 I. A. 1; 17 A. 112.

decide the merits are not judgments under section 15. The question still remains whether orders in incidental proceedings for attachment or arrest before judgment, for a temporary injunction or for the appointment of a Receiver are judgments within the meaning of the term as used in clause 15. Such proceedings are not natural steps in the determination of the cause. But they are remedies, though provisional in their character, and the judicial determination of those proceedings may well be deemed to be analogous to the disposal of original petitions which determines the rights of parties. An appeal was specially provided from such orders even in the Code of 1859, and the decisions in such cases may well be treated as interlocutory judgments. Cases of stay of execution, or security for costs, whether the order is in favour of one party or another, must stand on the same footing as temporarily affecting the rights of parties.

We have now to examine the decisions to see how far these principles are in accord with the rules that are deducible from the cases. So far as I have been able to discover, there are only four or five decisions in which an endeavour has been made to arrive at a definition of the term 'judgment' as used in clause 15 of the Letters Patent. The decision in *The Justices of the Peace for Calcutta* v. *The Oriental Gas Company* (8), stands at the head of them all. A mandamus was issued by Mr. Justice Phear sitting on the Original Side to the Justices of the Peace of Calcutta to compel them to refer to arbitration a question of compensation. "The mandamus was to do certain things or to show cause to the contrary so that the order of the Original Judge did not determine any question whatever between the parties. It only initiated the proceedings by which the liability of the Justices to make compensation would be ascertained and determined." Couch, C. J., says: "We think judgment in clause 15 means a decision which affects the merits of the question between the parties by determining some right or liability. It may be either final or preliminary or interlocutory, the difference between them being that a final judgment determines the whole cause or suit and a preliminary or interlocutory judgment determines only a part of it leaving other matters to be determined." I would only stop here to remark that a decision which determines the cause or proceeding so far as the particular Court is concerned, though it refuses to adjudge the merits, must also be deemed to be a judgment: for otherwise the rejection of a plaint for defect of form or insufficiency of Court-fee or a return of it for want of jurisdiction would be outside the definition of the learned Chief Justice which could hardly have been his meaning. I may also observe that the "part" which is determined may be a part of the claim separable from the rest or a determination of liability generally though the actual measure of liability may be a matter of account. The decision in *Sonbai, widow of Fazul Habibhai* v. *Ahmed Bhai Habibhai* (9) is in substantial accord with the judgment of the High Court of Bengal though Chief Justice Sargent seemed to consider that clause 15 was governed by Act VIII of 1859. That this latter view is erroneous appears to be clear from the decision of the Privy Council in *Harrish Chunder Chowdhry* v. *Kalisunderi Debi* (17), where an order of a single Judge refusig to transmit an order of the Privy Council to a subordinate Court for execution was held to be appealable as a 'judgment' under clause 15 although such an order was not included as appealable under section 588 of the Code of 1882. The decision in *DeSouza* v. *Coles* (10), was the first attempt in Madras to ascertain the meaning of the word 'judgment' in the Letters Patent. Leave to institute a suit having been refused by the Judge sitting on the Original Side on the ground that the cause of action having in great part arisen outside Madras, an appeal was preferred under clause 15. The two very learned Judges who decided that case held that the term meant any decision or determination affecting the rights or the interest of any suitor or applicant. If they had stopped there, it might be doubted whether this language was not in substantial accord with that of Sir R. Couch in *The Justices of the Peace for Calcutta* v. *The Oriental Gas Company* (8) but Sir Adam Bittleston proceeds to say at page 388: "When the language giving the appeal is so general in its terms as that contained in the fifteenth clause of the Chapter, it is, we think, impossible to prescribe any limits to the right of appeal founded upon the nature of the order or decree appealed from." It seems to me that this is manifestly too wide a definition. And

the opinion has been expressed in later cases in Madras and elsewhere that this is so. I need not stop to notice the passing remark in *R*——v *R.*——(3) that every order of a single Judge is a judgment. For this has been disapproved of in two later cases, *Srimantu Rajah Yarlagadda Durga Prasada Nayadu* v. *Srimantu Raja Yarlagadda Mallikarjuna Prasada Nayadu* (12) and *Kuppusami Chetti* v. *Rathnavelu Chetti* (27), in which one of the learned Judges, who was a party to the judgment in *R*—v. *R*—(3) joined in the disapproval. In *Chinnasami Mudali* v. *Arumuga Goundan* (16), which was an appeal from a decision of a single Judge declining to interfere under section 25 of the Small Cause Courts Act, Sir S. Subramania Aiyar officiating, C. J., and Russell, J. defined 'judgment' in section 15 of the Letters Patent by confining it to an adjudication of the right or liability. But they regarded a refusal to interfere as no judgment. It was said that the Court had a discretion to interfere and a refusal to exercise a discretion was no judgment. This raises a question as to whether the refusal to exercise a discretion does not involve the application of the judicial mind as much as a decision in the exercise of discretion. Observations similar to those that have been made in this case are to be found in *Srimantu Raja Yarlagadda Durga Prasada Nayadu* v. *Srimantu Raja Yarlagadda Mallikarjuna Prasada Nayadu* (12) and in *Appasami Pillai* v. *Somasundara Mudaliar* (15) in which latter case Benson and Boddam, JJ., refused to entertain an appeal from an order refusing leave to appeal in *forma pauperis* because it was within the discretion of the Court to grant or refuse such leave. I am unable to agree in the principle enunciated in these decisions as regards discretionary orders and orders refusing to exercise a discretion not being appealable, This view was expressly disapproved of by Subramania Aiyar and Miller, JJ. in *Maruthamuthu Pillai* v. *Krishnamachariar* (2). In the Privy Council case of *Hurrish Chunder Chowdhry* v. *Kali Sunderi Debi* (17), it was held (see page 493) that the appellate Court had rightly entertained the appeal under section 15 from the order of the single Judge who refused to transmit the order of the Privy Council for execution. The appellate Court which entertained the appeal in Calcutta had expressly stated, in *In the matter of the petition of Kally Soondery Debia* (28), that the wrong exercise of descretion by the Judge below was the ground on which the appeal was entertained. In *DeSouza* v. *Coles* (10), the point was well put by Sir Adam Bittleston at page 388. The question of the right of appeal, he pointed out, was different from how a matter of discretion should be dealt with by an appellate Court. He said: "It is obvious that the duty of the appellate Court in disposing of the appeal may vary considerably according to the nature of the order or decree complained of. And we think it may be stated as a general rule that when the determination complained of is merely the result of the exercise of discretion on the part of the Judge, in a matter which was a proper subject for the exercise of that discretion, the appellate Court would rightly decline to interfere." The fact of a matter being within the discretion of the original Judge is not a ground for refusing to entertain the appeal but a sufficient reason for declining to interfere with that discretion. I cannot, therefore, accept Mr. Seshagiri Aiyar's apparent concession that if the order of the single Judge is one which he has made in the exercise of discretion, a party has no right to the exercise of that discretion in a particular way and is, therefore, not entitled to appeal when he is aggrieved by an erroneous exercise of that discretion.

It is unnecessary to examine all the cases in detail. It is sufficient to say that I have gone through every one of them. In some of them the true principle does not appear to have been recognized or kept in view. In some others the application of the principle to the particular facts of the case appears to be open to exception. All the Calcutta cases cited at the Bar, *The Justices of the Peace for Calcutta* v. *The Oriental Gas Company* (8); *Howard* v. *Wilson* (18); *Ebrahim* v. *Fuckhrunnissa Begum* (1); *Hurrish Chunder Chowdhry* v. *Kali Sundari Debi* (17); *Toolseemoney Dassee* v. *Sudevi Dassee* (19); *Mussammat Brij Coomaree* v. *Ramrickdass* (13); *Gopinath Pati* v. *Moheswar Pradhan* (21), with the exception perhaps of the decisions in *Mussammat Amirrunnessa* v. *Baboo Behary Lall* (29); *Mowla Baksh* v. *Kishen Pertab Sahi* (30); *Manly* v. *Patterson* (31);

(27) 24 M. 511.

(28) 6 C. 594 at p. 599.
(29) 25 W. R. 529.
(30) 5 C. 102. (31) 7 C. 339.

Lutf Alikhan v. *Asgur Reza* (32) and *Kishen Pershad Panday* v. *Tilokdhary Lall* (20), which are cases of leave to appeal to the Privy Council dealt with on special grounds, appear to be in accord with the principles I have endeavoured to formulate. So are also all the Bombay cases cited: *Sonbai, widow of Fazul Habibhai* v. *Ahmadbhai Habibhai* (9); *Hirji Jina* v. *Narran Mulji* (33); *Vaghoji* v. *Camaji* (22); *Jehangir Cowasji* v. *The Hope Mills Limited* (34); *Atlas Assurance Company Limited* v. *Ahamedbhoy Hobhibhoi* (23) and *Soonabai* v. *Tribhovan Das* (35). As regards the Madras cases, it is impossible to express oneself as in agreement with them all. The decision in *DeSouza* v. *Coles* (10) is certainly right, whatever may be said with reference to the definition given of "judgment." In *Somasundaram Chetty* v. *Administrator General* (11), an appeal was rightly held to lie against an order determining the rate of commission payable to the Administrator-General. In *R*—v.—*R* (3), the order of adjournment was certainly not appealable. But an appeal lay as regards the application to vary the rate of alimony and though the definition of judgment there was certainly open to exception, the order of adjournment itself was not varied in appeal. In *Vanangamudi* v. *Ramasami* (36), where a single Judge had set aside a decree for rent in part and called for a report as to the remainder, there was at least an interlocutory judgment from which an appeal was rightly held to lie. In *Commercial Bank of India Limited* v. *Sabju Saheb* (5), the application of a transferee from the plaintiff to be added as a party was refused. As the refusal was a determination of the proceeding so far as he was concerned, it seems to me he was rightly held entitled to appeal. The decision in *Srimanta Raja Yarlagadda Durga Prasada Nayadu* v. *Srimanta Raja Yarlagadda Mallikarjuna Prasada Nayadu* (12), where an order refusing to stay execution was held not to be a judgment, proceeded on the authority of Letters Patent Appeal No. 5 of 1900 and *Mohabir Prasad Singh* v. *Adhikari Kunwar* (37) and upon the view that the order of the single Judge was one made by him in the exercise of his discretion. Staying execution is a temporary interference with a right adjudged, and refusal to stay is a refusal of a provisional remedy, as would be the refusal of an injunction or an attachment before judgment. It appears to me that the sounder view is that of the Calcutta High Court in *Musammat Brijcoomaree* v. *Ramrick Dass* (13). The Calcutta case *Mohabir Prosad Singh* v. *Adhikari Kunwar* (37), which this Court purported to follow, is explained away in the later decision in *Musammat Brij Coomaree* v. *Ramrick Dass* (13). I have already dealt with the argument derived from the discretionary character of the order. If pushed to its full length, it would cover all cases of specific relief which are within the discretion of the Court and the grant or refusal of such relief would cease to be the subject of appeal under clause 15 of the Letters Patent, a result which shows its weakness. It is difficult to distinguish in principle between an order staying execution or refusing to stay it and an order directing security for the costs of an appeal during its pendency. Though the failure to furnish the security may eventually lead to the dismissal of the appeal where security was ordered, the refusal to direct security is not attended with any such consequences. All these orders affect the right of the parties though temporarily and must be deemed to fall within the definition of judgment. It is worthy of note that in *Kuppusami Chetti* v. *Rathnavelu Chetti* (27), an order for stay of execution and an order for security for costs referred to by way of illustration were treated on the same footing though in favour of the opposite view that no appeal lay. It was rightly held, if I may presume to say so, in *Subapathi Chetti* v. *Narayanasami Chetti* (4) and *Seshagiri Row* v. *Nawab Askur Jung Aftab Dowla* (7), that an appeal lay from an order refusing to extend time for the giving of security for the costs of an appeal and from an order directing security to be given. Two further cases remain to be noticed. *Veerabadran Chetty* v. *Nataraja Desikar* (14) and *Maruthamuthu Pillai* v. *Krishnachariar* (2). It is difficult to support the latter. An order refusing to issue a commission, however serious the ultimate results to the party, is purely interlocutory order and not a judgment terminating a suit or other proceedings or affecting the merits.

(32) 17 C. 455.
(33) 12 B. H. C. R. 129.
(34) 33 B. 216; 10 Bom. L. R. 488; 2 Ind. Cas. 294.
(35) 10 Bom. L. R. 337.
(36) 14 M. 406.
(37) 21 C. 473.

As regards the former it is possible to contend that so far as the judgment of the single Judge of this Court was concerned it was passed in revision and not in the course of interlocutory proceeding. The Subordinate Judge had refused to issue a commission for the examination of a witness. That was a mere interlocutory order. Mr. Justice Boddam set that aside in revision. Could his order be treated as other than interlocutory so far as the execution proceeding was concerned in which the witness was to be examined on commission? It is unnecessary to express an opinion on the question whether Mr. Justice Boddam's order was a judgment. A full examination of the cases cited on both sides leads me to the conclusion that no appeal lies from the order of Mr. Justice Wallis in the present case. I would answer the reference accordingly.

Ayling, J.— I agree that the answer to the questions referred for disposal should be in the negative.

MADRAS HIGH COURT.

CIVIL APPEAL No. 177 OF 1907.

October 7, 1910.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Krishnaswami Aiyar.

GADE LAKSHMINARASIMHAM PANTULU—APPELLANT

versus

BHARATA MAHANTY—RESPONDENT.

Limitation Act (XV of 1877), s. 20—Acknowledgment of liability—Endorsement of payment—Reckoning of time—Whether from date of endorsement or payment.

Under section 20 of the Indian Limitation Act (XV of 1877), time has to be reckoned from the date of payment and not from the date of endorsement of such payment.

A mere endorsement of payment does not amount to an acknowledgment of a subsisting liability within the meaning of the said section.

Appeal against the decree of the District Court of Ganjam, in Original Suit No. 32 of 1906.

Judgment.—The endorsement relating to payment of Rs. 50 cannot properly be construed as an acknowledgment of a subsisting liability. Nor is the contention that time must be reckoned from the date of endorsement and not of payment tenable in the face of section 20 of the Limitation Act. The contention that certain letters contain

an acknowledgment does not find a place in the grounds of appeal and cannot be allowed to be urged.

The appeal is dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL APPEALS NOS. 28, 34 AND 50 OF 1906.

September 6, 1910.

Present:—Mr. Justice Munro and Mr. Justice Abdur Rahim.

IN No. 28

RANGASAWMY MUDELIAR AND OTHERS—APPELLANTS

versus

STRINIVASA MUDALIAR AND OTHERS—RESPONDENTS.

IN No. 34

STRINIVASA MUDALIAR—APPELLANTS

versus

RANGASAWMY MUDALIAR AND OTHERS—RESPONDENTS

IN No. 50

SADAGOPA MUDALIAR AND OTHERS—APPELLANTS

versus

SRINIVASA MUDALIAR AND OTHERS—RESPONDENTS.

Interest Act (XXXII of 1839)—Arbitration—Award directing payment to plaintiff within two months by assignment of debts—Failure to make payment—Interest.

An award by arbitrators directed defendants to pay certain amounts to plaintiff by effecting a division within two months, if there were no obstruction, and assigning to plaintiff the debts which fell to the share of each of the defendants:

Held, that on the defendants' failure to pay to plaintiff as aforesaid, the plaintiff was not entitled to interest under the Interest Act after the said period of two months as the time of payment was not certain.

Appeals against the decree of the Additional Subordinate Judge's Court of Tanjore, in O.S. No. 51 of 1904.

Judgment.—Appeal No. 28 is by the 1st defendant, Appeal No. 34 by the plaintiff and Appeal No. 50 by the 2nd defendant in O.S. No. 51 of 1904 on the file of the Additional Subordinate Judge of Tanjore.

The plaintiff and defendants Nos. 1 and 2 were members of a joint Hindu family. They and another member referred certain disputes to arbitration and on the 18th May 1896, the arbitrators made a partial award Exhibit A.

The material portion of Exhibit A runs as follow:—

"The award passed by us with reference to the arrangements amicably made by the above said persons after settling the disputes that existed amongst them in respect of the excess and deficit of the shares to be got is as follows:—To Srinivasa Mudaliar Avergal, Rangasami Mudaliar Avergal shall pay Rs. 30,000, and Sadagopa Mudaliar Rs. 4,000 and Thiruvengada Mudaliar Avergal Rs 33,000, each of them shall take an equal share of all the movable and immovable properties in the family. None of those shall claim in excess of one-fourth of the family properties; the amounts to be paid as aforesaid to Srinivasa Mudaliar by the remaining three persons shall be paid to him within two months from this date by assigning to the said Srinivasa Mudaliar, subject to the approval of the *panchayatadars* the debts due (to the family) falling to the share of each; should delay be caused by one or more Rangasami Mudaliar, Tiruvengada Mudaliar and Sadagopa Mudaliar in the division of the debts due to the family, those by whom such delay is caused shall pay interest to Srinivasa Mudaliar on the amount due to him at $\frac{3}{4}$ per cent. per mensem up to date of payment (to him) of the amount and should delay be caused by Srinivasa Mudaliar in the above matter, he shall lose interest on the said amount." The plaintiff alleged in his plaint that the 1st defendant had caused delay and, therefore, claimed interest from him on Rs. 67,000 from the 1st July 1896 at 9 per cent. per annum. He asked in the alternative that "such of defendants as may be found liable do pay the interest to the plaintiff at a rate specified upon the respective amounts payable by them." The Subordinate Judge found that no delay was caused by the 1st defendant but gave the plaintiff interest under the Interest Act XXXII of 1839 at 6 per cent. per annum against the 1st and 2nd defendants and the other member on the amounts specified to be due from those persons by Exhibit A.

In Appeal No. 34 the plaintiff attacks the finding of the Subordinate Judge that no delay was caused by the 1st defendant. We are of opinion that the finding is right on the evidence. The best persons to judge whether any delay was caused to the arbitration proceedings were the arbitrators and neither of them is prepared to go so far as to say that delay was in fact caused by any act or omission on the part of the 1st defendant. The other contention raised in Appeal No. 34 is that the interest should have been allowed at 9 per cent. instead of 6 per cent. per annum. As we find that the plaintiff is not entitled to any interest, the contention also fails and Appeal No. 34 is dismissed with costs of the 7th respondent.

The question whether the Subordinate Judge was wrong in awarding interest under the Interest Act is common to Appeals Nos. 28 and 50. We are clearly of opinion that the award of interest was wrong. There can be no doubt in this case that at the time Exhibit A was drawn up, those concerned were under the impression that provided there was no obstruction by the parties, the debts due to the family could be divided within the period of two months within which the sums specified were to be paid to the plaintiff by assigning to him the debts which fell to the shares of the other three parties to the award.

To deter the parties from causing obstructions, provision was made that if any party, or parties other than the plaintiff, caused obstruction he or they should pay to the plaintiff interest at 9 per cent. per annum on the whole amount of Rs. 67,000 in the discharging of which the debts were to be assigned, which if the plaintiff himself caused obstruction, he was to get no interest. We think it is clear that the parties did not contemplate any payment of interest save under the circumstances for which specific provision was made, and as those circumstances never arose, the plaintiffs' claim for interest must altogether fail. We may also observe that in our opinion the Interest Act does not apply. In the circumstances of this case that Act will only apply if under Exhibit A, a sum certain was payable at a certain time. It is sufficient for our purpose to point out that the time of payment was not certain, assuming for the sake of argument that the assignment of debts of a certain value could be considered the payment of a sum certain. No doubt, the assignment was to be made within two months, if possible, but the possibility of there being delay was contemplated, as no assignment could be made until the debts had been divided. The provision simply amounts to this: that the assignment was t

be made in two months if within that time the debts had been divided, and as it was not certain that the divisions would be effected, it cannot be said that there was any certain time. The interest awarded to the plaintiff is, therefore, disallowed and the lower Court's decree will be modified accordingly. The other grounds in Appeal No. 28 are not pressed, save the ground regarding costs. In the lower Court the costs as between the plaintiff and the 1st defendant will be proportionate and the costs of Appeal No. 28 will also be proportionate.

In Appeal No. 50 the interest awarded to the plaintiff is similarly disallowed, and the lower Court's decree will be modified accordingly. In this appeal, it is further contended that the Subordinate Judge was wrong in striking out issues Nos. 3 to 7 and 32. The appellant cannot be allowed to raise this contention, seeing that before the Subordinate Judge, this very appellant along with others successfully contended in 1904 that these issues should be struck out. It is stated at the Bar by one of the Vakils who appeared for the appellant, that the appellant did not join in the contention. The Vakil on the other side asserts the contrary. No affidavits have been put in, and in any case, we should prefer the statement recorded by the Subordinate Judge, at the time, to the recollection of the Vakil as to what took place more than six years ago. Costs in the lower Court and in this Court will be proportionate.

MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 4 OF 1909.

September 23, 1910.

Present:—Sir Arnold White, KT., Chief Justice, and Mr. Justice Ayling.

ARAKAL BASTIAN ANSUP AND OTHERS —APPELLANTS

versus

K. V. R. NARAYANA IYER AND OTHERS —RESPONDENTS.

Will—Application for probate—Caveat—*Caveat by judgment creditors of testator's son, beneficiary under the Will—Persons 'claiming an interest in the estate of the deceased.'*

The judgment-creditors of the son of a testator, who have attached his property, are persons 'claiming an interest in the estate of the deceased' testator, and are entitled to oppose an application for probate of the Will by the son, who is a beneficiary thereunder.

In re Nilmoney Singh: *Umanath Mukopadhya* v. *Nilmoney Singh*, 6 C. 429; *Kishen Dai* v. *Satyendranath Dutt*, 28 C. 441, followed.

Appeal against the decree of the District Court of South Malabar, in Original Suit No. 1 of 1908.

Facts of the case appear from the following judgment of the District Judge:—

Plaintiffs (petitioners) applied for probate of a Will alleged to have been executed on January 1st, 1906 by one Francis Mathew who died on June 25th, 1907. First plaintiff was appointed executor under the Will.

Caveats against the grant of probate were lodged by defendants Nos. 1—4 (who claimed to have an interest in the estate left by the deceased) on the ground that the Will was a forgery and had been set up for the purpose of defrauding the creditors of the testator's only son, 3rd plaintiff. The defendants also alleged that the Will even if genuine, had been revoked by the subsequent marriage of the testator to 12th plaintiff.

2. The following issues were framed.

(1) Whether the Will in question was duly executed by the deceased Francis Mathew?

(2) Whether the Will has been revoked by the marriage of the deceased to plaintiff No. 12?

(3) Whether defendants are entitled to question the validity and genuineness of the Will?

(4) Whether the estate has been properly valued?

3. 2*nd issue*.—Plaintiffs' Vakil has put in a statement to the effect that the marriage of the 12th plaintiff with the deceased Francis Mathew took place on 22nd February 1906 *i. e.*, subsequent to the alleged execution of the Will.

It is clear that the Will was revoked under section 56 of the Indian Succession Act by the marriage of the testator to the 12th plaintiff. My finding on this issue is in the affirmative.

4. 3rd *issue*.—Second defendant has, it is stated, obtained a decree against the testator's son, 3rd plaintiff whose properties have been attached. Defendants Nos. 3 and 4 are also judgment-creditors who have obtained a decree against 3rd plaintiff. It is clear, I think, that these persons "claim an interest in the estate of the deceased" and as such have a *locus standi* in opposing the grant of probate of the

S. N. DAR, B. A. LL. B.,
Vakil High Court,
SRINAGAR (Kashmir).

Will. See *Uma Nath Mukopadhya* v. *Nilmoney Singh* (1) and *Kishen Dai* v. *Satyendranath Dutt* (2).

My finding on this issue is in the affirmative.

5. It is unnecessary to take evidence and record findings on the remaining issues.

6. In view of my finding on the 2nd issue the suit must be dismissed with costs (two sets). Vakil's fee Rs. 25.

Judgment.—The application for probate of the Will was dismissed on the ground that the Will had been revoked by marriage. The appellant does not contend that the Will had not been revoked. He says the defendants had no *locus standi* to oppose the application for probate. They are judgment-creditors of the son of the deceased, two of whom had attached the son's interest in his deceased father's estate before the application or probate was made. The District Judge followed the authorities in *In re Nilmoney Singh*, *Umanath Mukopadhya* v. *Nilmoney Singh* (1) and *Kishen Dai* v. *Satyendranath Dutt* (2). In the latter case the Privy Council decision in *Nilmoney Singh Deo* v. *Umanath Mookerjee* (3) was considered. We are not prepared to say he was wrong.

The second appeal is dismissed with costs —two sets.

(1) 6 C. 429; (2) 28 C. 441.

Appeal dismissed.

(3) 10 C. 19; 13 C. L. R. 314; 10 I. A. 80.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 831 OF 1909.

October 14, 1910.

Present:—Mr. Justice Abdur Rahim.

R. M. S. PARAMASIVAM PILLAI—PETITIONER

versus

SANKARAYA CHITRAVATTIAR, MINOR THROUGH HIS MOTHER AND GUARDIAN, SANKARA VADIVANAMMAL—RESPONDENT.

Negotiable Instruments Act (XXVI of 1881), s. 4—Promissory-note—Unconditional promise to pay—Specified person—Intention to make promissory-note not necessary.

Where a document executed by one person to another contains an unconditional promise to pay a certain sum of money to the latter, who is sufficiently indicated, the document is a promissory-note and it is not necessary to show that the maker of the document intended to make a promissory-note.

Sibree v. *Tripp*, 15 M. and W. 35; 15 L. J. Ex. 318, explained and distinguished.

Petition under section 25 of Act IX of 1887, praying the High Court to revise the decree of the Subordinate Judge's Court of Tuticorin, in Small Cause Suit No. 1845 of 1908.

Judgment.—In my opinion, the learned Subordinate Judge was right in holding that the two documents in question are promissory-notes. The wordings of the documents constitute an unconditional promise to pay a certain sum of money and it is conceded that the person to whom the money is to be paid is sufficiently indicated. This being so, the requirements of section 4 of the Negotiable Instruments Act are satisfied. But it is argued that it must also be shown that the executant of instruments intended to make promissory-notes and reliance is placed on *Sibree* v. *Tripp* (1) and Mr. Chalmers' notes to section 83 of the English Bills of Exchange Act, 1882, where the definition given of a promissory-note may be taken to be substantially the same as in the Indian Statute.

In *Sibree* v. *Tripp* (1), however, the wording of the instrument was different and as it clearly appears from the observation of the Parke B. to the counsel in course of argument, the Lord Baron construed the documents as an agreement to return a certain deposit of money in specie. It seems to me, therefore, that when the Chief Baron Pollock says in the judgment that a promissory-note means something which the parties *intend* to be a promissory-note, his remark must be understood with reference to the instrument which was under consideration in that case.

Otherwise I must say that I should find it difficult to understand, when a person has in writing given on unconditional undertaking to pay a certain sum of money to a specified person, what further intention would be necessary in order to make the instrument a promissory-note. Mr. Chalmers, no doubt, cites the case of *Sibree* v. *Tripp* (1) as authority for the proposition that it is not enough that the document should comply with the terms of the statute but that it must be such as to show the intention to make a note. But as I read that case it does not support such a proposition.

The petition is dismissed with costs.

Petition dismissed.

(1) 15 M. and W. 35; 15 L. J. Ex. 318.

SWAN SINGH *v.* KARIM BAKHSH.

(s. c. 93 P. R. 1910; 128 P. W. R. 1910.)

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 860 OF 1909.

May 19, 1910.

Present:—Mr. Justice Johnstone.

SAWAN SINGH AND ANOTHER—DEFENDANTS—APPELLANTS

versus

KARIM BAKHSH—PLAINTIFF—RESPONDENT.

Evidence Act (I of 1872), s. 90—Ancient document lost—Presumption of genuineness—Practice—Decision based on conjectures—Mortgage—First mortgage with possession—Second mortgage without possession—Limitation—Mutation—Collateral mortgages.

The operation of section 90 of the Evidence Act is not limited to cases in which the document is actually produced in Court, and consequently, secondary evidence of an ancient document is admissible without proof of the execution of the original when the document is shown to have been lost and to have been last heard of in proper custody.

Khetter Chunder Mookerjee v. *Khetter Paul Sreeterutno*, 5 C. 886; 6 C. L. R. 199; *Ishri Prasad Singh* v. *Lalli Jas Kunwar*, 22 A. 294, relied upon.

It is not right for a Judge to base his decision in favour of a party on conjectures as to matters of fact, which have nowhere been alleged by the party.

The defendants were in possession of certain land as mortgagees for Rs. 41-8. Subsequently the mortgagor executed a further mortgage without possession for Rs. 77 in 1872. More than 30 years after, the heirs of the mortgagor brought this suit for redemption on payment of Rs. 41-8. The defendants replied that the land could not be redeemed without payment of the amount due on the second mortgage. The plaintiff contended that the defendant's claim in respect of the second mortgage was time-barred and that the second mortgage could not be recognized as defendants never obtained mutation thereunder:

Held, (1) that limitation did not ever begin to run against defendants, as there was no occasion for them to sue to enforce a valid mortgage without possession.

(2) That as the mortgage was not with possession and collateral mortgages are not entered in the mutation register at all, no mutation of the second mortgage was possible.

Further appeal from the decree of Khan Bahadur Abdul Ghafur Khan, Khan of Zaida, Divisional Judge, Sialkot Division, dated the 24th April 1909.

Mr. *Sukh Dial*, for the Appellants.

Messrs. *Shircore* and *Roshan Lal*, for the Respondent.

Judgment.—In this case, the plaintiff sued for redemption of a mortgage on payment of Rs. 41-8. The defendants replied that in addition to the burden of Rs. 41-8, the original mortgagor had, by a mortgage without possession, burdened the land with an additional sum of Rs. 77 by a registered deed of 4th June 1874. In replication plaintiff argued that the law of limitation prevented the defendants from relying upon this further deed of mortgage, and he also pleaded on another ground that the second deed of mortgage was invalid. The first Court came to the following findings:—

(*i*) that the plaintiff's father did execute the mortgage-deed of 4th June 1874 for Rs. 77;

(*ii*) that the original mortgage-deed has been proved to be lost;

(*iii*) that, therefore, secondary evidence of its contents may be given;

(*iv*) that inasmuch as the original deed was more than 30 years old, the presumption regarding it described in section 90 of the Indian Evidence Act may be made;

(*v*) that the mortgage of 1874 is not invalid by reason of section 257A of the old Civil Procedure Code inasmuch as the sum of Rs. 77 aforesaid is not in excess of the amount of the decree which the mortgagee held against the mortgagor; and

(*vi*) that the law of limitation did not affect that mortgage.

Finally the first Court gave plaintiff a decree for redemption on payment of Rs. 413-8. The plaintiff appealed to the Divisional Court which took a totally different view of the case and finally gave plaintiff a modified decree for redemption on payment of Rs. 41-8 only.

The defendants have filed a further appeal in this Court and, in my opinion, that appeal must succeed. The Divisional Judge's way of looking at the case seems to me wholly incorrect. He began by holding that the loss of the original document of 1874 was not sufficiently proved. In connection with this it is only necessary to observe that the plaintiff in his written replication and also in the oral statement made in answer to defendants' pleas never challenged the assertion that the deed was lost. In these circumstances, the first Court seems to me to have done its duty when it accepted as sufficient the formal evidence tendered by the defendants as to the loss of the document, namely, the deposition of one Gurditta who seems to be a respectable and independent person.

Next, the learned Divisional Judge laid it down that section 90 of the Evidence Act

relates only to originals and not to copies and that, therefore, there can be no legal presumption in defendants' favour about the genuineness of the original document of 1874. This, in my opinion, is bad law. No doubt the section does not expressly deal with a case like the present; but I am inclined to agree with the dictum in *Khetter Chunder Mookerjee* v. *Khetter Paul Sreeterutno* (1) followed in *Ishri Prasad Singh* v. *Lalli Jas Kunwar* (2) to the effect that the words "Where any document * * * * * * * is produced" do not limit the operation of the section to cases in which the document is actually produced in Court, and consequently secondary evidence of an ancient document is admissible without proof of the execution of the original when the document is shown to have been lost and to have been last heard of in proper custody. To rule otherwise would, in my opinion, be to misunderstand the policy of the Legislature in these matters. The obvious intention of section 90 of the Indian Evidence Act is not to make it too difficult for persons relying upon ancient documents to utilise those documents in proving their cases, and, if the section is not to be applied to cases where the original is lost, that policy is not fully carried out; for when the original is lost, it is doubly difficult for the party concerned to prove the execution and hand-writing and so on. Therefore, in the present case the genuineness of the original mortgage-deed of 1874 is, to my mind, not in the least doubtful.

After this the learned Divisional Judge loses himself in a wilderness of conjectures and surmises. He talks of possibilities that the original mortgage-deed was returned to Fazla, the money having been paid. But does the plaintiff even suggest in his replication or in the subsequent statement made by him that anything of this kind happened?

It does not seem to me to be right for a Judge to base his decision in favour of the plaintiff on conjectures as to matters of fact which have nowhere been alleged by the plaintiff.

Next the Divisional Judge points out that defendants never obtained mutation under the mortgage-deed in question; but if that officer had consulted Rule 46, Chapter V of the Rules under sections 28, 29, 46 and 155 (*d*) of the Punjab Land Revenue Act, he would have seen that collateral mortgages are never entered in the mutation register at all. This mortgage was not a mortgage with possession, and, therefore, no mutation of it was possible.

Proceeding further the Divisional Judge then states that the income from the land was certainly much in excess of what the defendants could have obtained as interest for the whole of the principal debt. This may be true or not; but there is on the record absolutely no foundation for the statement.

As regards limitation against defendants, I cannot see that limitation ever began to run against them. There was no occasion for them to sue to enforce a valid mortgage without possession.

In short, it seems to me that the decision of the first Court was quite sound. There is no doubt about the validity or genuineness of the mortgage-deed of 1874 and there is no doubt that it has not been paid off or cancelled in any way. Therefore, the plaintiff cannot redeem the land without paying the principal money on both the mortgage-deeds and the interest on the second mortgage-deed. I, therefore, accept the appeal, set aside the judgment and decree of the lower appellate Court and restore the decree of the first Court and I direct that the plaintiffs do pay the costs incurred by the defendants in all the Courts.

Appeal allowed.

(1) 5 C. 886; 6 C. L. R. 199.
(2) 22 A. 294.

(s. c. 8 M. L. T. 247.)

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1015 OF 1906.

July 18, 1910.

Present:—Mr. Justice Wallis and Mr. Justice Krishnasami Aiyar.

RAYAR SIVARAMA KRISHNIER AND OTHERS—DEFENDANTS—APPELLANTS

versus

SANKARALINGA KONE AND OTHERS—PLAINTIFFS—RESPONDENTS.

Pleadings—Practice—Appeal, second—Plea raised for the first time in.

A plea cannot be raised for the first time in appellate Court and cannot be considered by it.

Second appeal against the decree of the Court of the Subordinate Judge of Tinnevelly, in A. S. No. 278 of 1905, presented against

the decree of the Court of the Additional District Munsif of Tinnevelly, in O. S. No. 93 of 1904.

Judgment.—There is no plea that the suit is barred by section 42 of the Specific Relief Act and no issue as to possession at the date of the plaint. The point is not considered in the lower appellate Court and we are not prepared to consider it. The second appeal is dismissed with costs.

The memorandum of objections is not moved and is dismissed with costs.

Appeal dismissed.

(s. c. 94 P. R. 1910; 131 P. W. R. 1910.)

PUNJAB CHIEF COURT.

CIVIL REVISION No. 2075 OF 1909.

April 16, 1910.

Present:—Mr. Justice Williams.

NIADAR MAL AND OTHERS—PLAINTIFFS—PETITIONERS

versus

MR. E. N. W. LEWIN—DEFENDANT—RESPONDENT.

Landlord and tenant—Notice to quit—Failure to quit whole house on the date notified—Right to new notice.

A tenant gave notice to his landlord that he would vacate the house on 31st October 1908. The tenant, however, found himself unable to give up possession absolutely and entirely on 31st October 1908, though the landlord got partial possession on 30th October. After the tenant had departed, the landlord re-entered the vacant tenement:

Held, that, under the circumstances, the landlord was entitled to a new notice or failing this, to a month's rent.

Application, under section 25 of Act IX of 1887, for revision of the order of Khwaja Tasadduq Hussain, Judge, Small Cause Court, Delhi, dated the 12th August 1909.

Mr. *Harnam Das*, for the Petitioners.

Mr. *Oertel*, for the Respondent.

Judgment.—I do not think this judgment of the lower Court can be upheld. When owing to whatever reasons Mr. Lewin found himself unable to give up possession absolutely and entirely on 31st October 1908, the landlord became entitled, if he chose to press for it, to a new notice or failing this to a month's rent. The mere fact that he got partial possession on the 30th and that after Mr. Lewin had finally departed the landlord re-entered the vacant tenement would not by itself do away with the necessity for notice unless there was some distinct understanding come to on the subject, the burden of proving

which is on defendant. If it had been shown that plaintiff had dismissed defendant's *chaukidar* as stated by Muhammad Ismail, but denied by plaintiff, I should have held differently, because that would have indicated that the plaintiff was not making entry simply into a vacant house to prevent its being derelict.

I hold, therefore, that plaintiff is entitled to two months' rent Rs. 130-7. I disallow interest, and as I think that the plaintiff has pressed his rights to somewhat extreme limit, I leave the parties to bear their own costs throughout.

Revision accepted.

(s. c. 8 M. L. T. 247.)

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 595 OF 1906.

July 21, 1910.

Present:—Mr. Justice Wallis and Mr. Justice Krishnasami Aiyar.

VOLETI SREERAMULU AND OTHERS—(PLAINTIFF AND HIS LEGAL REPRESENTATIVES) PETITIONERS

versus

GUDISA VENKATA REDDY AND OTHERS—DEFENDANTS—RESPONDENTS.

Negotiable Instruments Act (XXVI of 1881), s. 78—Endorsee-holder—Payment.

An endorsee of a negotiable instrument is the holder thereof and payment should be made to him.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the decree and judgment of the Subordinate Judge of Kistna at Ellore, dated the 11th August 1906, in Small Cause Suit No. 357 of 1906.

Judgment.—Under section 78 of the Negotiable Instruments Act, payment must be made to the holder. The appellant as endorsee was the holder.

We set aside the judgment and grant a decree with interest up to date and costs here and below.

Judgment set aside.

FEROZE-UD-DIN *v.* RAHIM BAKHSH.

(s. c. 96 P. R. 1910.)

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 1005 OF 1909.

August 2, 1910.

Present:—Sir Arthur Reid, KT., Chief Judge and Mr. Justice Scott-Smith.

FEROZE-UD-DIN—DEFENDANT—APPELLANT

versus

RAHIM BAKHSH—PLAINTIFF—RESPONDENT.

Pre-emption—Custom—Nature of proof—Value of cases in which right was admitted—Kunjah, District Gujrat—Serai—Tavela—*Punjab Courts Act (XVIII of 1884), s. 70 (1) (b)—Question of Law—Appeal, second.*

The custom of pre-emption prevails in the town of Kunjah, District Gujrat. Instances, in which the existence of the custom of pre-emption is either admitted or assumed, are not valueless as precedents.

Ramjas v. *Bura Mal*, 42 P. R. 1905; 58 P. L. R. 1905; *Muhammad Nawaz Khan* v. *Musammat Bobo Sahib*, 44 P. R. 1903; 75 P. L. R. 1903, followed.

Rama Mal v. *Bhagat Ram*, 17 P. R. 1895, not approved.

The question, whether a certain building, upon the facts as found by the lower Court, is or is not a *serai*, is one of law.

A building cannot be held to be a *serai*, when it was not built as a *serai* and there has been no unmistakeable use of it as such. The mere fact that some of the rooms are rented out to more or less permanent tenants and others to chance-visitors occasionally does not necessarily convert, what was originally a *tavela* into a *serai*.

Musammat Nur Jahan v. *Aziz-ud-Din*, 108 P. R. 1895, relied upon.

Kishen Singh v. *Jai Kishen Das*, 2 P. R. 1903; 53 P. P. L. R. 1903, distinguished.

Further appeal from the decree of Sheikh Inam Ali, Divisional Judge, Jhelum Division, dated the 5th December 1908.

Messrs. *Muhammad Shafi* and *Kamal-ud-din*, for the Appellant.

Mr. *Shadi Lal*, for the Respondent.

Judgment.—This is an appeal under section 70 (1) (*b*) of the Punjab Courts Act. It was admitted on the following grounds:—

(1) Whether the custom of pre-emption prevails in the town of Kunjah?

(2) Whether the property in suit is a *serai*, within the meaning of section 13 (2) of the Punjab Pre-emption Act?

Mr. Shadi Lal raised a preliminary objection to the effect that the question, whether a certain building was a *serai*, was not one of law and was not important.

The word *serai* is not defined in the Pre-emption Act, but we are clear that the question, whether a certain building, upon the facts as found by the lower Courts, is or is not a *serai* is one of law. It is also of sufficient importance to justify admission under section (70) (1) (*b*). We, therefore, overrule the preliminary objection.

The Courts below have found that the property in dispute is not a *serai* and we agree with them. It was not built as a *serai* and there has been no prolonged unmistakeable use of it as such. The mere fact that some of the rooms are rented out to more or less permanent tenants and others to chance-visitors occasionally does not necessarily convert, what was originally a *tawela* into a *serai*. There are some very pertinent remarks in *Musammat Nur Jahan* v. *Aziz-ud-Din* (1) at page 505. That was a case of pre-emption and a very similar question arose, whether a certain building had become a *katra* or *serai*. In *Kishen Singh* v *Jai Kishen Das* (2) the facts were quite different.

The most important question in this case is, whether the custom of pre-emption prevails in the town of Kunjah?

Previous instances, where the custom of pre-emption has been held or admitted to exist in the town of Kunjah, have been cited as follows:—

1. *Tara Singh* v. *Ludhu Singh* decided on 23rd February 1833. Plaintiff was given a decree upon defendant's confession of judgment.

2. *Gurdas Ram* v. *Prabh Dyal* decided on 23rd February 1892. The existence of the right was at first denied, but arbitrators arranged a compromise and the plaintiff was given a decree.

3. *Guranditta* v. *Musammat Jwala Devi* decided after a contest by Rai Bahadur Ganga Ram, Honorary Extra Assistant Commissioner, on 7th March 1896. It was held that the custom of pre-emption existed in the town of Kanjah.

4. *Hayat Muhammad* v. *Hayat Bakhsh* decided on 19th August 1901.

Defendant admitted the plaintiff's claim. Nur Din, who was plaintiff's *mukhtar* in that case, is *mukhtar* of the defendant in the present case.

5. *Hassan Muhammad* v. *Miran Bakhsh* decided after contest by Rai Bahadur Dilbagh Rai, Honorary Extra Assistant Commissioner, on 23rd May 1903. The custom of per-emption was found to exist.

(1) 108 P. R. 1895.

(2) 2 P. R. 1903; 53 P. L. R. 1903.

Not a single instance has been cited by the defendant, where it was held that the custom did not exist.

Mr. Shafi asks us to disregard instances Nos. 1, 2 and 4 in the above list, on the ground that there was no judicial decision as to the existence of the custom. He refers us to *Rama Mal* v. *Bhagat Ram* (3) in which at p. 67 the learned Judges say: "The admission of plaintiff's right by the defendant's renders the case valueless as a precedent regarding custom."

We do not, however, think such instances altogether valueless, and the same view was taken in *Ramjas* v. *Bura Mal* (4) where in six out of seven instances cited, the existence of the custom was either admitted or assumed. Such instances were also held to be relevant in *Muhammad Nawaz Khan* v. *Musammat Bobo Sahib* (5) page 154 of the Record).

Kunjah is a small town and one cannot expect to find many instances. In the only two contested cases, which appear to have occurred, it has been held that the custom of pre-emption exists, and in three other cases the plaintiff's claim was admitted. In the absence of any instance on the other side, we consider that the above are sufficient to warrant the finding of the Courts below that the custom does exist.

The appeal, therefore, fails and is dismissed with costs.

Appeal rejected.

(3) 17 P. R. 1895.
(4) 42 P. R. 1905; 58 P. L. R. 1905.
(5) 44 P. R. 1903; 75 P. L. R. 1903.

(s. c. 8 M. L. T. 249; 1 M. W. N. 594.)

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1537 OF 1908.

March 11, 1910.

Present:—Sir Ralph Benson, Judge, and Mr. Justice Krishnaswami Aiyar.

THAZHE VITTIL PANTHeERADI ANANDA VARAR—DEFENDANT—APPELLANT

versus

KAVUMPRETH ILLATH VASUDEVAN NAMBUDIRI—PLAINTIFF—RESPONDENT.

Limitation Act (*XV of* 1877), *Sch. II, art.* 120—**Devaswam's** *property—Suit for declaration of rights—Limitation.*

A suit for a mere declaration of right brought more than six years after the grant of a *patta*, which is the foundation of the action, is barred.

Second appeal against the decree of the District Court of North Malabar, in A. S. No. 355 of 1907, presented against the decree of the Court of the District Munsif of Vayitri, in O. S. No. 76 of 1906.

Judgment.—We do not think there is any force in the objection that the plaintiff cannot sue. Even assuming that the surrender is invalid, the plaintiff as an *anandravan* and *de facto* manager is entitled to ask for a declaration that the property is the *jenman* of the *Devaswam*. But the other contention as to limitation is fatal. It is a mere suit for declaration of rights. The cause of action is dated 1895 and the grant of *patta* to the defendant is the foundation of the action. More than six years have elapsed since that date. The right, if any, of the *Devaswam* is not affected. But the remedy of a declaration is barred. The defendant did not apparently raise the question of limitation in the appellate Court. We must reverse the decree of the District Judge and dismiss the suit. Each party will bear his own costs throughout.

Appeal dismissed.

MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 9 OF 1905.

October 18, 1910.

Present:—Sir Arnold White, KT., Chief Justice, and Mr. Justice Ayling.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL, REPRESENTED BY THE COLLECTOR OF TINNEVELLY—APPELLANT

versus

AMBALAVANA PANDARASANNIDHI—RESPONDENT.

Madras Act (*VII of* 1865)—*Water-cess*—Fasli jasti—*Irrigation with water from Government stream*—*Implied engagement exempting water-cess, tests for determining.*

The essential conditions for the levy of water-cess under the provisions of Madras Act VII of 1865 are:

(1) The irrigation must be effected by means of the water of a river, stream, channel or work belonging to or constructed by Government.

(2) If the water from such a source is received by indirect flow or used after storage in an intermediate reservoir, the irrigation must, in the opinion of the Collector (subject to the control of the Board of Revenue and Government), be beneficial to, and sufficient for, the requirements of the crops.

SECRETARY OF STATE FOR INDIA *v.* AMBALAVANA.

(3) The charge must not be contrary to any engagement between the landholder and Government, whereby the former is entitled to irrigation free of charge.

Where the source of irrigation is a stream, which is itself formed by the junction of two streams, one of which rises in Government hills, the Government is entitled to levy water-cess for the land so irrigated, *jasli jasti*, *i.e.*, water rate for a second crop cultivated on wet lands.

The mere fact that the waters of the Government stream, before use, were mingled with those of another stream, or that they passed through a river bed or channel of joint or doubtful or even alien ownership is immaterial.

Urlam Proprietrix v. *Secretary for State for India*, App. No. 64 of 1907 and *Secretary of State for India* v. *Swami Nautheswarar*, S. A. 1019 of 1907, followed.

As to condition (2), the questions as to the beneficial character of the water taken from the Government source and of its sufficiency are not for the Civil Court, but for the Collector to determine, subject to the control of the Board of Revenue and of the Government.

Secretary of State for India v. *Swami Nautheswarar*, S. A. 1019 of 1907, followed.

Where an implied undertaking as to exemption from water-cess is deducible from any *sanad* or grant by Government, the undertaking must be limited, as regards double crop cultivation, to the extent actually under double crop cultivation.

Ordinarily, the implied right to free irrigation, deducible from the grant, should be measured by the area irrigated.

Chidambara Row v. *Secretary of State of India*, 26 M. 66 and *Lutchmee Doss* v. *Secretary of State for India in Council*, 32 M. 457; 6 M. L. T. 242; 3 Ind. Cas. 456, referred to.

Secretary of State for India v. *Perumal Pillay*, 24 M. 279; 11 M. L. J. 117 and *Marisusa Mudeliar* v. *Secretary of State for India*, 14 M. L. J. 350, distinguished.

Morgan v. *Kirby*, 2 M. 46, *Kristna Aiyan* v. *Venkatachella Mudali*, 7 M. H. C. R. 60, *Ramachandra* v. *Narayanaswami*, 16 M. 333, distinguished.

A land-holder is not precluded from showing that the excess of wet cultivation, 1st or 2nd crop as the case may be, irrigated with the aid of Government water, over that existing at the time of the grant, is due to thrifty use of water or careful maintenance of his channels and tanks to prevent wastage, and not to the use of an increased quantity of water; in which case water-cess on the increased area would not be leviable. But in all such cases, rigid proof should be required, the natural presumption being that the quantity of water used varies in proportion to the extent under irrigation.

Appeal against the decree of the Subordinate Judge's Court of Tinnevelly, in Original Suit No. 51 of 1902.

Mr. *C. F. Napier* (Government Pleader), for the Appellant.

Mr. *P. R. Sundaram Aiyar*, for the Respondent.

Judgment.—This appeal is presented on behalf of the Secretary of State for India in Council against the decree of the Additional Subordinate Judge of Tinnevelly directing a refund of Rs. 835-13-7, *fasli jasti* (water rate for a second crop cultivated on wet lands) alleged to have been illegally collected for *Fasli* 1310 of the respondent on Mitta of Kambaneri Pudukudi, and granting a permanent injunction against the future levy of such *fasli jasti* on the lands situated under the plaint tanks, 15 in number.

2. The tanks in question are fed by branch channels leading from the Pappankar, an artificial channel which takes off from a river called the Karuppanadi. The whole suit turns on the right of Government to levy water-cess on irrigation so conducted: and this has to be judged solely with reference to the provisions of Madras Act VII of 1865.

3 A reference to the Act will show that the essential conditions for the levy of the water-cess are these;

A. The irrigation must be effected by means of the water of a river, stream, channel, tank or work belonging to, or constructed by, Government.

B. If the water from such a source is received by indirect flow or used after storage in an intermediate reservoir (as in the present case), the irrigation must, in the opinion of the Collector (subject to the control of the Board of Revenue and Government), be beneficial to, and sufficient for, the requirements of the crops.

C. The charge must not be contrary to any engagement between the land-holder and Government whereby the former is entitled to irrigation free of charge.

4. We shall deal with these conditions in order.

5. The first has been made the subject of acute contention before us although in the Court of the Subordinate Judge it appears to have fallen into the back ground.

The Subordinate Judge has concentrated his attention on condition C; and if we correctly apprehend the meaning of his judgment as a whole, has decided in the plaintiff's favour, not on the ground that the water used was not that of a Government irrigation source (in itself a sufficient reason for giving the decree sued for) but because he found that the plaintiff was entitled to free irrigation by virtue of an implied engagement with Government (condition C). Confining our attention in the first instance to condition A, we

think it must be held to be established in favour of Government.

6. There is fortunately no dispute about the facts as bearing on this part of the case. The Karuppa Nadi (Black river) above referred to is formed by the junction of two hill streams of which one, the Kulirati, rises in Government hills, and the other, Arudithalai in those of the Vyravan Kulam Mitta. These streams bring down water in approximately equal proportions. From the point of their junction the combined river, called the Karuppanadi, runs between Government lands on one side and Mitta lands on the other for two miles to the place where the Pappankal takes off by means of anicut and head sluice. This Pappankal at its head and for half a mile lower down, has Government lands on one side, and Mitta lands on the other, after which it flows alternately through Mitta and Government lands but chiefly through the former. Branch channels from the Pappankal feed the 15 plaint tanks, under which lie practically all the lands for which the water rate has been charged, a very small proportion being irrigated from the branch channels direct.

7. Now, apart from all discussion of the ownership of the Pappankal itself, it cannot be denied that the irrigation is effected by means of the water of the Karuppanadi and following the interpretation of section 2 of Madras Act III of 1905, adopted by Miller and Munro, JJ. in *Urlam Proprietrix* v. *The Secretary of State for India in Council* (1), this river must undoubtedly be treated as a Government irrigation source. Even irrespective of this view, we should hold that condition A was satisfied by the fact that the water of the Government hill stream, the Kuliratli, was certainly used for the plaint irrigation. That this Kuliratli is a Government stream is beyond dispute, and the mere fact that its waters before use were mingled with those of another stream (the Aruvithulai) or that they passed through a river bed or channel of joint, or doubtful, or even alien ownership, is immaterial. This point is established in the most emphatic way by another recent decision [*Secretary of State for India in Council* v. *Swaminannatheeswarar* (2)]. The reasoning of the learned Judges therein (Benson and Krishnaswami Iyar, JJ.,) is entirely applicable to the present case and conclusive of the point.

8. Passing to the second condition (B), we may quote from the judgment in the case last cited:

"The question as to the beneficial character of the water taken from the Government source and of its sufficiency are not for the Civil Court, but for the Collector, subject to the control of the Board of Revenue, and of the Government. The Collector in this case having imposed the assessment and he not having been overruled by the higher Revenue authorities, we think the plaintiff is clearly liable to pay the assessment".

9. The right of Government to charge water rate being thus far established, it only remains to consider whether Government is precluded from so doing by any engagement with the plaintiff or his predecessor-in-title (condition C.)

10. The plaintiff's Mitta forms part of the old Chokkam *patti zemindari*, which was permanently settled in 1802, brought to sale for arrears and purchased by Government in 1836 and again granted in 1859 by a fresh *sanad* (Exhibit D). It is common ground that the terms of this fresh grant imply an undertaking on the part of Government to allow the use of Government water free of charge for the lands of the *zemindari* to some extent, greater or less: and that apart from this implied undertaking, there is no other engagement with Government which the plaintiff can plead. The difficulty is to fix the extent of the above mentioned implied undertaking.

11. According to the defendant, it must be strictly limited (as regards double crop cultivation with which we are now concerned) to the extent actually under double crop cultivation at the time of the regrant in 1859.

12. The plaintiff's contention, on the other hand, taken at its widest and as set forth in the plaint, is that the grant allows (by implication) the free use of the water passing down to the Pappankal to any extent and in any way the grantee may choose. The Subordinate Judge's findings, as set forth in paragraph 18 of his judgment, amount to a considerable limitation of this claim and in fact recognises the plaintiff's right only to the "accustomed flow" of

(1) App. No. 64 of 1907.
(2) S. A. No. 1019 of 1907.

water through his (the plaintiff's) sluices as it existed in 1859. The decree, however, goes much further than this, and gives an absolute injunction against the levy of *fasli jasti* on the plaintiff's lands under the plaint tanks, quite irrespective of whether the "accustomed flow" was exceeded or not. We may say at once that this undoubtedly goes too far. No engagement to allow free of charge such unlimited irrigation can possibly be deduced from the grant and Mr. Sundara Aiyar, Vakil for the respondent, in fact, stated in the course of the hearing of this appeal that he would be content with the establishment of his right to so much water as his client's predecessor-in-title was accustomed to take from the Pappankal through the branch channels in 1859. That this is as far as the undertaking can be legitimately presumed will be apparent when the reason for inferring its existence is considered. It is based simply on the assumption that in fixing the *peshcush* with reference to the income derivable from the *zemindari*, Government must be presumed to have taken into account all irrigation facilities than enjoyed by the *zemindari ryots*.

13. Practically, therefore, the controversy narrows itself down to the question of whether the implied right to free irrigation deducible from the grant should be measured by the area irrigated or by the quantity of water used—or rather, whether the area irrigated should be viewed as a final and conclusive measure of the quantity of water used.

14. In the great majority of cases, no other test of any practical value than that of the area irrigated can be suggested. It has been constantly adopted and acted upon as conclusive of the extent of a Mittadars', *zemindars'* or *inamdars'* rights to free irrigation, as numerous decisions show. We need only refer to *Chidambara Rao* v. *The Secretary of State for India in Council* (3), *Lutchumee Doss* v. *The Secretary of State for India in Council* (4) and the *Urlam case* (1) above mentioned. The respondent's Vakil seeks to distinguish these cases on the ground that the first two relate to *Inam* villages, and the last to a *zemindari* formed from *Haveli* lands, while the suit Mitta was carved out of an ancient *zemindari*. But it is difficult to see why the same principle should not be followed, the implied undertaking being based on precisely the same principle in the case of *zemindaris* and *Inams*. The chief cases adduced on the plaintiff's side are *The Secretary of State for India in Council* v. *Perumal Pillai* (5) and *Mariasusai Mudaliar* v. *The Secretary of State for India In Council* (6). The former is easily distinguished on the ground that it was passed before the amendment of the Irrigation Cess Act by Madras Act V of 1906. The case of *Mariasusai Mudaliar* v. *The Secretary of State for India in Council* (6) has been referred to by both sides, in support of their contentions and is worthy of special attention, as arising out of a precisely similar dispute, in another Mitta formed from the Chokkampatti *Zemindari*. It relates partly to lands under this same Pappankal and partly to lands under another channel from the Karuppanadi known as the Perukal and it is notable that the charge of the water rate is allowed in the case of the former, and disallowed in the case of the latter. The two cases are dealt with separately in the judgment and as might be expected, each side in the present appeal relies on the reasoning found in the portion favourable to its contention.

15. We have very carefully considered the judgment and it appears to us that the vital fact differentiating the case of the two channels was that in the case of the Perumakar, there appears to have been in force, both at the time of the grant and thenceforward to the date of suit, a definite arrangement whereby the *zemindar* and Government *ryots* took the channel water in turns of five days each: in the case of the Pappankal, no such arrangement has ever been set up. Accepting this "Morai" (to use the convenient vernacular phrase) as proved, the learned Judges naturally held that the rights of the *Zemin ryots*, must be measured thereby without reference to the extent of land which they might cultivate in the exercise thereof. In the case of the Pappankal, where there was no such "Morai", they appear to have applied the usual test. They say: "The evidence for the plaintiff does not prove what is the customary supply to which the plaintiff is entitled in respect of

(3) 26 M. 66.
(4) 32 M. 457; 6 M. L. T. 242; 3 Ind. Cas. 456.
(5) 24 M. 279; 11 M. L. J. 117.
(6) 14 M. L. J. 350.

tanks Nos. 22 and 23, and does not prove what was the exact extent of second crop cultivation in 1859". None of the cases quoted in the above judgment is of any use to respondent. *Morgan* v. *Kirby* (7) and *Kristna Ayyan* v. *Venkatachala Mudali* (8) were both suits between private parties, and although Government was a party in *Krishna Ayyan* v. *Venkatachala Mudali* (8), the suit was brought to establish a right to an uninterrupted supply of water based on prescription. None of these cases nor the later case quoted *Ramacahandra* v. *Narayanasami* (9), deal with the extent to which an implied engagement of the nature, now in question, extends, or to its effect in barring the right to levy water rate.

16. We should be inclined to hold as follows:—

A land-holder is not *precluded* from showing that the excess of wet-cultivation (1st or 2nd crop as the case may be) irrigated with the aid of Government water over that existing at the time of the grant, is due to thrifty use of water or careful maintenance of his channels and tanks to prevent wastage; and not to the use of an increased quantity of water: in which case water-cess on the increased area would not be leviable. But in all such cases, rigid proof should be required, the natural presumption being that the quantity of water used varies in proportion to the extent under irrigation.

17. Turning to the facts of the present case, we find that water-cess has been collected on 225·02 acres, the entire area cultivated with double crop, in *Fasli* 1310. No deduction has been made on account of double crop area as existing in 1859; but in the written statement the defendant admits that the double crop cultivation to the extent of 15 *Kotas* (about 20 acres) existed (all under the plaint tank No. 3), in 1859, and states that he is prepared to refund a proportionate amount. In the course of the trial it became evident that the above figure did not represent the entire cultivation even under tank No. 3 which the Government pleader now admits must be taken to amount to at least 24 *Kotas* (say 35 acres). What it was under the other 14 tanks he is not prepared to say.

(7) 2 M. 46.
(8) 7 M. H. C. R. 60.
(9) 16 M. 333.

18. A mass of oral evidence has been adduced on both sides, all of more or less unsatisfactory character, as to whether the 2nd crop cultivation is or is not larger now than before the re-grant in 1859. If the plaintiff's witnesses are to be believed, it then amounted to 635 *Kotas*, or more than two-thirds of the wet Ayacut.

This evidence is of a very interested character and is unsupported by anything in the nature of accounts. The aggregate figure is enormous, whether compared with the present day cultivation or with the cultivation in 1836 which the Subordinate Judge finds to have been about 15 per cent. of the wet Ayacut, and, we have no doubt, is an exaggeration. On the other hand, it is perfectly clear from the documentary evidence produced by plaintiff (Exhibits R. R. S. S. and W.) that between 1836 and 1859, and even at the *Paimash*, 2nd crop cultivation was carried on in the Kar season under the other tanks besides No. 3, which Government has not allowed for. The documentary evidence is most incomplete, no cultivation accounts being produced for the period in question or the immediately succeeding years: but the most noticeable feature is the failure of Government even to specify the true extent of second crop cultivation at the time of grant for which irrigation should be allowed free. The figure given in the written statement is now admitted to be incorrect.

19 It is suggested by the Government pleader that the improvements effected to the head works of the Pappankal about 1877 must have resulted in an increase of second crop cultivation. There seems no reason whatever to suppose that this was so. The works in question included the *lowering* of the anicut and the construction of a head sluice. They appear to have been undertaken mainly with a view of preventing the numerous breaches in the channel which had usually occurred in the Pisharamy season. Their primary effect must have been a *reduction* of the quantity of water passing down the channel though no doubt the supply was better regulated and the wastage by breaches avoided. This, however, probably in no way tended to increase but rather to decrease, the *kar* cultivation which takes place between May and October, a season when freshes are com-

paratively few and scanty and when no breaches were said to occur.

20. A more plausible cause of recent increase of 2nd crop cultivation may be the fixing of long term money rents about 20 years prior to suit, but it is only put forward by one or two witnesses and there is no reliable evidence as to the extent to which it operated.

21. On the whole, we see no reason to differ from the conclusion of the Subordinate Judge that the area of second crop cultivation charged for was not in excess of that existing in 1859. It follows that it was not liable to *fasli jasti* and that the amount collected for *Fasli* 1310 was rightly ordered to be refunded. The question whether any increase in area irrigated was affected without the use of an increased amount of water (*vide* paragraph 16 *supra*) does not, therefore, arise.

22. The next matter for decision is the question of the injunction. As already explained it cannot possibly stand in its present absolute and unlimited form which goes far beyond the rights to which the respondent is entitled or what his Vakil now claims. The record unfortunately affords no data for granting an injunction in sufficiently precise terms. On the other hand, there are obvious difficulties in the way of qualifying it. To be of any use an injunction must be sufficiently precise to render it easy to determine whether any infringement of it has occurred. In the present case there are no reliable data for fixing the area of second crop cultivation in 1859, and none at all for fixing the quantity of water then used for the irrigation of the plaint lands. The only course, unsatisfactory as it may seem, is, therefore, the omission of the injunction from the decree.

23. The apportionment of costs is somewhat difficult. On the whole it seems equitable that each side should bear its own costs in the Court below and that the respondent should recover his costs in this Court from the appellant. In other respects the decree of the Subordinate Judge will be confirmed.

24. The respondent has filed a memorandum of objections regarding the charges collected in *faslis* 1308 and 1309, recovery of which the Subordinate Judge held to be barred by limitation. The Subordinate Judge was right in holding that limitation runs from the actual date of payment

The objection memorandum must be dismissed with costs.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 353 OF 1909.

September 22, 1910.

Present:—Mr. Justice Munro and Mr. Justice Sankaran Nair.

P. K. KELU—APPELLANT

versus

AMMAD KULLY AND OTHERS—RESPONDENTS.

Landlord and tenant—Lease—Stipulation for surrender on demand—Notice to quit—Transfer of Property Act (IV of 1882), s. 106.

A condition in a deed of lease, whereby the lessee agrees to surrender the property demised to the lessor *on demand*, is "a contract to the contrary" within the meaning of section 106 of the Transfer of Property Act, and no notice to quit is necessary.

Second appeal against the decree of the District Court of South Malabar, in Appeal Suit No. 420 of 1908, presented against the decree of the Court of the Additional District Munsif of Calicut, in Original Suit No. 174 of 1907.

Facts of the case are set forth in the following judgment of the lower appellate Court:—Plaintiff leased certain property to 1st defendant for one year on a monthly rent of Rs. 10 on 15th October 1905 under Exhibit A. There is a provision in the lease that if the rent is left in arrears an enhanced rent of Rs. 15 per mensem is payable. There is an express stipulation that the lessee is prohibited from making improvements, and that if any improvements are made, they will not be paid for. First defendant having erected a building on the land in spite of the prohibition in the lease, plaintiff sent a notice Exhibit B to 1st defendant on July 5th, 1906, demanding surrender of the property within 4 days. The District Munsif gave plaintiff a decree for surrender and held that 1st defendant was liable to pay rent at the enhanced rate from Thulam 1082 (M. E.) October—November 1907.

2. The contentions raised in appeal are:—
   (1) That the stipulation as to enhanced rent in Exhibit A is penal.
   (2) That the full value of compensation

claimed should have been awarded.

(3) That no proper notice to quit was given.

The first ground of appeal is not pressed by appellant's Vakil. As regards the value of improvements claimed, it is provided in Exhibit A that 1st defendant is entitled to be paid for the improvements existing on the date of the lease at the time of surrender. The District Munsif accordingly awarded Rs. 62-10-7, the value of 2 sheds (Item No. 2) in the Commissioner's account. First defendant's claim for reclamation was disallowed. The District Munsif held that 1st defendant was not entitled to claim the value of erections, two warehouses and a shed *viz.*, Rs. 301-13-0 (item No. 1 in the Commissioner's account). The property leased consists of two contiguous plots on the bank of the Kolluri river and was used by 1st defendant for storing timber. The lease was not one for agricultural purposes. Any contract limiting or taking away a tenant's right to make improvements is, of course, invalid under section 19 of the Malabar Compensation for Improvements Act. First defendant's case was that he had merely improved and repaired the existing buildings while plaintiff states that 1st defendant demolished the old buildings and erected new ones. The Commissioner's account shows that the buildings, item No. 1 in his account, had been constructed within the preceding year. I prefer to accept plaintiff's version. I do not think that such works can be said to be "improvements" as defined in section 3 (3) of the Act. They clearly do not add to the value of the holding. Plaintiff has himself only a Kanom right over the property. The buildings (sheds standing on posts) are not permanent erections and can be easily removed. In spite of the stipulation in the lease, 1st defendant erected the sheds during plaintiff's absence and as soon as the latter became aware of the fact, he sent the notice B to which 1st defendant did not reply. It is clear, therefore, that plaintiff did not stand by and allow the tenant to go on with the work. I think that the District Munsif was right in disallowing the value of the buildings claimed, as well as 1st defendant's claim for reclamation. It is not satisfactorily proved that 1st defendant reclaimed the land.

3. It appears that 1st defendant, after executing Exhibit A, leased a portion of the land to defendants Nos. 2 and 3. It is stipulated in Exhibit A that 1st defendant had no right to transfer possession of the land to any one else, and that in the event of his not requiring the property, he would surrender it to plaintiff.

The lease does not contain any clause giving the lessor a right of re-entry or providing that the lease shall become void in case of a breach of the covenant against alienation. As there is no such proviso in the lease, the condition against alienation cannot be said to be for the benefit of the lessor and is void under the provisions of section 10 of the Transfer of Property Act, and the lease cannot be said to have been determined under the provisions of section 111 Clause (9) of the Act. See *Nil Madhab Sarkar* v. *Narathan Sarkar* (1), *Parameshri* v. *Vittappa Shanbaga* (2).

4. It is clear that Exhibit B which is dated 5th July 1906 was not a proper notice to quit. The property was leased for a year and the period of the lease did not expire till 15th October 1906. The suit was instituted on February 22nd, 1907. First defendant was allowed to hold over and remain in possession after the expiration of the original term of the lease. He was entitled to 15 days' notice expiring with the end of a month. It is not shown that the notice was dispensed with and the fact that the lease contains a provision that 1st defendant shall surrender on demand does not, I think, deprive him of the right to notice. As no proper notice to quit was given, plaintiff is not entitled to evict 1st defendant.

The appeal is accordingly allowed and plaintiff's suit dismissed. Under the circumstances, I direct that plaintiff and 1st defendant do pay their own costs throughout.

Judgment.—Seeing that in Exhibit A there is an express provision to surrender on demand, we think there is a contract to the contrary within the meaning of section 106 of the Transfer of Property Act. The plea of the waiver raised for the respondent was not taken in either of the Courts below. We, therefore, reverse the decree of the District Judge and restore the decree of the District Munsif with costs in this and the lower appellate Court.

Appeal allowed.

(1) 18 C. 826.
(2) 26 M. 157; 12 M. L. J. 189.

VELAYUTHA CHETTY *v.* GOVINDASAMI.

(s. c. 1 M. W. N. 637.)

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1162 OF 1904.

October 14, 1910.

Present:—Sir Arnold White, KT., Chief Justice, and Mr. Justice Wallis.

VELAYUTHA CHETTY AND OTHERS—PLAINTIFFS—APPELLANTS

versus

GOVINDASAMI NAICKEN—DEFENDANT—RESPONDENT.

Transfer of Property (Act IV of 1882), s. 55—Purchase-money not paid—Vendee entitled to possession—Vendor's lien for unpaid purchase-money.

According to the provisions of the Transfer of Property Act, a vendee is entitled to possession even though the purchase-money is not paid and the vendor is entitled to have a statutory charge on the property for unpaid purchase-money.

Baijnath Singh v. *Paltu*, 30 A. 125; A. W. N. (1908) 38; 5 A. L. J. 96; *Shib Lal* v. *Bhagwan Das*, 11 A. 244, doubted.

It is not open to Courts of this country to introduce and enforce equities modifying the provisions of the statute law.

Webb v. *Macpherson*, 30 I. A. 238; 13 M. L. J. 389; 5 Bom. L. R. 838; 8 C. W. N. 41; 31 C. 57, referred to.

Second appeal against the decree of the District Court of Coimbatore, in Appeal Suit No. 175 of 1902, presented against the decree of the Court of the District Munsif of Erode, in Original Suit No. 102 of 1908.

Facts.—The suit is for possession of plaint land and to recover Rs. 615 from defendants Nos 1 to 3 for arrears of rent. Defendants Nos. 1 to 3 contend that the plaintiff had no right and had no enjoyment in the plaint lands that the lands belong to the 4th defendant, that they are 4th defendant's tenants and they paid to him the whole rent due; that plaintiff's suit is barred by limitation and that plaintiff cannot maintain one suit against them. Fourth defendant is brought on record on this contention and he contends that plaintiff obtained the sale-deed from him for the plaint lands that he failed to pay consideration for it; that plaintiff was, therefore, given no possession of the lands and that plaintiff had no enjoyment in the lands for more than 12 years before the suit and that the suit is barred by limitation. Item No. 1 was sold by the 4th defendant to the 1st plaintiff on 27th January 1886. Item No. 2 was sold to the 1st plaintiff by one A on behalf of the 4th defendant on 19th February 1886 and the sale-deed was attested by the 4th defendant. The suit was instituted on the 19th March 1901. The District Munsif found on the evidence that the consideration amount had been paid for the sale by the plaintiff and that the possession by the 4th defendant after the sale was not adverse but only permissive and as agent for plaintiff. The plaintiff's suit was accordingly decreed. On appeal by the 4th defendant, the District Judge held that the purchase-money has not been wholly paid and that the plaintiff's suit was time-barred and, therefore, reversed the decision of the lower Court and dismissed the suit, The plaintiff appealed to the High Court. The case came on for hearing in 1907 and the first judgment of the High Court will be found in the case of *Velayutha Chetty* v. *Govindasawme Naicker* (1). The appeal was ordered to be re-heard on the ground that on the date of the former hearing the appellant was dead and no one was brought on record to represent him and accordingly the appeal came on for re-hearing on the 11th of January 1901.

Mr. *V. Purashotkama Iyer*, for the Appellants.

Mr. *T. V. Gopalasami Mudaliar*, for the Respondent.

Judgment.—This appeal, *see Velayutha Chetty* v. *Govindasawme Naicker* (1), was ordered to be re-heard on the ground that at the date of the former hearing the appellant was dead and no one had been brought on the record to represent him. At the re-hearing it was contended that we were wrong in having given the vendee, who was found not to have paid the whole of the purchase-money, an unconditional decree for possession and we were referred to the recent decision in *Baijnath Singh* v. *Paltu* (2), in which it was held that although a vendee, who has not paid the purchase-money, is entitled to maintain an action for possession against the vendor, yet the vendor has an equity arising out of the purchase-money, and that the proper decree is that if the plaintiff pay the purchase-money within six months, the property be delivered to him, and if he fails to do so, his suit do stand dismissed. The decision follows an *obiter dictum* of Mahmood, J., in *Shib Lal* v. *Bhagwan Das* (3), that "in a case such as this in common with some other classes of cases, equities may exist

(1) 30 M. 524; 17 M. L. J. 450; 3 M. L. T. 10.
(2) 30 A. 125; A. W. N. (1908) 38; 5 A. L. J. 96.
(3) 11 A. 244.

in favour of the defendant, so as to subject the decree for possession to restrictions and conditions appropriate to the circumstances of each case." Now, the provisions of the Transfer of Property Act that after conveyance, the vendee is entitled to possession and that the vendee has a statutory charge on the property for unpaid purchase-money, are perfectly clear, and the effect of the decision, in our opinion, is, therefore, to override the provisions of the statute and to say that the vendee is not entitled to possession until he is paid. With great respect, we think it is not open to Courts of this country to introduce and enforce equities modifying the provisions of the Statute Law. In this connection we may refer to the language of Lord Davey delivering the judgment of their Lordships of the Judicial Committee in *Webb* v. *Macpherson* (4), where he remarks that "the Law of India, speaking broadly, knows nothing of the distinction between legal and equitable property in the sense in which that was understood when equity was administered by the Court of Chancery in England." Even then if an unpaid vendor could set up such an equity in England either as to the land or the title-deeds which would not appear to be the case, *Good* v. *Burton* (5), that would not entitle us to enforce such an equity here. With reference to the last cited case, it is observed in Dart's Vendors and Purchasers, page 731, that when an unpaid vendor is sued for possession of the deeds by the vendee, his proper course is to counter-claim for the enforcement of his lien. If the present Code allowed of counter-claims and the vendor had counter-claimed for the enforcement of his charge, we might have been at liberty to do as the Allahabad Court has done, *i. e.*, to enforce the unpaid vendor's charge by passing a decree for foreclosure against the vendee, but that is not the case before us.

Another point taken at the re-hearing was that even allowing due weight to Ex. G, which was not considered by the District Judge, there is other evidence that the 4th defendant's possession was adverse to the plaintiff, and that under these circumstances we ought to either affirm the judgment of the District Judge or call for a fresh finding as to whether the suit is barred by limitation on the evidence on record. Findings should be submitted within six weeks and seven days will be allowed for objections.

[The District Judge found that the 4th defendant was in possession as plaintiff's agent and not adversely to him and, therefore, that the suit was not barred by limitation.]

Judgment.—Accepting the finding, we restore the decree of the District Munsif with costs here and in the lower Courts.

Appeal allowed.

(4) 30 I. A. 238 at p. 245; 13 M.L.J. 389; 5 Bom. L. R. 838; 8 C. W. N. 41; 31 C. 57.

(5) 1 Ex. Ch. 189; 16 L. J. Ex. 309; 11 Jur. 851; 74 R. R. 633.

(s. c. 1 M. W. N. 639.)

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 309 OF 1909.

July 22, 1910.

Present:—Mr. Justice Wallis and Mr. Justice Krishnaswami Aiyar.

INDETY CHINA NAGADU—DEFENDANT—PETITIONER

versus

POTU KONCHII VENKATASUBBAYA—PLAINTIFF—RESPONDENT.

Madras Estates Land Act (*I of* 1908), *s.* 3 *cl.* 2, (*d*)—*Estate—Jurisdiction of Civil Court—Presumption as regards* inam *—Burden of proof.*

The onus of proving that an *inam* village comes within the definition of clause 2 (*d*) of section 3 of the Madras Estates Land Act and that the jurisdiction of the Civil Court is ousted is on the defendant.

Whatever may be said as to there being a presumption that the *inam* is only a grant of Land Revenue, there can be no presumption that an *inam* was granted to a person not owning the *Kudivaram*.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the District Munsif of Ellore, in Small Cause Suit No. 670 of 1908, dated the 23rd day of November 1908.

Facts.—The plaintiff is a sharer in an *inam* village which has been enfranchised as a personal *inam* by the *Inam* Commissioner. The defendant is a tenant cultivating land in it and has executed and registered a *muchilika*. One of the issues framed was whether the Civil Court has jurisdiction to try the suit. It was contended that the suit for rent should be brought in the Revenue Court as the *inam* village comes within the definition of an estate under section 3, clause 2 (*d*),

of the Estates Land Act. The District Munsif held that the onus of proving this issue was on the defendant who set it up in bar of the jurisdiction of the Civil Court and found that the defendant had failed to discharge the onus. The defendant appealed.

Mr. *P. Narayanamurthi*, for the Petitioner.

Mr. *V. Ramesam*, for the Respondent.

Judgment.—The onus is on the defendant to show that the village comes within the definition in clause 2 (*d*) of section 3 of the Madras Estates Land Act.

Whatever may be said as to there being a presumption that the *inam* is only a grant of the land revenue, we think there can be no presumption that an *inam* was granted to a person not owning the *Kudivaram*.

The petition is dismissed with costs.

Petition dismissed.

(s. c. 1 M. W. N. 640.)

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1243 OF 1909.

September 20, 1910.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Krishnaswami Aiyar.

KRISHNIER—DEFENDANT—APPELLANT

versus

SARVOTHAMA ROYAR AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, R. 33—Powers of Appellate Court.

The High Court in second appeal and the District Judge on appeal can pass a decree against a defendant even though the plaintiff has not filed any appeal or cross-objections against the decree dismissing the suit against him.

Second appeal against the decree of the District Court of Tanjore, in Appeal Suit No. 815 of 1908, presented against the decree of the Court of the District Munsif of Valangiman, in Original Suit No. 108 of 1908.

Facts.—This is a suit for Rs. 154-8-0 being the amount of mesne profits for the years 1905, 1906 and 1907 in respect of certain lands described in the plaint. Plaintiff's case is that he obtained symbolical delivery of one-half of certain properties, the other half of which belonged to 1st defendant; and in a subsequent division between him and 1st defendant on 30th January 1904, the suit lands were allotted to that half. The 1st defendant was, however, in possession of the entire land in the three years in suit, and was in enjoyment of the profits through 2nd defendant, his *purakudi* tenant. First defendant pleads that he received from the tenant only his half share of the rent and has subsequently mortgaged his share to strangers. He says that 3rd defendant is in possession of plaintiff's share and should give plaintiff profits.

The District Munsif found that the plaint properties fell to the share of plaintiff by a partition-deed, dated the 30th September 1904 and that the 1st defendant was in possession of the lands for the years, 1905, 1906 and 1907 through 2nd defendant and gave a decree for plaintiff against 1st defendant dismissing the suit as against the other people. The first defendant appealed to the District Court. The District Judge found that the grant of the profits for 1905 was barred, but otherwise confirmed the lower Court's decree. The first defendant appealed to the High Court on the ground that there was no evidence to support the lower Court's finding of 1st defendant's possession through 2nd defendant.

Mr. *S. Muthia Mudaliar*, for the Appellant.

Mr. *C. Balarama Row*, for the Respondents.

Judgment.—The learned pleader for the appellant, (1st defendant), contends that there is no evidence to show that the 1st defendant was in possession of the land after partition or that the 2nd defendant paid rent to the 1st defendant for 1906 and 1907. This contention seems to be well-founded and the learned pleader for the plaintiff has not been able to draw our attention to any evidence in support of the Judge's finding. We may also mention that the notice (Exhibit I.) given by the plaintiff to the 1st defendant on the 25th December 1906 expressly states that from 1906 onwards he would himself collect the rent from the 2nd defendant, his tenant. This appeal must, therefore, be allowed and the decree against the first defendant set aside with costs in this and the Courts below.

But the 2nd defendant is clearly liable for the rent for 1906 and 1907 and his payment to the 3rd defendant even if true cannot absolve him from such liability.

It is true there was no appeal or cross-objections to the District Judge against the District Munsif's judgment dismissing the suit against the 2nd defendant.

The District Judge had power under Order XLI, Rule 33, of the new Civil Procedure Code, which was in force at the date of the disposal of the appeal to him to pass a decree against the 2nd defendant; we also have the same power and we think this is clearly a case in which there should be a decree against the 2nd defendant. It is unfortunate that the 2nd defendant does not appear before us but we think his liability can hardly be disputed. There will, therefore, be a decree for the plaintiff for Rs. 66-8-0 against the 2nd defendant but without costs.

Appeal allowed : Decree modified.

(s. c. 1 M. W. N. 642.)

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 871 OF 1908.

March 3, 1910.

Present:—Sir Ralph Benson, Judge, and Mr. Justice Krishnaswami Aiyar.

THOTUVAYIL KURUNGOTT THATATHIL THRIKKAYIKKAL KUNHI RAMAN *alias* KUNHAN NAIR KARNAVAN AND MANAGER OF THE PUTIAVAKASAM TAVAZHI TARWAD—PLAINTIFF—APPELLANT

versus

THODUWAYIL NELLIYOT POYYAPRATH KURUNGOTT THATATHIL THIRUKAYIKIL KUNHI PARWATHI KATHILAMMA AND OTHERS—DEFENDANTS—RESPONDENTS.

Malabar Law—Putravakasam *property*—Karnavanship—*Management of properties—Senior male or senior female.*

Tavazhi properties are generally held by the *Tavazhi* with the incidents of *Tarwad* management and it is the rule in Malabar that the senior male manages the *Tarwad* properties though the earlier and original rule was management by the senior female. The older rule survives in South Canara and among the descendants of Royal families in Malabar.

The inquiry as to custom in Malabar is generally an inquiry as to what is the law and not as to what is the usage. Much less evidence than in cases in which the usage is opposed to the well-established law of the country ought to be sufficient.

Second appeal against the decree of the District Court of North Malabar, in Appeal Suit No. 131 of 1907, presented against the decree of the Court of the District Munsif of Nadapuram, in Original Suit No. 716 of 1904.

Mr. *J. L. Rosario*, for the Appellant.

Mr. *T. R. Ramachandra Iyer*, for the 1st Respondent.

Judgment.— The plaintiff and 2nd defendant are members of a *Tavazhi* of the Kurungot *Tarwad*. The plaintiff sues to redeem a Kanom of certain properties which belong to the *Tavazhi* along with other properties. They were acquired in *putravakasam* right. The question is who is the Karnavan of the *Tavazhi*? It has been held that *Tavazhi* properties should be held by the *Tavazhi* with the incidents of *Tarwad* management. It is the rule in Malabar that the senior male manages the *Tarwad* properties. But the earlier and original rule was management by the senior female though the practical inconvenience of such management has led in modern time to management by the senior male. But the older rule survives in South Canara and among the descendants of Royal families in Malabar. In this case the custom is set up of management of the *Tavazhi* properties by the senior female. The enquiry as to custom in Malabar is generally an enquiry as to what is the law and not as to what is the usage at variance with law. Having regard to the prevalence of the custom of management by the senior female we should be satisfied with much less evidence of the usage than in cases in which the usage is opposed to the well-established law of the country which only admits of rare exceptions. Going to the evidence we start with the concurrent finding of both the lower Courts. The oral evidence relied on by the Courts below, is fairly satisfactory and it is supported by the judgment Exhibit XXXIX and the Karar Exhibit S. The plaintiff's own statement and conduct are clearly in favour of the custom alleged. We are not prepared to disturb the finding arrived at below. The plaintiff contends that even as an *anandravan* he is entitled to redeem. This was not the case set up below. He elected to state his case on the footing that he was the Karnavan. The question may arise whether as *anandravan* he can ask for redemption when it is alleged

that there is an agreement to renew. We are not prepared to allow the plaintiff to change the basis of his claim. We dismiss the second appeal with costs.

Appeal dismissed.

(s. c. 1 M. W. N. 648.)

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 201 OF 1909.

October 26, 1910

Present:—Mr. Justice Munro and Mr. Justice Sankaran Nair.

SUBRAMANIA AIYER—PETITIONER

versus

SRINIVASA AIYER AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act XIV of 1882), ss. 318 and 622—Auction-purchaser—Obstruction of counter-petitioners—Claiming under judgment-debtor—Removal—Jurisdiction.

Where the counter-petitioners, obstructing delivery of property to the auction-purchaser, derived their title from the judgment-debtor subsequently to the attachment, under which the auction sale was held, the Court is bound to order delivery to the auction-purchaser.

Civil Revision Petition under section 622, Civil Procedure Code, 1882, (section 115 of new Code) against the order of the District Munsif of Valangiman, in (E. P. No. 664 of 1908), in S. C. S. No. 3172 of 1900.

Facts.—One S obtained a Small Cause decree in Small Cause Suit No. 3172 of 1900 and attached the interest of the defendants in that suit in certain properties on the 25th of October 1902. The sale in pursuance of the attachment was held on the 6th of August 1908 and the petitioner a stranger purchased the same in auction. A certificate of sale was issued to him on the 8th of September 1908. The auction-purchaser applied to be put in possession on the 20th of November 1908 and the counter-petitioners obstructed saying that they held of the defendants by a sub-usufructuary deed of the 27th of April 1904 and of the 12th of July 1905. The petitioner then applied under section 318 of the Civil Procedure Code for being put in possession of the lands bought by him after removal of the obstruction by the counter-petitioners. The District Munsif passed the following judgment. "The petitioner admits the counter-petitioners are in possession of the property and he now finds they hold the possession as mortgagee

under the judgment-debtors. He asserts the mortgage is invalid. It is not necessary to consider whether the mortgage is valid or not. As it is admitted, the counter-petitioners are in possession under a mortgage taken long prior to the petitioner's purchase, the petitioner cannot be given possession. The petition is rejected with costs." The petitioner then applied for revision to the High Court on the ground that the District Munsif failed to exercise the jurisdiction vested in him under section 318, Civil Procedure Code of 1882, and that the criterion under section 318 was not the date of purchase, but the date of attachment which was prior to the date of the sub-usufructuary mortgage under which the counter-petitioners claimed.

Mr. *T. V. Seshagiri Iyer*, for the Respondents.

Mr. *N. R. K. Tatachariar*, for the Petitioner.

Judgment.—Under section 318, Civil Procedure Code, the District Munsif was bound, in the admitted circumstances of the case, to order delivery. The decree is set aside and the petition is allowed with costs.

Petition allowed.

(s. c. 13 O. C. 282.)

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL APPLICATION No. 10 OF 1910.

May 13, 1910.

Present:—Mr. Evans, A. J. C., and Mr. Piggott, A. J. C;

IKBAL HUSAIN—DECREE-HOLDER—APPLICANT

versus

JAFAR ALI KHAN—JUDGMENT-DEBTOR—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 73—Rateable distribution, application for—Notice to rival decree-holders, necessity of.

An application for rateable distribution should be dealt with after notice to the rival decree-holder, whose interests may be seriously affected thereby.

Appeal against the order of the Sub-Judge, Lucknow, dated 10th September, 1909.

Mr. *Sami-ul-lah Beg*, for the Applicant.

Mr. *Zahur Ahmed*, for the Opposite Party.

IKBAL HUSAIN *v.* JAFAR ALI KHAN.

Judgment.—This is an application in revision against an order of the learned Subordinate Judge of Lucknow, dated September 10th, 1909, rejecting an application under section 73 of the Code of Civil Procedure made under the following circumstances. Nawab Jafar Ali Khan had caused certain immovable property to be attached in execution of a decree held by him against Fatima Begam and others. Sadiq Ali Khan and Kasim Ali Khan had also taken out execution of a decree, held by them against Fatima Begam only, and it would seem that they had also obtained an order of attachment against the same property, or part of it. On June 14th, 1909, they applied to the Court under section 73 of the Code of Civil Procedure, (Act V of 1908), asking that their decree might be satisfied by rateable distribution of any assets, which might be realized by sale in execution of Nawab Jafar Ali Khan's decree. The Court passed an *ex parte* order, dated June 24th, 1909, the effect of which is that the execution proceedings instituted by Sadiq Ali Khan and Kasim Ali Khan shall be amalgamated with the proceedings, which were going on under Nawab Jafar Ali Khan's application, with a view to an eventual rateable distribution of the realized assets. On July 22nd, 1909, the Court re-considered the matter and ordered a separate sale-statement to be prepared in connection with the application of Sadiq Ali Khan and Kasim Ali Khan. On August 20th, 1909, a portion only of the property attached under Jafar Ali Khan's decree was put up for sale and sold for a larger sum than was sufficient to satisfy that gentleman's decree. On September 8th, 1909, Sadiq Ali Khan and Kasim Ali Khan applied for rateable distribution of the money thus realized; and two days later their application was rejected by the order now under consideration. This order runs as follows:—"This application cannot be entertained. There is other property besides which requires sale. This sale too has not yet been confirmed."

The matter has been brought before this Court in revision by Syed Iqbal Husain, who is Assignee of the decree of Sadiq Ali Khan and Kasim Ali Khan; his application has been opposed on behalf of Nawab Jafar Ali Khan, and we have heard counsel on both sides.

The proceedings of the learned Subordinate Judge are not satisfactory. The order of June 14th, 1909, should not have been passed without notice to the rival decree-holder. With regard to the order of July 22nd, 1909, the parties before us were not able to refer us to anything in the rules under section 70 of the Code of Civil Procedure, which rendered it incumbent on the Court to prepare a separate sale statement on the application of Sadiq Ali Khan and Kasim Ali Khan. We are not able, however, on the materials before us to say with certainty that there may not have been something in the circumstances of the case which justified the view taken by the learned Subordinate Judge that it was not possible for him simply to continue the execution proceedings on the lines indicated by his order of June 24th 1909. It is clear that rules framed by the Local Government, under section 70 of the Civil Procedure Code, cannot have the effect of nullifying the provisions of section 73 of the same Code; but it is conceivable that difficulties may arise in particular cases. The Local Government might have just cause for complaint if sanction were obtained to the sale of certain immovable property upon a statement of the facts which represented the value of the property as much in excess of the amount of the decree, and it were afterwards found that, in consequence of an application under section 73 of the Civil Procedure Code by another decree-holder, the sale of the entire property in question had failed to satisfy the decree in connection with which sanction had been given. It would appear that some such considerations as this must have influenced the learned Subordinate Judge, both in passing his order of July 22nd, 1909, and in summarily rejecting the subsequent application of Sadiq Ali Khan and Kasim Ali Khan by means of the order now under consideration. We find it impossible, however, to maintain this order as it stands. The lower Court seems to have got into difficulties to start with by passing its order of June 24th, 1909, *ex parte*; applications for rateable distribution should be dealt with after notice to the rival decree-holder, whose interests may be very seriously affected there-

by. The difficulty about the Local Government's sanction to the sale might have been met by intimating to the Collector the fact of the application of June 14th, 1909, and such orders as the Court might have seen fit, after proper inquiry, to pass upon the same. The difficulty now is that the application of September 8th, 1909, appears on the face of it a proper application under section 73 of the Civil Procedure Code, apart altogether from any question as to the effect of the orders of June 24th, 1909 and July 22nd, 1909, and that the reasons given by the learned Subordinate Judge for summarily rejecting the same are of no weight. If he means to say that he has no assets in his hands available for distribution until the sale has been confirmed, that is a difficulty, which could and should have been met by simply directing the application of September 8th, 1909, to come up for orders after the sale had been confirmed. The statement that other property remains to be sold is quite beside the point. So far as Nawab Jafar Ali Khan's decree is concerned, it would not appear that any further sale was proposed to be held in execution of the same; and the fact that Sadiq Ali Khan and Kasim Ali Khan had other property of their judgment-debtor's under attachment in execution of their decree cannot in itself deprive them of their rights to rateable distribution.

It was contended on behalf of Nawab Jafar Ali Khan that he was prepared, upon being allowed a fair opportunity of doing so, to show cause against the granting of the application. We have heard some arguments on this point, and find that there are questions involved with which we cannot deal on the materials before us. The order complained of must, in our opinion, be set aside; the learned Subordinate Judge has simply refused, for quite inadequate reasons, to exercise the jurisdiction vested in him by law in respect of the application of September 8th, 1909. We set aside the order of September 10th, 1909, and direct the lower Court to take up this application *de novo*, and to dispose of it according to law, after due notice to the other parties concerned.

Order set aside.

(s. c. 13 O. C. 286.)

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 63 OF 1910.

July 18, 1910.

Present:—Mr. Lindsay, O. A. J. C.

SAKHAWAT ALI—PLAINTIFF APPLICANT

versus

Thakur BALDEO SAHAI—DEFENDANT—OPPOSITE PARTY.

Limitation Act (*IX of* 1908), *Sch. I, art.* 120—*Suit to recover money deposited as security for payment of rent.*

Where money was deposited with a lessor as security to ensure payment of rent payable under a contract of lease: *Held*, that article 120, Schedule I of the Limitation Act, applied to a suit for recovery of such deposit.

Upendra Lal Mukhopadhya v. *Collector of Rajshahye*, 12 C. 113, referred to.

Appeal against the decree of the Subordinate Judge as Judge, Court of Small Causes, dated 1st April, 1910.

Mr. *J. P. C. Bhattacharji*, for the Applicant.

Babu *Ishri Prasad*, for the Opposite Party.

Judgment.—This application for revision was filed as being one under section 115 of the Code of Civil Procedure. It is, however, in reality an application under section 25, Act IX of 1887, for revision of the order passed by the Judge of a Small Cause Court, dismissing the suit of the plaintiff-applicant on the ground that it was barred by limitation.

The plaintiff took from the defendant a lease of a village for a period of five years, which determined in August 1904. While the lease was running, the plaintiff paid to the defendant two sums, *viz.*, one of Rs. 140 on the 26th May, 1900, and one of Rs. 50 on the 8th October, 1902. In the receipts granted by the defendant, both these payments are described as having been made by way of security (*bataur zamanat*) and according to the plaintiff's story the agreement was that these sums were to be treated as security for the payment of the rent. The defendant's case was that the sums were merely advance payments of rent and had been duly applied in satisfaction of instalments of rent due from the plaintiff. No written contract was produced, and there is no finding of the Court below as to which version of the matter is to be accepted as correct. The Court has merely found that,

assuming the plaintiff's version to be correct, the suit was time-barred.

The plaintiff relied on section 10 of the Limitation Act, which was held, and I think rightly, not to apply. The case is not one of trust at all, and it cannot be said that the money ever vested in the defendant. It was held that the case might fall under article 62 of the first Schedule to the Limitation Act: but the Judge thought this doubtful and applied article 115.

It is here contended that if section 10 of the Act does not govern the case, it ought to be held to fall within article 120, and after careful consideration I am of opinion that this contention should prevail.

Article 62 cannot, I think, apply. In cases falling within that article, limitation begins to run from the date of receipt of the money; but here according to the plaintiff's story the defendant was not liable to return the money till the month of August, 1904, when the lease expired, *i.e.*, till more than four years after the date of the first payment, and till nearly two years after the date of payment of the second.

Nor can I see how the suit can be deemed to fall within article 115, for it is certainly not a suit for compensation for breach of contract.

I think the case is one under article 120, and I am supported in this view by the ruling reported in *Upendra Lal Mukhopadhya* v. *Collector of Rajshahye* (1). There the suit was for recovery of a deposit made to secure the due discharge of the plaintiff's duties as manager of an estate under the Court of Wards, and it was held that the period of limitation could not be less than 6 years from the date of the accrual of the right to sue (article 120).

In principle, there is no difference between the case where security is deposited to ensure the discharge of the duties of an office and a case like the present where the object of giving security was to ensure the payment of the rent payable under a contract of lease.

I hold that article 120 applies and that the lower Court was wrong in dismissing the suit as barred by limitation. I set aside the decree and direct the Court below to take up the case and dispose of it on the merits according to law.

Decree set aside.

(1) 12 C. 113.

(s. c. 13 C. C. 289.)

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPLICATION No. 100 OF 1910.

August 18, 1910.

Present:—Mr. Lindsay, O. A. J. C.

GADA HUSAIN—ACCUSED—APPLICANT

versus

JANKI—COMPLAINANT—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 203, 439—Revision of order passed under the section—Notice to opposite party not necessary.

Revision of an order passed under section 203, Criminal Procedure Code, can be made without notice to the person complained against.

Haridas Sanyal v. *Saritulla*, 15 C. 608 at p. 624, followed.

Appeal against the order of the District Magistrate, Bara Banki, dated 8th June, 1910, reversing the order of the Deputy Magistrate, Bara Banki, dated 2nd May, 1910.

Mr. *R. F. Bahadurji*, for the Applicant.

Pandit *Jagat Narain*, and Mr. *S. N. Sinha*, for the Opposite Party.

The *Government Pleader*, for the Crown.

Judgment.—This is an application for revision of an order passed by the District Magistrate of Barabanki, under sections 435 and 437, Criminal Procedure Code, setting aside an order of a Magistrate dismissing a complaint under section 203, Criminal Procedure Code. The complaint was lodged by one Janki against a Sub-Inspector of Police, Gada Husain. The Magistrate took the statements of the complainant and of nine witnesses produced by him and then dismissed the complaint on the ground that there were contradictions in the statements of the witnesses. In revision the District Magistrate held that there were no contradictions and that the Magistrate had not carefully considered the evidence. He ordered a fresh trial.

The first point taken here is that the order of the District Magistrate is bad, as no notice was served on the other party, Gada Husain. It is pointed out by the learned counsel who appears for Janki, that no notice was necessary and reference is made to the ruling reported in *Haridas Sanyal* v. *Saritulla*(1). I agree with the view of the law taken in that case and hold that revision of an order passed under section 203, Criminal Procedure Code, can be made without notice to the person complained against.

The other point urged is that the order of the District Magistrate is wrong on the

(1) 15 C. 608 at p. 624.

MOHAN LAL *v.* HUMAYUN JAH.

merits. I am not satisfied that this is so. On the contrary it would appear that the reasons given by the Deputy Magistrate in support of his order dismissing the complaint were not good reasons and that some of the statements made in his order were incorrect. For example he stated erroneously that all the prosecution witnesses put forward by Janki were fellow-castemen of Janki, who is a Kalwar. That is not so.

I consider the order of the District Magistrate was a proper one and I see no reason to interfere with it. This application is rejected.

Application rejected.

(s. c. 13 O. C. 291.)

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 56 OF 1910.

July 29, 1910.

Present:—Mr. Evans, J. C., and Mr. Lindsay, A. J. C.

MOHAN LAL—DECREE-HOLDER—APPLICANT

versus

HUMAYUN JAH—DECREE-HOLDER.—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), ss. 63 and 73—Civil Procedure Code (Act XIV of 1882), ss. 285 and 295—Rateable distribution among decree-holders—Transfer of decrees to the Court where realization takes place—Application for execution to the Court realizing money, necessity of.

The object of section 73, Civil Procedure Code, is two-fold, *firstly*, to prevent unnecessary multiplicity of execution proceedings and to obviate the necessity of each and every decree-holder separately attaching and separately selling the property, and, *secondly*, to secure an equitable administration of the property by putting all the decree-holders upon the same footing and making the property rateably divisible among them.

Section 295 of Act XIV of 1882, (corresponding to section 73 of the present Code), did not require the transfer of a decree to the Court where the process of realization takes place as a condition precedent to an application under section 285, (section 63 of the new Code) and, therefore, *a fortiori* it is not necessary for the decree-holder seeking rateable distribution to apply for execution of his decree to the Court where the realization takes place.

Appeal against the order of the Deputy Commissioner, Lucknow, dated 14th September 1909.

Mr. *Shahid Husain*, for the Applicant.

Mr. *Mohammad Nasim*, for the Opposite Party.

Judgment.—This is an application for revision of an order passed by the Deputy Commissioner of Lucknow, in execution proceedings under the following circumstances. The applicant Mohan Lal had obtained a decree from the Court of the Subordinate Judge of Lucknow against Babu Fateh Chand and others and in execution of the same had applied for and obtained attachment of the immovable property of the judgment-debtors as a preliminary to sale. The sale statement was drawn up and submitted to the Local Government in order that sanction to the sale might be accorded. Meantime the property in question was sold in execution of a decree obtained in a Rent Court by Mirza Humayun Jah and others and the sale proceeds were held by the Court of the Deputy Commissioner of Lucknow.

Mohan Lal presented an application to the Deputy Commissioner under sections 63/73 of the Civil Procedure Code, representing the facts and asking that he might be allowed to share in the assets realized by the sale of his judgment-debtors' immovable property. This application was rejected by the Deputy Commissioner on the ground that Mohan Lal had not, before receipt of the assets, made any application in his Court for execution of the decree.

The case for the applicant here is that this order is wrong and that he was entitled to share in the distribution of the assets held by the Court of the Deputy Commissioner.

We are of opinion that the order of Deputy Commissioner is wrong and should be set aside.

The object of section 73 is, as has been ruled in various cases, twofold. The intention is *firstly* to prevent unnecessary multiplicity of execution proceedings, and to obviate in a case where there are many decree-holders, each competent to execute his decree by attachment and sale of a particular property, the necessity of each and every one separately attaching and separately selling that property. The other object is to secure an equitable administration of the property by placing all the decree-holders upon the same footing and making the property rateably divisible among them instead of allowing one to exclude all the others merely because he happened to be the first who had attached and sold the property.

SHUBRATI *v.* EMPEROR.

If the interpretation put upon section 73, read with section 63, of the Code of Civil Procedure by the Deputy Commissioner be accepted the intention of the section is defeated, for Mohan Lal being the holder of a decree of a Civil Court could not apply for execution to the Court of the Deputy Commissioner. We do not think that Mohan Lal's right to obtain satisfaction of his decree should be defeated or impaired by reason of his failure to do something which the law did not permit him to do. It is true that under a recent ruling of this Court [*Lala Indar Prasad* v. *Babu Fateh Chand* (1)] Mohan Lal might have applied to the Subordinate Judge for transfer of his decree to the Court of the Deputy Commissioner. In that case this Court declined to follow the ruling in *Raghubar Dayal* v. *Banke Lal* (2) and held in accordance with a ruling of their Lordships of the Privy Council, reported in *Nilmoni Singh Deo* v. *Taranath Mukerjee* (3) that there is nothing in the law to prevent the transfer for execution of a decree from a Civil Court to a Rent Court or *vice versa*. It may be said, therefore, that Mohan Lal ought to have applied to the Subordinate Judge for transfer of his decree to the Court of the Deputy Commissioner and having obtained the transfer he ought then to have applied to the Deputy Commissioner for execution. It has, however, been ruled by the Calcutta High Court, in a case under the Civil Procedure Code of 1882, that section 295 of that Code (corresponding to section 73 of the present Code) did not require the transfer of a decree to the Court where the process of realization takes place as a condition precedent to an application under section 285 (section 63 of the new Code). In that case there had been two attachments one in the Court of a Subordinate Judge and the other in the Court of a Munsif and the process of realization took place in the former Court under section 285. The person whose decree was executed in the inferior Court applied for rateable distribution without getting his decree transferred and it was held that he was entitled to get such distribution without such transfer.

(1) 13 O. C. 119; 6 Ind. Cas. 994.
(2) 22 A. 182.
(3) 9 C. 295; 12 C. L. R. 361; 9 I. A. 174.

Here the property was first attached in the Court of the Deputy Commissioner and under section 63 (1) of the Code, it was that Court which was bound to determine all claims to the property after realization. It was not necessary for Mohan Lal to first have his decree transferred for execution to the Court of the Deputy Commissioner: *a fortiori* it was not necessary that he should have applied to the Deputy Commissioner for execution of his decree.

We accept this application, set aside the order of the Deputy Commissioner and direct that the application of Mohan Lal for rateable distribution be re-admitted and disposed of according to law.

The applicant to get his costs in this Court.

Application accepted.

(s. c. 13 O. C. 295.)

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 256 OF 1910.

August 9, 1910.

Present:—Mr. Lindsay, O. A. J. C.

SHUBRATI—PRISONER—APPELLANT

versus

EMPEROR—RESPONDENT.

Jury, powers of—Verdict with respect to an offence of which the accused was not charged, validity of—High Court, interference by, with the verdict of a jury.

Where an accused, who was tried with the aid of a jury, was charged of an offence of rape and the verdict of the jury was to the effect that the charge of rape was not proved, but that the prisoner was guilty of an attempt to commit rape which verdict was accepted by the Sessions Judge: *Held*, that it was competent to the jury to return a verdict of guilty with respect to an offence of which the accused was not formally charged.

Held, further, that a High Court will not interfere with the verdict of a jury unless it is shown to be clearly and manifestly wrong.

Empress v. *Hardi Mirdha* and *Umed Sardar*, 3 C. 189; *Government of Bengal* v. *Mahaddi*, 5 C. 871; *Queen-Empress* v. *Devji Govindji*, 20 B. 215, referred to.

Appeal against the order of the Sessions Judge, Lucknow, dated 22nd June, 1910.

Mr. *Muhammad Arabi*, for the Appellant.

The *Government Pleader*, for the Crown.

Judgment.—The appellant, Shubrati, was tried in the Court of the Sessions Judge of Lucknow on a charge of rape (section 376, Indian Penal Code.) The trial was held with the aid of a jury; and the verdict of the jury was to the effect that the charge of rape was not proved,

CHAUHARJA BAKHSH v. KAINZ FATIMA.

but that the prisoner was guilty of an attempt to rape. The learned Sessions Judge accepted the verdict and sentenced the appellant to three months' rigorous imprisonment with twenty stripes.

The point of law involved in this appeal is whether it was competent to the jury to return a verdict of guilty with respect to an offence, of which the accused was not formally charged. The appellant's learned counsel contends that the only matter left for the jury was whether or not accused was guilty of rape. He argues that it was not open to them to return a verdict of an attempt to rape. This contention cannot prevail. In my opinion section 238 of the Code of Criminal Procedure is an authority for the proposition that a man charged with rape may be convicted of an attempt, although no charge of attempt is framed against him. In this connection the learned Government Pleader, who appears for the Crown, has called attention to the cases of *Empress* v. *Hardi Miridha* and *Umed Sardar* (1); and the *Government of Bengal* v. *Mahaddi* (2). I would also refer to another case, which was not cited at the Bar, namely, *Queen-Empress* v. *Devji Govindji* (3). Here the point in dispute is clearly dealt with; and it was held that, where the charge was one of murder, it was open to the jury on the facts as found, to come to a verdict that the accused was guilty of the minor offence of culpable homicide. It was also ruled in the same case that a High Court will not interfere with the verdict of a jury, unless, it is shown to be clearly and manifestly wrong. In the present case, after an examination of the evidence, I am satisfied that there were before the jury sufficient materials for them to come to the conclusion that the accused was guilty of an attempt to rape.

The appeal is dismissed.

Appeal dismissed.

(1) 3 C. 189.
(2) 5 C. 871.
(3) 20 B. 215.

(s. c. 13 O. C. 297.)

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 108 OF 1910.

August 30, 1910.

Present:—Mr. Lindsay, A. J. C.

CHAUHARJA BAKHSH—DEFENDANT—APPELLANT

versus

Musammat KANIZ FATIMA BIBI AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, art. 12—Sale in execution—Void sale—Suit for setting aside an execution sale—Representative of judgment-debtor bound by execution proceedings only to the extent of assets received.

Where a sale in execution is null and void for want of jurisdiction in the Court ordering it or for other causes or where it does not affect a stranger's interest, article 12, Schedule I of the Limitation Act, does not apply to a suit to have such sale set aside or to a suit which has indirectly the effect of setting it aside.

Where in an execution proceeding on the death of the judgment-debtor, the name of K was substituted as his legal representative: *Held*, that K was bound by the proceedings held in execution only to the extent of the assets received by her as heir of the deceased and not with respect to property acquired by K by purchase.

Moti Lal v. *Karrab-ul-din*, 25 C. 179; 1 C.W.N. 639, followed.

J. Ps. Select Case No. 215, *Vishnu Keshav* v. *Ram Chandro Bhaskar*, 11 B. 130; *Kadar Hussain* v. *Hussain Shah*, 20 M. 118, referred to.

Appeal against the decree of the Additional Judge, Fyzabad, dated 5th January, 1910, reversing the decree of the Additional Munsif, Fyzabad, dated 24th April, 1909.

Mr. *Jiban Krishna Banerji*, for the Appellant.

Mr. *Wazir Hasan*, for the Respondent No. 1.

Judgment.—The sole question for determination in this appeal is whether the suit, which was brought by the respondent No. 1, *Musammat* Kaniz Fatima Bibi, against the appellant, Chauharja Bakhsh, and the respondent No. 2, Sadik Ali, was or was not barred by limitation, as laid down in article 12 of the first Schedule to the Indian Limitation Act.

The facts of the case are as follows:—*Musammat* Kaniz Fatima Bibi is the widow of one Mazhar Ali Khan, who formerly was a co-sharer in a 12 *annas Pukhtadari* share, situated in *Mauza* Alipur Khajuri, *Pargana* Pachchumrath, *Tahsil* Bikapur, in the Fyzabad District. In the year 1901, in execution of a decree obtained by the Oudh Com-

mercial Bank, Limited, Fyzabad, the share of Mazhar Ali Khan was sold and purchased by one Muhammad Aiyub Khan. Some time after this, Mohammad Aiyub Khan conveyed to *Musammat* Kaniz Fatima the share of her husband which he had bought in execution of the decree.

It further appears that at the time of the settlement before last of the Fyzabad District one Ishri Goshain in a suit brought against Mazhar Ali Khan, obtained a decree against him for *birt* rights in respect of 39 *bighas* 11 *biswas*, situated in Mazhar Ali Khan's share in this village. On appeal it was held that Ishri Goshain was entitled to *birt* rights in respect of half of this area only, and the remainder was declared to be Mazhar Ali Khan's *khalsa* land. In spite of the order passed on appeal the settlement papers continued to show Ishri Goshain as having *birt* rights in 39 *bighas* and 11 *biswas*. At the recent settlement the mistake was discovered by the Settlement Officer who ordered the papers to be corrected accordingly, but even then it appears the correction was not made in accordance with the orders; and Mazhar Ali Khan, together with two other persons, was recorded as the *birt* holder of 19 *bighas* odd. The appellant Chauharja Bakhsh obtained a money decree against Mazhar Ali Khan, and, in execution of that decree, he had brought to sale what were described as the *birt* rights of Mazhar Ali Khan in 7 *bighas* 19 *biswas* 5 *biswansis*. By the time execution of the decree took place, Mazhar Ali Khan had died and his widow *Musammat* Kaniz Fatima was substituted as his legal representative. Sale took place in 1907 and was confirmed on the 26th of March of that year. The auction-purchaser was the respondent, Sadik Ali Khan.

Musammat Kaniz Fatima brought this suit to obtain a declaration to the effect that she is the owner of the 7 *bighas* 19 *biswas* 5 *biswanis*, the *birt* rights in which were offered for sale in execution of the decree. Her case is that her deceased husband, Mazhar Ali Khan, was never possessed of any *birt* rights in these lands and that the whole of Mazhar Ali Khan's right, title and interest in this property having been sold in execution of decree in 1901 there was no property of Mazhar Ali Khan left which could be sold in execution of the decree obtained by the defendant Chauharja Bakhsh.

The principal defence set up was that the suit was barred by limitation under article 12 of the first Schedule to the Indian Limitation Act. The first Court dismissed the claim on this ground; but the lower appellate Court has allowed the claim being of opinion that article 12 does not apply to the case.

In appeal it is contended that the suit is in substance one to set aside the sale in execution of a decree; and that, as there was in fact a sale, the plaintiff cannot succeed in getting a declaration without getting an order setting the sale aside.

The argument on the other side is that the sale was a nullity, as the property which was advertized to be sold had, in fact, no existence. There have been many rulings laying down the cases in which this article does or does not apply. One of them on which the appellant relies is a judgment of this Court (Select Case No. 215, Jwala Prasad's S. C.). In that case the two learned Judges differed as to the point now under consideration. However, the general effect of the numerous rulings, relating to the application of this article, appears to be that where a sale in execution is null and void for want of jurisdiction in the Court ordering it, or for other causes, or where it does not affect a stranger's interest and bind him, or where there is no occasion or necessity to set the sale aside, article 12 does not apply to a suit to set the sale aside, or to a suit which has indirectly the effect of setting it aside. In this connection I may refer to the decision of their Lordships of the Privy Council in the case of *Moti Lal* v. *Karrab-ul-din* (1). In that case there had been two successive sales of the same property, so that the purchaser, under the second sale, took nothing, as the entire interest of the judgment-debtor had been disposed of by the previous sale. At page 186 of the report their Lordships say: "Then the learned Judge holds that the suit is barred by article 12 of the Limitation Act, because it is, or ought to be, one to set aside the sale of the 22nd of October, 1884. But the suit is founded on the fact that prior to that sale a valid sale of the same interests had been made to Masih, and that Moti took nothing because nothing was left to pass to him. The sale is not set aside, but is

(1) 25 C. 179; 1 C. W. N. 639.

found not to affect the rights of the plaintiff derived from Masih.....Between setting aside a sale and holding that the plaintiff's rights are not affected by it, there is a wide difference."

The facts of this case are similar to this extent, namely, that, as the entire interest of Mazhar Ali Khan in the land in suit was sold in execution of decree in 1901, there was nothing left to be sold in execution of the decree obtained by Chauharja Bakhsh; and so in the present case there is no more necessity for setting aside the sale than there was in the case which was before their Lordships of the Privy Council. Great stress has been laid by the appellant's learned counsel on the point that in the execution proceedings *Musammat* Kaniz Fatima Bibi was representing her deceased husband Mazhar Ali Khan. It is argued that she is bound by the decree, and that being so bound, she cannot get the declaration asked for without having the sale set aside. It has been held that article 12 applies to cases in which the plaintiff would be bound by the sale if he did not succeed in getting it set aside [*Vishnu Keshav* v. *Ramchandra Bhaskar* (2) and *Kadar Hussain* v. *Hussain Saheb* (3)]. It seems to me, however, that in the present case it cannot be said that *Musammat* Kaniz Fatima was the legal representative of her deceased husband so far as the property in suit is concerned. This property has not come to *Musammat* Kaniz Fatima as an heir of her deceased husband; on the other hand, it is found that she acquired that property by purchase in 1901 from the person who bought it at the auction sale held in execution of the decree obtained by the Oudh Commercial Bank against her husband Mazhar Ali Khan. While the widow may be bound to the extent of the assets she has received as heir of her deceased husband, it cannot, I think, be maintained that she is bound with respect to the property which she has acquired by purchase. I do not consider, therefore, that there is any force in the argument that *Musammat* Kaniz Fatima, being bound by the decree, was bound to get the sale set aside by a suit to which article 12, Schedule I, of the Limitation Act applies. I note that the second ground of appeal has not been pressed. I think the order of the lower appellate Court is correct and should be affirmed; and I dismiss this appeal with costs.

Appeal dismissed.

(2) 11 B. 130.
(3) 20 M. 118.

(s. c. 13 O. C. 302.)

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 68 OF 1910.

August 1, 1910.

Present:—Mr. Lindsay, A. J. C.

Shah INAYAT-UL-RAHMAN—PLAINTIFF

versus

AZIZ-UL-RAHMAN AND OTHERS—DEFENDANTS.

Civil Procedure Code (Act V of 1908), O. XLIV, R. 1—Pauper appeal—Application for leave to appeal as a pauper, matters to be considered in determination of.

Under Order XLIV, Rule 1, Civil Procedure Code, all that a Judge is bound to consider is what is contained in the application, copy of the judgment and the copy of the decree. He is not at liberty to refer to any other matter in determining whether the application for leave to appeal as a pauper may or may not be granted.

Sakubai v. *Ganpat Ramkrishna*, 28 B. 451; 6 Bom. L. R. 442, referred to.

Appeal against the order of the District Judge, Lucknow, dated 9th April 1910.

Mr. *Mahommad Munim Bakht*, for the Applicant.

Judgment.—This is an application for revision of an order passed by the learned District Judge of Lucknow under Order XLIV, Rule 1 of the Code of Civil Procedure. The application before the learned Judge was for permission to appeal as a pauper and the learned District Judge, after considering the application, the copy of the judgment and the copy of the decree, came to the conclusion that there were no reasons for holding that the decree appealed against was in any way contrary to law and usage. The only point raised here by the applicant is that the learned Judge refused to allow his attention to be drawn to the evidence recorded at the trial. It is contended that an opportunity ought to have been given to the applicant to have the evidence discussed before the Judge at the time of the disposal of his application for leave to appeal. This contention cannot, however, be maintained. The language of the law is perfectly clear; all that the

Judge is bound to consider is what is contained in the application, copy of the judgment and the copy of the decree. He is not at liberty to refer to any other matter in determining whether or not the application for leave to appeal as a pauper may or may not be granted. If any authority is needed in support of this proposition it will be found in the case of *Sakubai* v. *Ganpat Ramkrishna* (1).

The application fails and is dismissed.

Application dismissed.

(1) 28 B. 451; 6 Bom. L. R. 442.

(s. c. 13 O. C. 303.)

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 32 OF 1910.

August 18, 1910.

Present:—Mr. Evans, J. C., and Mr. Lindsay, A. J. C.

MOHAMMAD ABDUL KARIM KHAN—DECREE-HOLDER—APPELLANT

versus

NAWAZ SINGH AND OTHERS—JUDGMENT-DEBTORS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 48, Sch. III, para. 11 (3)—Limitation Act (IX of 1908), Sch. I, art. 182—Saving of limitation during period of execution by Collector—Civil Procedure Code (Act XIV of 1882), s. 248, notice issued under—Notice based upon a preceding application which was defective or irregular.

The protection extended to a decree-holder by the provisions of paragraph 11 (3) of the third Schedule of Act V of 1908 applies, both, to the limitation of 12 years referred to in section 48 of Act V of 1908 and to the limitation of 3 years provided by article 182 of the first Schedule to the Indian Limitation Act (IX of 1908.)

The issue of a notice under section 248 of Act XIV of 1882 gives a new start for limitation even though the preceding application upon which the notice was issued was defective or irregular.

Muhammad Abdul Karim Khan v. *Niwaz Singh*, 12 O. C. 267; 3 Ind. Cas. 868, and *Keshav Lal Bechar* v. *Pitamber Das Tribhuwan Das*, 19 B. 261, referred to.

Behari Lal v. *Salik Ram*, 1 A. 675; and *Dhonkal Singh* v. *Phakkar Singh*, 15 A. 89, followed.

Bhagwan Jethi Ram v. *Dhondi*, 22 B. 83, not followed.

Appeal against the order of the District Judge Hardoi, dated 4th March, 1910, confirming the order of A. G. P. Pullen, Esquire, Assistant Collector, Hardoi, dated 1st December, 1909.

Pandit *Gokaran Nath Misra* and Mirza *Sanaul-lah Beg*, for the Appellant.

Babu *Puttoo Lal*, for the Respondent No. 1.

Judgment.

Evans, A. J. C.—This is an appeal against an order of the District Judge of Hardoi upholding a decision of an Assistant Collector dismissing the application of the appellant for execution of a decree against the respondents.

The facts so far as they are material to this appeal are as below :—

The date of the decree is 12th September, 1894. Three applications for execution were made in 1894, 1895 and 1896; and on the 5th April, 1897, the property was taken under the management of the Collector according to the provisions of section 323 and the following sections of Act XIV of 1882. It was released on the 1st June, 1906. On the 21st June there was a fresh application for execution. This was dismissed for default but re-heared upon an application dated the 11th October, 1907, and a notice under section 248 of Act XIV of 1882 was issued on the 1st April 1908. The application then made was to sell certain property belonging to the respondents and this finally failed for reasons which are to be found in the case of *Muhammad Abdul Karim Khan* v. *Niwaz Singh* (1). It was held that the property was not transferable. This decision is dated 26th April, 1909. Accordingly the appellant put in the present application on the 19th October, 1909, asking for execution by arrest of the respondents and also by attachment of their movable property. The learned Judge has held that the application is barred by limitation because it was made more than 12 years after the date of the original decree.

I do not think that the decision of the learned Judge is correct. The case has to be decided according to the provisions of Act V of 1908. Under section 48 of the Act no order for execution of a decree can be made upon an application presented after expiration of 12 years from the date of the decree. An exception to this rule is allowed under sub-section (2) of that section where the judgment-debtor has by fraud or force prevented the execution of the decree at sometime within 12 years before the date of

(1) 12 O. C. 267; 3 Ind. Cas. 868.

the application. But there is also a provision to be found in the third Schedule to the Act, paragraph 11, which corresponds to section 325A of the Code of 1882. This provides that so long as the Collector has management of the property of a judgment-debtor, the judgment-debtor cannot alienate the property and no Civil Court shall issue any process of execution against either the judgment-debtor or his property in respect of any decree for the satisfaction of which provision has been made by the Collector under paragraph 7 of the same Schedule. The third clause of this paragraph provides that the period noted above shall be excluded in calculating the period of limitation applicable to the execution of any decree affected by the provisions of this paragraph in respect of any remedy of which the decree-holder has been temporarily deprived. Therefore, it appears to us quite clear that during this period the appellant was temporarily prevented from issuing any process for execution against the judgment-debtor and the question arises whether the limitation of 12 years referred to in section 48 of the Code of Civil Procedure of 1908 is such a period of limitation as is referred to in paragraph 11 (3) of the third Schedule to the same Act. There are two kinds of limitation with respect to execution of decrees. Section 48 of Act V of 1908 corresponds to section 230 of Act XIV of 1882 and the apparent object of this section is to put an end to all execution proceedings on the expiration of 12 years from the date of the decree except in certain specified cases. The second kind of limitation is of the nature referred to in article 182 of the first Schedule to the Indian Limitation Act (IX of 1908). The apparent object of this article is to ensure due diligence by the decree-holder in applying for execution. The object of these two periods of limitation is to prevent the execution of decrees from going on indefinitely and at the same time to secure to the decree-holders the benefits of their decrees if they are ordinarily diligent. There is no distinction in principle to be drawn between the two periods laid down and, therefore, if under any special provision of law a decree-holder is prevented within these periods of limitation from taking out execution it is reasonable to hold that the decree-holder should be protected by the provisions of paragraph 11 (3) of the third Schedule of Act V of 1908 in either case. The ruling in *Keshavlal Bechar* v. *Pitamber Das Tribhuvan Das* (2), which was cited in the first Court as an authority for dismissing the application for execution is not, in our opinion, any authority at all. In that case the decree was passed in 1874 and the property was under the management of the Collector from October 1874 up to February 1892 and an application for execution was presented on 12th June, 1892. The application was contested *inter alia* on the ground that it was barred by limitation under section 230 of the Code of Civil Procedure of 1882. This contention was overruled by the District Judge and in appeal before the Bombay High Court it is recorded that "the objection of the Bar under section 230 (of Act XIV of 1882) was not seriously pressed in the argument of the appellant's pleader." I do not find any express authority in support of the contention taken on behalf of the respondents and, for the reasons stated above, I would hold that the present application is not barred by the limitation of 12 years provided by section 48 of Act V of 1908.

Another contention taken on behalf of the respondents is that the application is barred by limitation of three years under article 182 of the first Schedule to Act IX of 1908. It is conceded that notice under section 248 of Act XIV of 1882 was issued on the 1st April, 1908, and this application was made within three years from that date. It is, however, contended that the application upon which the notice was issued was defective and was not an application according to law and, therefore, the notice issued thereon was no notice at all. Upon this point the rulings of the Allahabad High Court in *Behari Lal* v. *Salik Ram* (3) and *Dhonkal Singh* v. *Phakkar Singh* (4) are against the respondents. The learned Judges of that Court are of opinion that the issue of a notice under section 248 of Act XIV of 1882 gives a new start although the preceding application upon which the notice was issued was defective or irregular. The Bombay High Court has expressed a contrary opinion

(2) 19 B. 261.
(3) 1 A. 675.
(4) 15 A. 84.

[*Bhagwan Jethiram* v. *Dhondi* (5)]. I prefer to follow the ruling of the Allahabad High Court as it appears to be strictly in accordance with the provisions of clause (5) of article 179 of the second Schedule to the Limitation Act of 1877 which corresponds to article 182 of the Act of 1908.

For the above reasons I hold that the application for execution is not barred by limitation. I would accept the appeal, set aside the order of the Court below and remand the case through the lower appellate Court to the Court of first instance for disposal according to law. The appellant is entitled to his costs in this Court and in the lower appellate Court.

Lindsay, A. J. C.—I agree. The period of limitation applicable to the execution of decrees to which reference is made in paragraph 11 (3) of the third Schedule to the Code of Civil Procedure is determined by the provisions of section 48 of the Code read with article 182 of the first Schedule to the Limitation Act (IX of 1908). In estimating the period prescribed by section 43 the time during which Collector holds the immovable property of the judgment-debtor in management must be excluded; and in the present case it is clear that if this time be excluded, section 48 offers no bar to the making of an order for the execution of the decree on the application of the decree-holder. Further it is manifest, for the reasons given by my learned colleague that the last application for execution made by the decree-holder in this case was within the limitation provided by article 182 of the first Schedule to the Limitation Act (IX of 1908). I concur in the order proposed.

Appeal accepted.

(5) 22 B. 83.

(s. c. 13 O. C. 309.)

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 72 OF 1910.

June 21, 1910.

Present:—Mr. Piggot, J. C.

AMAN ALI—ACCUSED—APPLICANT

versus

EMPEROR—COMPLAINANT.

Criminal Procedure Code (Act V of 1898), s. 421—Summary dismissal of appeal—Discretion, exercise of—Circumstantial evidence, conviction based on—Revision by High Court—Evidence Act (I of 1872), s. 27—Statements made by accomplice elsewhere than before the Court, admissibility of.

Although it is not required by law that a Sessions Judge should write a regular judgment when exercising the powers of summary dismissal given to him by section 421, Criminal Procedure Code, still the matter being one for discretion on the part of the subordinate appellate Courts, it is very important that such discretion should be exercised upon sound and reasonable lines.

Where a conviction is based upon circumstantial evidence, the question always remains whether the evidence which has been believed by the Court, which heard it, is of such a nature that it ought to have been accepted as establishing the guilt of the accused person beyond reasonable possibility of doubt and this is a question which may be dealt with by a High Court upon an application for revision.

Section 27 of the Indian Evidence Act is a proviso to the preceding sections which deal with what may or may not be proved as against the person making a confession. It has nothing whatever to do with what may or may not be proved as against other persons when the person who made the alleged confession is not himself on his trial but is appearing as a witness in the case.

Hearsay evidence of any statement whatsoever made at any time and under any circumstances by an accomplice cannot be produced as against the accused before the Court. Statements made by an accomplice elsewhere than before the Court and not in the presence of the accused can be proved only to corroborate, to contradict or to impeach the credit of the accomplice. In no case can they be put forward as substantive evidence of the truth of the facts therein stated.

Appeal against the order of the Sessions Judge of Fyzabad, dated 8th February, 1910, upholding the order of the Deputy Magistrate.

Mr. *Bahadurji*, for the Applicant.

The *Government Pleader*, for the Crown.

Judgment.—On the morning of December 3rd, 1909, the District Judge of Rae Bareli was proposing to inspect the office of the Additional Munsif at Sultanpur and the fact appears to have been known beforehand to the staff of the said office. Before the District Judge came on the scene Dhanwant Rae, *Nazir* of that Court, discovered that two Registers No. 6 and No. 10 were missing. An inquiry was set on foot. There were three process-servers attached to the Court of the Additional Munsif with whom Dhanwant Rae was on bad terms, their names being Sheonarain Lal, Aman Ali and Bhawani Bhik. It is in evidence that he had made complaints against them and that they had all three applied for a transfer. One of these three men, namely Sheonarain Lal, had been expressly deputed by the *Nazir* on the night of

AMAN ALI *v.* EMPEROR.

December 2nd to be on duty outside the office. It appears that in this Munsifi the sort of watch and ward is performed by the process-servers in turn, each taking a period of seven or eight days. In the present case I gather from the evidence that Sheonarain Lal was expressly put upon this work out of his regular turn on December 2nd. The *Nazir* gives no reason for having chosen Sheonarain Lal but admits that Sheonarain Lal protested and asked to be given processes to serve instead and that he disregarded these objections. The registers were kept in a room the door of which was locked and this lock was found intact in the morning, although there is no doubt that the registers were inside the room when the *Nazir* locked the door at 5 P. M. on December 2nd and took the key away with him. Sheonarain Lal having been the person on guard on the night of the theft, the *Nazir* in reporting the matter to the Police suggested that suspicion must naturally rest upon him in the first instance. His house was searched and nothing of a suspicious nature discovered. The investigating Police officer then pursued his inquiry, no doubt in the direction suggested by the *Nazir*, by considering what other persons there were among the process-servers who might be presumed to be at enmity with the *Nazir* and on terms of intimacy with Sheonarain Lal. Pursuing this line of inquiry he searched the house of Bhawani Bhik and discovered certain papers in connection with which a charge of criminal breach of trust was promptly instituted against this man. While in custody on this charge it appears that Bhawani Bhik made certain statements to the investigating Police officer with reference to the disappearance of the registers. He was produced before a Magistrate on December 7th, 1909, and his statement was then recorded in the form prescribed under the provisions of section 164 of the Code of Criminal Procedure for the examination of accused persons. He made a statement not including any kind of admission of guilt on his own part in the matter of the registers, but implicating Sheonarain Lal and Aman Ali. On that same date, it is said that certain pieces of partially burnt paper, which looked as if they might have formed part of one or other of the missing registers, were found in a drain. Certain other evidence was also forthcoming and Sheonarain Lal and Aman Ali were put upon their trial on a charge under section 381 of the Indian Penal Code. Bhawani Bhik was not put upon his trial at all, but was examined as a witness in the case. On the 11th January, 1910, the Magistrate who tried the case convicted Sheonaran Lal and Aman Ali of the offence charged and sentenced them both to imprisonment and fine. Petitions of appeal were presented by both accused to the Sessions Judge of Fyzabad, through the Superintendent of Jail, and both of them were dismissed under orders dated February 8th, 1910, reading as follows:—"Dismissed summarily. Section 421, Criminal Procedure Code," over the signature of the Sessions Judge. It is evident that a petition of appeal through a pleader must have been presented very shortly afterwards, for I find on the record a further order by the Sessions Judge rejecting the same on the ground that the appeals received from the Jail had already been dismissed, and this order is dated February 15th, 1910. Sheonarain Lal has submitted to his fate, but Aman Ali has brought the matter before this Court by a petition in revision. After hearing arguments in support of this application and examining the record, I issued notice to the District Magistrate and called up, on my own motion, the case as against Sheonarain Lal also, with a view to examining the propriety and legality of these convictions. I have to-day heard counsel in support of Aman Ali's application and the Government Pleader for the Crown, and have considered and examined the evidence on the record. With regard to the orders passed by the learned Sessions Judge on the petitions of appeal from the Jail, I must make a few preliminary remarks. I have already held in a recent case that it is not required by law that a Sessions Judge should write a regular judgment when exercising the powers of summary dismissal given to him by section 421 of the Code of Criminal Procedure. It is obvious, however, that while the matter is one for discretion on the part of the subordinate appellate Courts, it is very important that such discretion should be exercised upon sound and reasonable lines. In the present case upon a perusal of the Magistrate's judgment and of the petitions of appeal presented to the

Sessions Judge, I am of opinion that these appeals raised on the face of them somewhat difficult questions of law and of fact which required to be carefully dealt with by the Sessions Judge. As matters stand all that I know regarding the attitude of the learned Sessions Judge towards this case is that in his opinion, after a perusal of the Magistrate's judgment and of the petitions of appeal, there was no necessity whatever for any further examination of the evidence on the record or detailed consideration of the questions raised. I can only say that I am quite unable to agree with him in this view. The learned Government Pleader has contended before me that if this is my opinion I should, in accordance with the practice ordinarily followed in this Court, remand the case to the lower appellate Court and ask for a judgment from that Court after a regular hearing. This is the course, which I should myself prefer to follow in the majority of cases, but I am bound to hold that this Court has a discretion in such a case as the present to go into the entire evidence on its own account, and if necessary even to consider questions of fact as if in first appeal. The questions raised by this appeal are mixed questions of law and of fact which it is not very easy to disentangle. There is a great deal of evidence on the record which ought never, in my opinion, to have been admitted; and in the case of all convictions based as this one is upon circumstantial evidence, the question always remains whether the evidence which has been believed by the Court which heard it is of such a nature that it ought to have been accepted as establishing the guilt of the accused persons beyond reasonable possibility of doubt, and this is a question which may be dealt with by this Court upon any application for revision. I have thought it advisable, therefore, in the present case to pass a final order myself. The most important point in the case is the evidence of the process-server Bhawani Bhik and the other evidence which has been admitted upon the record regarding statements made by this man at various times. The position taken up by the Magistrate in this connection is certainly an impossible one. He has allowed evidence to be freely put up on the record regarding statements made by Bhawani Bhik to the Police officer who investigated the case and to a witness Munshi Sangam Lal while the said Bhawani Bhik was in Police custody, on the ground that these statements resulted in the discovery of certain relevant facts, and that consequently section 27 of the Indian Evidence Act permits them to be proved. Now section 27 of the Indian Evidence Act has nothing whatever to do with the circumstances of the present case. It is a proviso to the preceding sections which deal with what may or may not be proved as against the person making certain confession. It has nothing whatever to do with what may or may not be proved as against other persons when the person who made the alleged confession is not himself on his trial but is appearing as a witness in the case. Nor does section 133 of the Indian Evidence Act, which is also referred to by the Magistrate, justify the position taken up by him. According to the provisions of that section the evidence given in Court by Bhawani Bhik was admissible as against Sheonarain Lal and Aman Ali, even though the Court might be of opinion that Bhawani Bhik had himself been their accomplice in the commission of the offence with which they were charged. It does not follow that if Bhawani Bhik was an accomplice, therefore, hearsay evidence of any statement whatsoever made at any time and under any circumstances by Bhawani Bhik may be produced as against the accused before the Court. According to the ordinary rules of evidence statements made by Bhawani Bhik elsewhere than before the Court, and not in the presence of either of the accused, could be proved only to corroborate Bhawani Bhik, to contradict him or to impeach his credit. In no case could they be put forward as substantive evidence of the truth of the fact therein stated; that is to say, they could be used by the Court only in order to help it to make up its mind whether it did or did not believe the evidence given by Bhawani Bhik in the presence of the accused. The only section under which the sort of evidence to which I am referring, and of which there is a great deal on the record, could possibly have been put forward would have been section 10 of the Indian Evidence Act. The precise applicability of that section to a case like the persent is one which I need not discuss

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here, because in this particular case, apart from the objectionable evidence itself, there is no evidence on the record on the strength of which any Court could hold that there was reasonable ground for believing that Bhawani Bhik had conspired with Sheonarain Lal and Aman Ali to perpetrate the theft of these registers. For these reasons I exclude altogether from the evidence in this case the statement made by Munshi Sangam Lal and a great deal of what the Sub-Inspector has deposed as to what he says was told him by Bhawani Bhik at one time or another in the course of his inquiry. I am of opinion that the accused have been seriously prejudiced by the introduction into this case of all this inadmissible evidence, and I am by no means satisfied that a Court of appeal after properly considering this matter would be justified in maintaining the conviction even if it thought that there was other evidence on the record upon which the accused might perhaps have been convicted. I am of opinion, however, that the evidence on the record is both slender and unreliable.

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I am, however, of opinion that the case is a suspicious one altogether, and as I have thought it my duty in the absence of any assistance from the Sessions Judge to examine and take into my consideration the evidence as a whole, I am bound to give effect to my conviction that the charge was not satisfactorily proved against either of the accused persons. I set aside the orders of both the Courts below in this case, acquit both Sheonarain Lal and Aman Ali of the offence charged against them and direct that they be released. The fines if paid will be refunded.

Order set aside.

(s. c. 25 P. R. 1910 Cr.)

PUNJAB CHIEF COURT.

CRIMINAL REVISION No. 79 OF 1910.

July 16, 1910.

Present:—Sir Arthur Reid, KT., Chief Judge.

EMPEROR—COMPLAINANT

versus

ABDUL GHANI—ACCUSED.

Criminal Procedure Code (Act V of 1898), s. 250—Process-server's report—Institution of criminal proceedings by District Judge—Acquittal of accused—Process—server's liability to pay compensation—Complainant.

A process-server, on whose report, that the accused had obstructed him while executing a warrant in execution of a decree for custody of a wife and had removed the woman from his custody, the District Judge instituted criminal proceedings against the accused, is not a person upon whose complaint or information the accusation was made, and is not liable to pay compensation under section 250, Criminal Procedure Code.

Bharut Chander Nath v. *Jabed Ali Biswas*, 20 C. 481; *In the matter of the petition of Ram Padarath*, 26 A. 183; A. W. N. (1903) 216, followed.

Case reported by H. A. Rose, Esquire, Sessions Judge, Ambala Division, with his No. 92-P. of 10th January 1910.

Facts.—Abdul Ghani, process-server, made a report to the effect that on 15th April 1905 he received a warrant for the arrest of *Musammat* Bhani, daughter of Kanhya, resident of *mauza* Khatauli, against whom a decree for custody had been obtained by one Fateh Singh; that he accompanied by the decree-holder reached *mauza* Khatauli; that *Musammat* Bhani was found sitting in front of her house; that she at first resisted the arrest but afterwards accompanied him with the decree-holder; that when they had gone a distance of some 300 paces *Musammat* Ganeshi and Nando arrived, caught hold of *Musammat* Bhani's arm and cried out that *Musammat* Bhani was being taken away by the process-server; that thereupon seven accused arrived out of which the complainant identified Kapur Singh and Mutsaddi; that Kapur Singh wanted to see the warrant and on the same being shown to him, he snatched away the warrant and tore it into pieces and then took away *Musammat* Bhani by force; that none of the villagers would give evidence for him and consequently he got his report attested by two passers-by but he does not recognise them either.

One of the witnesses to the report who was traced denied any knowledge of the occurrence or signing the report. The other attesting witness could not be traced. Punnu, a third witness to the report, also pleaded ignorance about the occurrence and denied affixing his thumb impression to it.

The accused were acquitted by M. Sahib Dad Khan, exercising the powers of a Magistrate of the 1st class in the Ambala District, but the complainant Abdul Ghani was directed, by order, dated 5th July 1909, under section 250 of the Criminal Procedure Code, to pay Rs. 5 to each of the 9 accused as compensation, *i. e.*, Rs. 45 in all.

Grounds.—The proceedings are for-

warded for revision of the order awarding compensation to the accused on the authority of *In the matter of the petition of Ram Padarath* (1) and *Bharut Chander Nath* v *Jabed Ali Biswas* (2). A peon who makes a report of resistance to attachment is not a complainant and cannot be made to pay compensation to an accused.

On the merits I express no opinion as the whole of this series of charges and countercharges is before me in other proceedings.

The compensation has not been realized.

Order.—*Bharut Chander Nath* v. *Jabed Ali Biswas* (2) and *In the matter of the petition of Ram Padarath* (1) are directly in point and are authority for holding that the process-server, on whose report, that the accused had obstructed him while executing a warrant in execution of a decree for custody of a wife and had removed the woman from his custody, the District Judge instituted criminal proceedings against the accused is not a person upon whose complaint or information the accusation was made and is not liable to pay compensation under section 250 of the Code of Criminal Procedure. The correctness of the rulings is possibly open to doubt, but they were delivered by Judges of great experience and legal attainments and I am not prepared to differ from them.

I set aside the order for compensation. The learned Sessions Judge has recorded in his referring order that compensation has not been realized. An order for refund is consequently unnecessary.

Revision accepted.

(1) 26 A. 183; A. W. N. (1903) 216.
(2) 20 C. 481.

(s. c. 8 M. L. T. 283.)

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1487 OF 1907.

March 4, 1910.

Present:—Mr. Justice Munro and Mr. Justice Abdur Rahim.

CHINNAPAKKIRINAGASWARAGARAN —DEFENDANT—APPELLANT

versus

GOVINDASAMI PILLAI AND OTHERS—PLAINTIFFS AND DEFENDANTS—RESPONDENTS.

Possession—House purchased with purchaser's money —Benami.

Where a house was purchased with the purchaser's own money, he is entitled to possession of the same.

K. Veerareddi v. *K. Bapireddi*, 29 M. 336; 1 M. L. T. 153; 16 M. L. J. 395 (F. B.), followed.

Second appeal against the decree of the District Court of Tanjore, in Appeal Suit No. 31 of 1907, presented against the decree of the Court of the District Munsif of Mannargudi, in Original Suit No. 52 of 1906.

Judgment.—The finding is that the plaintiff bought the house with his own money and the principle, in *Kurri Veerareddi* v. *Kurri Bapireddi* (1), furnishes authority for holding that the plaintiff is entitled to recover possession from the 1st defendant.

The second appeal is dismissed with costs.

Appeal dismissed.

(1) 29 M. 336; 1 M. L. T. 153; 16 M. L. J. 395, (F. B.).

(s. c. 28 P. R. 1910, Cr.)

PUNJAB CHIEF COURT.

CRIMINAL REVISION No. 323 OF 1910.

July 1, 1910.

Present:—Sir Arthur Reid, Kt., Chief Judge, and Mr. Justice Johnstone.

EMPEROR

versus

DEWA SINGH AND OTHERS—ACCUSED.

Criminal Procedure Code (Act V of 1898), ss. 110, 121—Forfeiture of security bond—Commission of offence in Native State—Proof, nature of—"Offence punishable with imprisonment wherever committed"—"To be of good behaviour to His Majesty and to all His subjects.

Forfeiture of security, furnished by a person under section 110, Criminal Procedure Code, cannot be lawfully ordered unless and until there is on the record legal evidence of the commission of an offence punishable with imprisonment in respect of His Majesty or a subject of His Majesty.

The conviction of an accused in a Native State is not sufficient in British India to establish the commission of the offence.

The phrase "offence punishable with imprisonment, wherever it may be committed" covers the dishonest receipt of stolen property in a Native State by a British subject.

The commission of an offence in a Native State against a British subject is a violation of the security bond furnished under section 110, Criminal Procedure Code.

Case reported by W. A. LeRossignol, Esquire, Sessions Judge, Amritsar Division, with his No. 306 of 2nd March 1910.

Facts.—The accused was placed on security under section 110, Criminal Procedure Code, and his security was forfeited on the ground that he committed an offence in Kapurthala State.

EMPEROR *v.* DEWA SINGH.

The accused on conviction by Mr. E. J. Stephens, exercising the powers of a Magistrate of the 1st class in the Amritsar District, was sentenced, by order, dated 23rd November 1909 and his security to the amount of Rs. 1,000, was forfeited, the said order regarding the forfeiture of security being upheld by the District Magistrate by order dated 1st November 1909.

Grounds.—Dewa Singh was bound down under section 110, Criminal Procedure Code, to be of good behaviour. Subsequently he was convicted in Kapurthala territory under section 411, Indian Penal Code. His security has been forfeited, and it is urged that as the offence took place in Kapurthala, the forfeiture is illegal.

The District Magistrate, with reference to section 121, Criminal Procedure Code, holds that the words "wherever it may be committed" include an "offence" in a Native State.

I am very doubtful of the correctness of this view for the Code does not, except in two or three special cases, purport to deal with offences committed outside of British India.

By his bond, the accused undertakes to be of good behaviour to His Majesty and to all His subjects.

I have sent for the Kapurthala file and find that the person whose stolen property was found in accused's possession for which possession he was convicted, was *Musammat* Kassi, a British subject of Dulo Nangal in Amritsar District.

"Offence" in section 4 (0) of the Code is defined as any act made punishable by any law for the time being in force, but that I take to mean "in force in British India." Now the offence defined in section 411, Indian Penal Code, is made punishable in British India, but in this case the offence was not established in British India. As the case is of interest, I submit it for orders to the Chief Court.

It is, of course, very undesirable that bad characters should be immure from the results of their acts, merely by altering the venue of their crimes to a Native State, but it must be so, unless the law clearly provides for it. *Cf.* also section 8 of Act XXI of 1879, but this had been amended by Act XV of 1903, and indeed the Act has no real application to this case.

The *Government Advocate*, for the Crown.

Mr. *Mul Chand*, for the Accused.

Order.—The facts of this case in so far as they need be stated for the purposes of this revision are that the man Dewa Singh, who was under security for good behaviour under section 110, Criminal Procedure Code, was convicted of dishonestly receiving stolen property (section 411, Indian Penal Code) by a Court of the Kapurthala State. Upon this Mr. Stephens, 1st class Magistrate, Amritsar, declared the security forfeited, and this order was upheld by the District Magistrate.

The case comes before us on a reference by the learned Sessions Judge, the question for decision being whether forfeiture of security can lawfully be made merely on proof of the conviction aforesaid. We are of opinion that it cannot, though we are not inclined to go the whole length Mr. Mul Raj would have us go. He contends that not only is there in the present case no proper proof of the commission by Dewa Singh of the offence of dishonest receipt of stolen property, but that, even if there was such proof, there would be no ground for forfeiture of security, inasmuch as the offence was not committed in British India. We assent to the first proposition, but not to the second.

Mr. Mul Raj points to section 1 (2), Criminal Procedure Code, but this does not seem to us to affect the question. In section 40, Indian Penal Code, "offence" is defined as "a thing punishable by this Code," and section 4 of the Code makes the provisions of the Code applicable to any offence committed by any Native Indian subject of His Majesty in any place without or beyond British India. It seems to us, therefore, that the phrase "offence punishable with imprisonment, wherever it may be committed," found in section 121, Criminal Procedure Code, must cover the dishonest receipt of stolen property in the State of Kapurthala. Nor need the form of the bond itself cause any difficulty in the present case, see Schedule V, Criminal Procedure Code, Form XI. The owner of the stolen property was a British subject of Amritsar District, and thus the words "to be of good behaviour to His Majesty and to all His subjects" are fully met.

The point is suggested to us that *Muhammad Yar* v. *Empress*(1)and *The King-Emperor*

(1) 2 P. R. 1884 Cr.

v. *Khan Muhammad* (2), respectively lay it down that a previous conviction by the Court of a Foreign State, or a previous conviction under a special or local law, cannot work enhancement of sentence under section 75, Indian Penal Code. But we perceive a clear distinction between those cases and the present one. Under section 75, Indian Penal Code, the ground for enhancement, the circumstance which authorizes enhancement, is previous *conviction* of an offence of certain kind, while under section 121, Criminal Procedure Code, all that need be proved is the "commission of any offence punishable with imprisonment." We could not take the *conviction* in Kapurthala as sufficient, but *proof of commission* of an offence punishable under section 411, Indian Penal Code, the owner of the stolen property being a subject of the King-Emperor, seems to us sufficient to satisfy both section 121, Criminal Procedure Code, and the terms of the security bond.

In these circumstances, inasmuch as there is on the record no proof of commission by Dewa Singh of the offence specified above, we must set aside the order of forfeiture and order re-trial of the case by the 1st class Magistrate, it being understood that forfeiture cannot lawfully be ordered unless and until there is on the record legal evidence that Dewa Singh did actually commit an offence under section 411, Indian Penal Code.

Revision accepted.

(2) 17 P. R. 1904 Cr.; 125 P. L. R. 1904 Cr. 1 Cr. L. J. 1061.

(s. c. 8 M. L. T. 284.)

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1456 OF 1907.

March 3, 1910.

Present :—Mr. Justice Benson and Mr. Justice Krishnaswami Aiyar.

PETHASARI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SENDAMARAI AYI AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Widow—Acquisition of property from maintenance savings—Property sold by reversioner—Suit against reversioner—Amendment—Altering the character of suit.

In a suit for the recovery of property, which a widow had purchased out of monies paid to her for maintenance and which had been sold to the plaintiff by the reversioners of the widow, the plaintiff cannot

be allowed to change the title of his vendors as the heirs of the widow's *stridhan.*

Property purchased out of the monies paid to a widow for maintenance is her *stridhanam* property.

Subramanian Chetti v. *Arunachelam Chetti*, 28 M. 1, followed.

Second appeal against the decree of the Subordinate Judge's Court of Madura (West), in Appeal Suit No. 275 of 1906, presented against the decree of the Court of the District Munsif of Manamadura, in Original Suit No. 263 of 1904.

Judgment.—The suit is for the recovery of property sold to the plaintiff by Lakshmi Ammal's reversioners. We cannot allow the plaintiff to change his case and base his title on a purchase from the same persons as heirs to Lakshmi Ammal's *stridhan.*

The only question is whether Lakshmi Ammal had only a widow's interest as alleged in the plaint. She purchased the property out of monies paid to her for maintenance. There can be no doubt that these monies were her absolute property.

What she purchased with these monies must also be her absolute property. See *Subramanian Chetti* v. *Arunachelam Chetti* (1). On the case, as laid in the plaint the suit is not maintainable.

We must dismiss the second appeal with costs.

Appeal dismissed.

(1) 28 M. 1.

(s. c. 29 P. R. 1910 Cr.)

PUNJAB CHIEF COURT.

CRIMINAL REVISION No. 630 OF 1910.

July 16, 1910.

Present:—Mr. Justice Scott-Smith.

NANKU *alias* MUHAMMAD DIN—CONVICT—PETITIONER

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 110, 123—Security for good behaviour—Failure to furnish security—Power of Magistrate to order imprisonment for period exceeding one year—Reference under s. 123—Duty of Sessions Judge—Ex-convict—Justification for an order to furnish security.

Where a person accused under section 110, Criminal Procedure Code, is ordered by a Magistrate to furnish security for a period exceeding one year and the accused fails to furnish security, the Magistrate can only send the case to the Sessions Judge and detain the accused in prison pending the orders of the Sessions Judge. The Magistrate cannot himself sentence the accused to imprisonment subject to confirmation by the Sessions Judge. It is the duty of a Sessions Judge, in the case of a reference under section 123, Criminal Procedure Code, to consider the evidence and to pass an order after doing so.

NANKU *v.* EMPEROR.

He should not, just as a matter of course, and without regard to the evidence, send to prison the person who has failed to give the security ordered.

Security cannot be demanded of an ex-convict, where there is nothing to show that since he got out of jail he has been a bad character or has done something that would justify an order under section 110, Criminal Procedure Code.

Petition for revision of the order of the Sessions Judge, Jhelum Division, dated the 19th February 1910.

Judgment.—This is an application for revision of the order of the District Magistrate of Jhelum, calling upon Nanku to furnish a bond under section 110, Criminal Procedure Code, for a period of three years. The security required not having been furnished the District Magistrate sentenced the accused to three years' rigorous imprisonment subject to confirmation by the Sessions Judge. Upon this, the latter officer passed the following order: "I confirm the District Magistrate's order by which Nanku is directed to furnish a bond in Rs. 200 with two sureties to be of good behaviour for three years."

The procedure adopted by the District Magistrate upon Nanku's failure to furnish security was not that laid down in the Code of Criminal Procedure. He had no authority to order the accused to be imprisoned for three years subject to the Sessions Judge's confirmation.

The law is laid down in section 123, sub-sections (2) and (3), and is as follows:—

"When such person has been ordered by a Magistrate to give security for a period exceeding one year, such Magistrate shall, if such person does not give such security as aforesaid, issue a warrant directing him to be detained in prison pending the orders of the Sessions Judge, or, if such Magistrate is a Presidency Magistrate, pending the orders of the High Court and the proceedings shall be laid before such Court.

Such Court, after examining such proceedings and requiring from the Magistrate any further information or evidence which it thinks necessary, may pass such order on the case as it thinks fit.

Provided that the period (if any), for which any person is imprisoned for failure to give security, shall not exceed three years."

The gist of the above is that the Magistrate commits the person, from whom security has been demanded, to prison and sends the proceedings to the Sessions Judge for disposal as he thinks fit. There is nothing in the section about the Magistrate's order being confirmed.

On the merits the order of the District Magistrate cannot be maintained. Only one witness was examined for the prosecution *viz.*, Gopal Singh, Sub-Inspector, whose evidence was very briefly recorded and was merely to the effect that accused had been three times convicted of offences against property and three times of absence without leave. The record shows that the latter convictions were for offences under section 176, Indian Penal Code.

Nanku's last conviction for an offence against property was on 14th January 1905 and there is no evidence except the vague statement of the Sub-Inspector to show that since he got out of jail he has been a bad character, or has done anything that would justify an order under section 110, Criminal Procedure Code. The Superintendent of Police in his report says there is more than sufficient evidence against him as will be seen from the list of searches in 1907, 1908 and 1909. No evidence was taken by the Magistrate about these searches and no witnesses, except the Sub Inspectors were examined in regard to his behaviour.

I do not understand how the Magistrate or Sessions Judge considered the evidence to be sufficient. I would also point out that it is the duty of a Sessions Judge, in the case of a reference under section 123 of the Code of Criminal Procedure, to consider the evidence and to pass an order after doing so. He should not, just as a matter of course, and without regard to the evidence, send to prison the person who has failed to give the security ordered.

I accept the revision and set aside the orders of the Sessions Judge and the Magistrate and direct the immediate release of Nanku.

Revision allowed.

PERAM NARASIGADU *v.* MACHIREDDI.

(s. c. 8 M. L. T. 284; 1 M. W. N. 563; 20 M. L. J. 732.)

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 735 OF 1908.

February 25, 1910.

Present:—Sir Ralph Benson, Judge, and Mr. Justice Krishnaswami Aiyar.

PERAM NARASIGADU—PLAINTIFF—APPELLANT

versus

MACHIREDDI BUTCHIREDDI AND OTHERS—DEFENDANTS—RESPONDENTS.

Madras Rent Recovery Act (VIII of 1865)—Pattah *standing in one's name—Portion of the land purchased by another—Payment of rent by the purchaser—Sale of land for arrears due by the* pattah-*holder—Sale as to portion invalid—Landlord and tenant.*

Where a *zemindar* received a portion of the rent from one person, though the *pattah* for the whole land continued to stand in the name of another, the sale of the whole land without notice to the holder of a portion of the land is invalid.

Orr v. *Rakkumarathi*, 29 M. 83, distinguished.

Second appeal against the decree of the District Court of Nellore, in Appeal Suit No. 80 of 1907, presented against the decree of the Court of the District Munsif of Nellore, in Original Suit No. 167 of 1906.

Judgment.—The plaintiff purchased a portion of the 2nd defendant's *pattah* land, and has been holding the same ever since with the exception of a part which he transferred to his wife, the 1st defendant. The *zemindar* has recognised the plaintiff as tenant and accepted rent from him for several years though the *pattah* continued to stand in the name of the 1st defendant for the whole land. For the arrear of 1313, *Fasli* he took proceedings under the Rent Recovery Act against the 2nd defendant and brought to sale the plaintiff's portion which the 3rd defendant purchased. The plaintiff seeks to set aside the sale as invalid. We agree with his contention. No notice was given to the plaintiff of the arrear or of the attachment. The proceedings, therefore, are void as against the plaintiff. Mr. Subramania Aiyar relies on *Orr* v. *Rakkumarathi* (1), for the view that the landlord is under no obligation to proceed against the real tenant but is at liberty to proceed against the person to whom he chooses to give *pattah*. We think the landlord is bound to find out who holds the tenant's interest and proceed against him for the rent in arrear. The case referred to is no authority for the position contended for. The tenancy there was admitted by the landlord. But he still wanted to make in the *pattah* an entry that the land in question had been sold away. This he was not permitted to do. We must, therefore, hold that the plaintiff's interest has not been legally sold to the 3rd defendant. See Second Appeal No. 1213 of 1906.

It is argued for the 3rd defendant that he was a *bona fide* purchaser. No question was raised before the Munsif as to the 2nd defendant having been the ostensible owner. We refuse to entertain the 3rd defendant's present contention. We must reverse the decree of the District Judge and restore that of the Munsif. Defendants Nos. 1 and 3 will pay the plaintiff's costs throughout.

The memorandum of objections put in by the 1st respondent is dismissed with costs.

Appeal allowed.

(1) 29 M. 83.

EMPEROR *v.* SUNDAR SINGH.

(s. c. 30 P. R. 1910 Cr.)

PUNJAB CHIEF COURT.

CRIMINAL REVISION No. 9 OF 1910.

April 23, 1910.

Present:—Mr. Justice Scott-Smith.

EMPEROR—PETITIONER

versus

SUNDAR SINGH—COMPLAINANT—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 250—Case compounded—Compensation cannot be awarded—Practice—Magistrate cannot decline to allow the composition of compoundable offence.

When a criminal case is compounded, a Magistrate cannot legally award compensation to the accused under section 250, Criminal Procedure Code. To justify the award of compensation, the Magistrate himself must acquit the accused under section 245 or section 247 of the Code.

Where an offence is compoundable, the Magistrate would be wrong in refusing to allow it to be compounded.

Case reported by H. A. Rose, Esquire, Sessions Judge, Ambala Division, with his No. 2659 G, dated the 15th December 1909.

Facts.—Sundar Singh prosecuted Lal Singh, *Qanungo*, under sections 323 and 448, Indian Penal Code, alleging that he owed money to Lal Singh, that Lal Singh came to his house on October 13th and demanded payment; that Lal Singh forced his way into complainant's house, caught complainant by the beard and slapped him on both cheeks.

Lal Singh denied the charge saying that he never went to complainant's house on 13th and that the complaint has been lodged to

prejudice his chance of success in the Civil suit.

A compromise was also put in.

The accused was discharged by Mr. B. Glancy, exercising the powers of a Magistrate of the 1st class in the Simla District, by order, dated 25th October 1909, and the complainant was ordered to pay Rs. 15 as compensation, under section 250 of the Criminal Procedure Code, to the accused.

Grounds.—This case is referred for a ruling on a point which has not yet, as far as I can ascertain, been decided in this Province. The question is whether a Court can award compensation in a criminal case, which is compounded.

In this case the complainant filed a complaint, and the accused was summoned, but complainant did not deposit any process-fee. Accused, however, attended of his own accord and an order was then passed or drafted accepting the compromise. This order was, however, cancelled by the Magistrate who passed an order in English in due form. *Hurphul* v. *Nanku* (1), cited by petitioner's counsel, does not apply.

It is, however, contended by him on the authority of Bombay High Court's Judgments Nos. 8 of 1898 and one dated 26th June 1894 that in a case which has been compounded the Magistrate cannot award compensation. I have no copies of these Bombay judgments to refer to and there are no reported cases in the Indian Law Report for Bombay.

I am, however, doubtful whether the contention is correct. Under section 345, Criminal Procedure Code, a composition in the case of a compoundable offence has the effect of an *acquittal* (clause 6 of section 345). The accused was thus *acquitted* and under section 250, Criminal Procedure Code, the Magistrate would appear to have clear jurisdiction to make the complainant pay him compensation.

On the merit there is nothing to be said. Complainant owed money to accused and a civil suit was pending. The complaint, as the Magistrate found, was intended to prejudice accused in the prosecution of his suit.

I do not recommend revision of the Magistrate's order, but as the legal point involved is a novel one, I refer the case for its decision. The compensation has been levied on 27th October 1909.

(1) 3 P. R. 1906 Cr.; 84 P. L. R. 1906; 4 Cr. L. J. 36.

Order.—The point referred by the Sessions Judge is whether when a Criminal case is compounded, a Magistrate can allow compensation to the accused under section 250 of the Code of Criminal Procedure.

In *The Empress* v. *Khushali Ram* (2), it was held that to justify the award of compensation under section 250 of the Criminal Procedure Code, the Magistrate himself must acquit the accused under section 245, or 247 of the Code, but where a case is compounded under section 345, the composition itself has the effect of an acquittal and compensation cannot be legally awarded.

In the present case on the day fixed for hearing the evidence, the parties appeared in Court and filed a deed of compromise.

The accused's statement was not recorded as to whether he agreed to the compromise, but the deed purports to be signed and thumb-marked by him, and as he has not appeared to-day and has not at any time repudiated the compromise, I must assume that he did agree to it. I am further supported in this view by the fact that accused appeared before the Magistrate along with complainant though summons had not been served upon him.

As the offences charged were compoundable, the Magistrate was wrong in refusing to allow them to be compounded. He should at once have acquitted the accused and in accordance with the above-mentioned ruling he had no power to order the complainant to pay compensation.

I, therefore, accept the revision and set aside the order awarding Rs. 15 as compensation to Lal Singh.[1]

Revision accepted.

(2) 19 P. R. 1888 Cr.

(s. c. 8 M. L. T. 285.)

MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 152 OF 1906.

May 5, 1910.

Present:—Sir Ralph Benson, Judge, and Mr. Justice Krishnaswami Aiyar.

PANDIRI BANGARAM AND OTHERS—PLAINTIFFS—APPELLANTS

versus

KARUMOORY SUBBARAJU AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), ss. 41, 43—Mortgage of half-share—Mortgagor entitled only to one-

LEKHRAJ *v.* EMPEROR.

third share—Decree against one-third share—Erroneous representation—Estoppel.

Under section 43 of the Transfer of Property Act, mere belief in and acting upon a representation may be sufficient to pass the subsequently acquired interest, while under section 41 mere belief is insufficient.

The well-known principle given effect to in section 41 is that interest feeds the estoppel.

Mokhoda Debi v. *Umesh Chandra Banerjee*, 7 C. L. J. 381 at p. 383, and *Gangabhai* v. *Baswant*, 34 B. 175 at p. 182; 12 Bom. L. R. 143; 5 Ind. Cas. 866, followed.

A mortgaged one-half share of a property to B. A was at the time of the mortgage entitled to one-third share and B knew this fact. It was not proved that B bargained and paid for a half share: *Held*, that B was not entitled to proceed against the subsequently acquired interest of A.

Appeal against the decree of the District Court of Godavari, dated the 3rd day of July 1906, in Original Suit No. 38 of 1905.

Judgment.—The plaintiff has obtained a decree against the one-third share of the 1st defendant. He purported to mortgage one-half during his father's life-time when he was only entitled to a third. It is found by the District Judge in paragraph No. 17 of his judgment and we entirely agree with him that the plaintiff knew at the date of the mortgage that the first defendant was only entitled to a third share in the property. We are also clear that the plaintiff did not bargain and pay for a half share. Under these circumstances, the question is raised whether the plaintiff can bring his case within the four corners of section 43 of the Transfer of Property Act. We are asked to say that in the absence of words in section 43 to the effect that the benefit of that section can only be claimed by a person who has believed in and acted upon the representation, the plaintiff is entitled to proceed against the added interest of the father. We are unable to accept this view. It is true section 41 of the Act requires a person who has obtained a transfer from the ostensible owner to have done so in good faith and after due enquiry in order to become entitled to the interest purported to be transferred. But as pointed out by the learned Advocate-General, the difference in language between sections 41 and 43 of the Act may be due to the fact that under the latter section mere belief in and acting upon the representation may be sufficient to pass the subsequently acquired interest, while under section 41 such mere belief of the transferee is insufficient. The case of *Anganayya* v. *Daroor Narasanna* (1), does not decide the question under consideration. On the other hand, the Advocate-General has drawn our attention to the observations in *Mokhoda Debi* v. *Umesh Chandra Banerjee* (2) and *Gangabhai* v. *Baswant* (3), which seem to show that the principle of section 43 of the Transfer of Property Act is the acting by the transferee on the erroneous representation of the transferor. Further the well-known maxim of the law, to which effect is given in section 41, is 'interest feeds the estoppel.' That section only enunciates rule which is an illustration of the general principle of estoppel not confined to the law of evidence but extending to the region of substantive law. No authority has been cited to us to induce us to take a different view of the section. We must, therefore, hold that the decree of the District Judge is right. It is unnecessary to express any opinion on the other questions and especially on the genuineness of the Will.

We dismiss the appeal with costs.

Appeal dismissed.

(1) 18 M. L. J. 247; 3 M. L. T. 243.
(2) 7 C. L. J. 381 at p. 383.
(3) 34 B. 175 at p. 182: 12 Bom. L. R. 143; 5 Ind. Cas. 866.

(s. c. 31 P. R. 1910 Cr.)

PUNJAB CHIEF COURT.

CRIMINAL REVISION NO. 230 OF 1910.

April 23, 1910.

Present:—Mr. Justice Chevis.

LEKHRAJ—CONVICT—PETITIONER

versus

EMPEROR—RESPONDENT.

Jurisdiction—Forging hundi—Hundi, *a valuable security—Power of Magistrate First Class to try a case of forging* hundi—*Serious offence including a minor offence—Penal Code* (*Act XLV of* 1860), *ss.* 420, 467, 468.

A *hundi* is a valuable security. The offence of forging a *hundi* falls under section 467 of the Penal Code and is triable only by the Sessions Court or by a Magistrate invested with enhanced powers.

The fact that the offence includes a minor offence, which is triable by an ordinary First Class Magistrate, does not give an ordinary First Class Magistrate power to deal with the case.

A First Class Magistrate can only dispose of a Sessions case either by an order of discharge or by committal to the Sessions.

Petition for revision of the order of C. L. Dundas, Esquire, Sessions Judge, Rawalpindi Division, dated the 12th February 1910.

MAHADEVA *v.* GOPALA IYER.

Messrs. *Grey* and *Beechey*, for the Petitioner.

Bhagat *Gobind Das*, for the Respondent.

Judgment.—The petitioner has been convicted by a first class Magistrate and sentenced under sections 420 and 468. The offence with which he stands charged is forging a *hundi* for the purpose of cheating. Now a *hundi* is a valuable security so the offence charged really falls under section 467, and the case is triable only by the Sessions Court or by a Magistrate invested with enhanced powers. The fact that the offence includes a minor offence which is triable by an ordinary 1st class Magistrate no more gives an ordinary 1st class Magistrate power to deal with the case than the fact that a man who commits murder also commits grievous hurt gives an ordinary Magistrate jurisdiction to dispose of a charge of murder.

I set aside conviction and sentence and all proceedings on appeal in the Sessions Court, and also all proceedings in the Magistrate's Court as far back as, and including, the framing of the charge. The case is returned through the District Magistrate, who can, if he thinks fit, transfer the case to his own file or to the file of any Magistrate invested with section 30 powers. If the case is not so transferred, the Magistrate will proceed with the case, but he can only dispose of it either by a committal to Sessions or by an order of discharge. At request of petitioner's counsel I note that it is open to the District Magistrate, if he thinks fit, to transfer the case to his own Court and then to pass an order of discharge, but I note at the same time that nothing in the present order is to be taken as an expression of any opinion on the merits of the case. The petitioner will remain on bail as at present till further orders are passed by the Magistrate or by any other Court to whom the case may be transferred.

Conviction set aside.

(s. c. 8 M. L. T. 289.)

MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 106 OF 1906.

February 21, 1910.

Present:—Sir Arnold White, KT., Chief Justice, and Mr. Justice Abdur Rahim.

MAHADEVA IYER—APPELLANT

versus

GOPALA IYER AND OTHERS—RESPONDENTS.

Mortgage deed—Wrong description of mortgaged property—Extrinsic evidence—Survey numbers wrong—Mistake—No relief claimed in the plaint for rectification—Form of relief to be granted.

Extrinsic evidence is admissible to show the mistake of description in a deed of mortgage and the omission of a prayer for rectification is, at most, a matter of form.

Karuppa Goundan alias *Thoppala Goundan* v. *Periathambi Goundan*, 30 M. 397; 2 M. L. T. 336, followed.

Appeal against the decree of the Court of the Subordinate Judge at Negapatam, in Original Suit No. 47 of 1905.

Judgment.—It is to be regretted that the respondent is not represented in this appeal.

It is found that the survey numbers in the two mortgage deeds, executed by the 1st defendant to the plaintiff 49D and 194O, were by mutual mistake inserted instead of 49A and 194W, respectively. The second defendant was a subsequent mortgagee. His evidence, as we understand the case, was that he knew of this mistake and that it was on the strength of this mistake that he advanced money on second mortgage. The Judge finds that the 2nd defendant made the advance without notice of the error in the mortgage to the plaintiff "though" he says, "he was aware of it." We cannot follow this finding. If the 2nd defendant made the advance with knowledge of this mistake, we do not see how it can be said that he did so without notice, or that he acquired rights in good faith. (Section 31 of the Specific Relief Act). The plaint does not contain a prayer for rectification of the 1st defendant's mortgage, but it alleges a mutual mistake of fact, and the omission of a prayer for rectification is, at most, a matter of form. Extrinsic evidence is admissible to show the mistake [*Karuppa Goundan* alias *Thoppala Goundan* v. *Periathambi Goundan* (1)]. In our opinion, the plaintiff is entitled to relief against the 2nd defendant in respect of Survey Nos. 49A

(1) 30 M. 397; 2 M. L. T. 336.

and 194W, and the decree must be modified accordingly.

The 2nd defendant must pay the costs of this appeal.

Decree modified.

(s. c. 5 P. R. 1910 Rev.)

FINANCIAL COMMISSIONER'S COURT, PUNJAB.

CIVIL REVISION No. 27 OF 1909-10.

May 26, 1910.

Present:—The Hon'ble, Mr. Douie.

Financial Commissioner.

RAJA RAM—JUDGMENT-DEBTOR—PETITIONER

versus

DURGA DUT—DECREE-HOLDER—RESPONDENT.

Appeal—Execution of decree—Attachment of land by Civil Court—Transmission of record to Collector for intervention—Order declining to intervene, not appealable—Appeals from subsequent orders.

Where in execution of a decree, a Civil Court, after attaching land, sends the file to the Collector, this amounts to an order enquiring from the Collector whether he wishes to intervene.

No appeal lies against an order of the Collector declining to intervene.

Obiter dictum.

When the Collector informs a Civil Court that he desires to intervene and the Civil Court authorizes him to do so, any order passed by the Collector subsequently, in exercise of the authority conferred by the Court, would be subject to appeal.

Petition for revision of the order of A. Meredith, Esquire, Commissioner, Delhi Division, dated the 14th June 1909.

Mr. *Obburd*, for the Petitioner.

Mr. *Jai Lal*, for the Respondent.

Order.—The Commissioner's order cannot stand. The Civil Court by order, dated 28th August 1908, sent the file to the Collector after attaching the land. This must be taken as an order enquiring from the Collector whether he wished to intervene (paragraph 3 on page 330 of Land Administration Manual). The Collector by order dated 19th October 1908, declined to intervene. There is no appeal against that order. Had the Collector informed the Civil Court that he desired to intervene and the Civil Court had decided to authorise him to do so (paragraph 5 on page 330 of Land Administration Manual), then any orders passed subsequently by the Collector in exercise of the authority conferred by the Court would have been subject to appeal under the rule published in Punjab Government Notification No. 156, dated 23rd September 1895, and

reproduced in paragraph 7 on page 333 of the Land Administration Manual. The Commissioner had no jurisdiction and his order must be set aside.

Order set aside.

(s. c. 8 M. L. T. 290.)

MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 175 OF 1905.

March 1, 1910.

Present:—Sir Arnold White, KT., Chief Justice, and Mr. Justice Abdur Rahim.

CHINNAYA GOUNDEN—DEFENDANT—APPELLANT

versus

THE COLLECTOR OF SALEM FOR AND ON BEHALF OF SUBBARAYA GOUNDEN AND ANOTHER—PLAINTIFFS AND DEFENDANTS—RESPONDENTS.

Hindu Law—Ancestral estate—Gift by father—Whether binding on the son.

A gift of a portion of the ancestral estate by the father is not binding on the son and he can impeach.

Kamakshi Ammal v. *Chakrapany Chettiar*, 30 M. 452 17 M. L. J. 405; 3 M. L. T. 23, referred to.

Appeal against the decree of the Subordinate Judge's Court of Coimbatore, in Original Suit No. 6 of 1904.

Judgment.—The only contention which was pressed upon us in appeal was that the gift was a marriage gift of reasonable amount made to a relation by the father and that the gift was binding on the son. The gift consisted of land worth Rs. 7,000—which formed part of the ancestral estate of the family of which the father and son were members. On the facts of this case, it seems to us to be quite clear on the authority of the cases referred to in paragraph 26 of the judgment of the Subordinate Judge [to which we may add *Kamakshi Ammal* v. *Chakrapany Chettiar* (1)] that the gift can be impeached by the son. The appeal must be dismissed with costs.

As regards the memo. of objections, we are not prepared to say that the Subordinate Judge was wrong in allowing the deductions to which the memo. of objections relates and we do not feel called upon to interfere with the discretion exercised by him in his order as to costs.

The memo. of objections is dismissed without costs.

Appeal dismissed.

(1) 30 M. 452; 17 M. L. J. 405; 3 M. L. T. 23.

(s. c. 8 M. L. T. 291.)

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 308 OF 1910.

(REFERRED CASE No. 44 OF 1910).

July 25, 1910.

Present:—Mr. Justice Sankaran Nair.

EMPEROR

versus

THODDAMATHA AND OTHERS—ACCUSED.

Criminal Procedure Code (Act V of 1898*) s.* 106 (3) *—Power of Appellate Court—Some of the accused ordered to furnish security—Legality.*

Where a Sub-Divisional Magistrate, while confirming the sentence of the lower Court, ordered some of the accused to furnish security to keep the peace under section 106 (3) of the Criminal Procedure Code:

Held, that the order was illegal as being opposed to the decisions of the Madras High Court.

Case referred for the orders of the High Court under section 408, Criminal Procedure Code, by the District Magistrate of Coimbatore, in his letter, dated 27th June 1910, D. Dis. No. 629 of 1910.

Facts.—In C. A. Nos. 6 and 7 of 1910, on the file of the Sub-Divisional Magistrate of Kollegal, the Sub-Divisional Magistrate while confirming the sentence of the lower Court for offences under sections 147 and 323, Indian Penal Code, ordered some of the accused to furnish security to keep the peace under section 106 (3), Criminal Procedure Code. This procedure is opposed to the rulings of the Madras High Court in *Muthiar Chetti* v. *Emperor* (1); *Paramasiva Pillai* v. *Emperor* (2); *Doraisami Naidu* v. *Emperor* (3).

When asked to explain his procedure, the Sub-Divisional Magistrate, Kollegal, stated that when he passed the order referred to above he had in his mind the Bombay High Court ruling quoted in *Emperor* v. *Bhau Singh Dhumal Singh* (4) and thought inadvertently that the ruling should be followed in preference to those of the Madras High Court.

Order.—The order of the Sub-Divisional Magistrate directing some of the accused to furnish security is opposed to the decisions of this Court. Vide *Paramasiva Pillai* v. *Emperor* (2) and *Doraisami Naidu* v. *Emperor* (3). It is true that a different

(1) 29 M. 190; 3 Cr. L. J. 461.
(2) 30 M. 48; 1 M. L. T. 403; 5 Cr. L. J. 88.
(3) 30 M. 182; 1 M. L. T. 343; 4 Cr. L. J. 498.
(4) 33 B. 33; 10 Bom. L. R. 759; 8 Cr. L. J. 267; 1 Ind. Cas. 454.

view is taken by the Bombay High Court. But I see no reasons to doubt the decisions of this Court. The order is, so far as it directs security to be taken, accordingly set aside.

Order set aside.

(s. c. 8 M. L. T. 297.)

MADRAS HIGH COURT.

CIVIL APPEAL AGAINST ORDER No. 102 OF 1909

August 5, 1910.

Present:—Mr. Justice Wallis and Mr. Justice Krishnaswami Aiyar.

DEPURU KALAPPA REDDI—PETITIONER—PLAINTIFF—APPELLANT

versus

UMADE RAJAHA RAJA DAMARA KUMARA AKKAPPA NAYANIM BAHADUR VARU, (DECEASED) BY GUARDIAN VENKATARAMA SARMA, UMADE RAJAHA RAJA DAMARA KUMARA THIMMANAYANIM BAHADUR VARU—DEFENDANT—RESPONDENT.

Execution of decree—Hindu Law—Impartible zemindary*—Liability of same in the hands of successor for decree-debts of the previous holder—Court of Wards Act (Madras Act III of* 1904*), ss.* 41, 55 (1) *and* (3).

An impartible *zemindary* is assets in the hands of the holder thereof liable to be proceeded against in execution of decrees for money against the previous holders.

Raja of Kalahasti v. *Achigadu*, 30 M. 454; 17 M. L. J 367; *Zemindar of Karvetnagar* v. *Trustee of Tirumalai, Tirupati, &c., Devastanams*, 32 M. 429; 2 Ind. Cas. 18, followed.

Section 55 (3) of the Madras Act III of 1904 is applicable only when the estate is relinquished under section 55 (1); and section 41 of the said Act is absolute except in so far as it is cut down by section 55 (3).

Appeal against the order of the District Court of North Arcot, dated 25th February 1909, in Execution Petition Register No. 60 of 1905, in Original Suit No. 9 of 1898, District Court of Chingleput.

Judgment.—As to the first point, we think it is now settled that the *zemindary* being impartible is assets in the hands of the successor liable to be proceeded against in execution of decrees for money against the previous holder, *Raja of Kalahasti* v. *Achigadu* (1), *Zemindar of Karvetnagar* v. *Trustee of Tirumalai, Tirupati, &c. Devastanams* (2). As regards the other point, the

(1) 30 M. 454; 17 M. L. J. 367.
(2) 32 M. 429; 2 Ind. Cas. 18.

provisions of section 41, Court of Wards Act, are absolute except in so far as they are cut down by section 55 (3). That sub-section only applies when the estate is relinquished under section 55 (1). The District Judge has not considered whether the estate was relinquished under this sub-section, nor is it found that no claim was preferred by the decree-holder to the Regulation Collector so as to bring the case under section 41. We reverse the order and remand the case for disposal according to law.

Costs will be provided for in the lower Court.

Case remanded.

(s. c. 8 M. L. T. 295.)

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 258 OF 1909.

August 5, 1910.

Present :—Mr. Justice Wallis and Mr. Justice Krishnaswami Aiyar.

TOGARAM APPADU PATNAIDU—PETITIONER—PLAINTIFF—APPELLANT

versus

TOGARAM APPALASWAMI PATNAIDU AND OTHERS—DEFENDANTS—RESPONDENTS.

Partition suit—Civil Procedure Code (Act XIV of 1882), s. 396—Preliminary decree—Pendency of suit till final decree under s. 396 is passed.

A suit for partition must be considered pending until a final decree is passed under section 396 of the Code of Civil Procedure.

Appadu v. *Venkata Ranga Rau*, 18 M. L. J. 23; 3 M. L. T. 328, referred to and approved.

Appeal against the order, dated the 26th day of August 1909, of the District Court of Ganjam, in I.A. No. 396 of 1909, in O.S. No. 1 of 1892.

Judgment.—The attention of the District Judge does not appear to have been called to the observations of this Court in *Appadu* v. *Venkata Ranga Rau* (1), which reference to this very suit. We adhere to the view therein expressed and hold the suit must be considered still pending until the decree under section 396 is passed. We reverse the order and remand the case for disposal according to law. The costs will be provided for in the order of the lower Court.

Case remanded.

(1) 18 M. L. J. 23; 3 M. L. T. 328.

(s. c. 8 M. L. T. 300.)

MADRAS HIGH COURT.

CROWN SIDE.

August 30, 1910.

Present:—Mr. Justice Sankaran Nair.

In the matter of UMALAKSHMI SARASWATI BAI AND YOGAMBA DHARMASAM VARDHINI—(MINOR).

AND

In the matter of THE NOTICE OF MOTION BY SWAMI VIDYANANDA PARAMAHAMSA *alias* T. S. MUTHUSWAMY SASTRY, UNDER SECTION 491 OF THE CODE OF CRIMINAL PROCEDURE.

SWAMY VIDYANANDA PARAMAHAMSA *alias* T. S. MUTHUSAWMY SASTRY—PETITIONER

versus

Y. T. S. NARAYANA SASTRY—COUNTER-PETITIONER.

Criminal Procedure Code (Act V of 1898), s. 491—Habeas Corpus—Writ—Person illegally or improperly detained—Powers of Court under s. 491 (2).

M, the father of two minor girls of the ages of about 14 and 16 years, applied for a writ against N, his younger brother, for their surrender. M became a *sanyasi* in 1901 and relinquished his rights as head of the family to N. He became a Brahmo in 1906 and between 1906 and 1910 again began to live with his wife and children and also begot some more children. The elder brothers of the minors had all along been living with N and were educated by him. The wife died in April 1910. The object of the writ was to prevent the marriage of the minors before they attained the age of 16; and there was no question of morality or corruption:

Held, that the petitioner was quite free to keep his daughters unmarried till their 16th year or even after that age even though he may put his daughters not only to great inconvenience but to danger of excommunication and the fact of his becoming a Brahmo did not affect the matter.

Held, also, that as the petitioner became a *sanyasi* previously, he was not in 1906, when he became a Brahmo, the guardian in Hindu Law of his children.

Held, further, that though the *de facto* guardianship of the petitioner, from 1906 to 1910, of the minors may give him a right to sustain a prosecution under section 391, Indian Penal Code, against strangers, it would not entitle him to an order under section 491, Criminal Procedure Code.

The ordinary rule of Hindu Law is that rights once vested are not divested and the petitioner cannot re-gain his status in his natural family which he had renounced.

Application for a writ of *Habeas Corpus*.

Judgment.—This is an application under section 491, Criminal Procedure Code, in the nature of a writ of *habeas corpus* by a father for the custody of his two

daughters in their 14th and 16th years respectively.

On reading the affidavits, it appeared to me that the case is one which ought to be decided on sworn testimony. I accordingly directed the parties to examine witnesses. These are the facts.

The petitioner, who calls himself Swami Vidyananda Paramahamsa *alias* T.S. Muthusamy Sastry is a B. A. of the Madras University and was tutor in the Madras Christian College from 1892 to 1899 drawing a pay which ranged from Rs. 35 to 65. Before 1889, he had pledged himself that he would not marry his daughters before their 16th year. His wife had English education in the Training School and was a teacher in the Vizianagaram Raja's Girl School. In 1895, while a tutor, the petitioner donned the yellow robe. In 1899 he went to Sringeri to become a *sanyasi*. From there he wrote Exhibit II to his brother Narayanan, with whom his daughters are living and who opposes this application. He resigned his appointment in the Christian College to become a *sanyasi*. He writes in Exhibit II:—"Now you are wise, experienced and gentle. I, therefore, give the whole family burden to you. The children are all yours, the books and furniture are yours. I make you a complete manager"* * * "Out of family dignity, I would ask you to support the renounced family completely from your income." * * "Do not write to me anything about the privats affairs of the family." There can be no doubt that his wife did not like this. A few months after in November 1899, Narayanan from Madras wrote to him that she was refusing to receive any help from him and said she did not want any help at all. He wrote that they were not on friendly terms on account of his refusal to receive the mother-in-law into the house. He states that for one month he supplied everything she wanted and would do so again willingly if she would allow him. He wrote he would help his brother the petitioner also. So far as the sons are concerned, Narayanan took charge of them from 1900. They have been living with him ever since, were educated by him. The eldest boy is now 21 or 22. The petitioner came to Madras and became a *sanyasi* at Tiruvottiyur in 1901 obtaining the consent of his wife which he says was given on condition that he would not renounce the duties of a husband. His father died in 1901. He left it to his brother Narayanan to perform the usual ceremonies in the ordinary way. He did what a *sanyasi* does on such occasions, bathe with the clothes he was then wearing. From June 1901 to June 1902 he travelled in the Madras Presidency. He spent the rest of 1902 and the whole of 1903 in Northern India and returned to Madras only at the end of the year. A photo of his taken during this trip is Exhibit IV filed to show he was then a *sanyasi*. Till March 1905 he lived at various places in Madras but not with his wife and children, whom he admits he did not maintain and who, Narayanan says, were maintained by him. He was suffering from fever for four or five months when he says his wife asked for the favour of an interview with him which he was pleased to grant. From that time she was visiting him occasionally but did not live with him. He also says that the eldest daughter who must have been then below 10 stayed with him and cooked his meals for him. In March 1905, he went to the Circars for about 6 months to collect subscriptions for a press leaving his wife and daughters in the house. He returned in about November 1905 and after that period to her death according to himself, she permanently lived with him though according to his brother such permanent residence was only from 1906. Early in June 1906 his mother died, he refused to perform the funeral ceremonies as he thought that Narayanan who had become the eldest son in the family, by his own renunciation of that place which was his by birth, was the proper person. On the 11th of that month he wrote "as a self-adopted son of mother India" a characteristic letter to Narayanan, in which assuring him, "I went away from the bodily mother in order I might serve mother India" and that he has one of the best of their race and that Narayanan ought to be proud of him as the only "Sanyasin product" of the Madras University, 'calls upon' Narayana to honour his mother's memory with a contribution of Rs. 15 a month towards the maintenance of the press, which, he says, is for the improvement of the Vernacular literature. The evidence does not show what the reply was.

Though he did not attend the funeral ceremonies, his wife attended, without asking him,

as he says in such matters she did not take his consent. It is probable he was displeased with her treatment as she took away the daughters who were till then living apparently with Narayanan. Within a few days after this, 16th June 1906, the petitioner signed the covenant and—became a Brahmo. His wife did not sign the covenant. But it is probable that to please him she lived a Brahmo life. Till September 1908, his daughters continued to live with him. His sons were with Narayanan. He wanted Narayanan to send them to him. Narayanan says he left it to them to do what they liked. But it may be inferred that he was not willing to send them and the petitioner says that his wife dissuaded him from taking any legal steps. In 1908 his eldest daughter ran away to her uncle Narayanan's house, as she hoped that he would get her married. The petitioner brought her back and to prevent any further attempts placed her in a Home at Poona in September 1908. The second daughter also was taken there in January 1909. His wife went to Poona in September 1909 and brought them away without obtaining the consent of the petitioner and against his wish. The petitioner states that the reason was that it was a hard life his daughters were leading there. The evidence on the other side is that she wanted to get them married; after this, they lived together. But according to the daughter, the petitioner cooked his own meals, and they cooked their meals separately, though they lived in the same house. This is denied by the petitioner. The evidence on either side to corroborate this is not of much value. The wife and children lived with the petitioner till April 1910 when the wife went to the Maternity Hospital. She died there. Between 1906 and 1910, the petitioner and his wife lived as husband and wife and she bore him children. On her death, the petitioner states that he performed the memorial service in Brahmo form. Narayanan was not in Madras on the day of her death and, therefore, no Brahmin priest was engaged the first day. On the 2nd day he arrived and the ceremonies were thenceforward carried out in the orthodox Brahmin style.

There is no doubt that from 1905 to 1910 while his wife and daughters were with him, he was earning enough to maintain them, but it is also proved beyond doubt that she underwent great privations. Besides the evidence of witnesses on either side who prove payments of small sums of cash and their supplying them with necessaries like rice, there is the strong evidence furnished by Exhibit I, a memo. left by her on her death, which shows that she pledged even her Tali, marriage symbol, for 8 annas. A married woman will, of course, not do this unless in very dire straits. She tells her children in this memo. not to tell their father of this, and it is evident from his distress in the witness box when he read this that it came to the petitioner as a painful surprise. My conclusion on this point is that he was so absorbed in his divine mission, the service of 'Mother India' that though he earned sufficient for their living, he did not give her enough and that she bore everything in silence trying as best as she could in various ways to make both ends meet. The object of the petitioner is to prevent the marriage of his daughters before they complete their 16th year. His brother and other relatives apprehend that if the girls are not married before they attain age, they may be put out of caste or they may find it difficult to get them married and if the girls return to their father who is a *sanyasi* and was living with his wife there may arise further difficulties.

I think the petitioner is quite free to keep his daughters unmarried till their 16th year or even after that age even though he may put his daughters not only to great inconvenience but to danger of ex-communication.

The fact that he has become a Brahmo does not affect the matter. He will not thereby lose any rights he had before. Leaving out of consideration for the present his living with his wife, there is nothing proved against his character. He seems to be a man of strong convictions, who is acting upon them sacrificing his worldly prospects, who has consecrated his life to what he regards his holy mission in life and will not allow on that account his material interests or the happiness and the interests of his wife and children to stand in the way. He wants his daughters to be brought up according to his own views.

None of his relatives, his brothers, brother-in-law &c. share his views. They retain their old faith and strictly orthodox ideas in their completeness. His wife was an

educated lady herself. She led an uncomplaining, silent and hard life from 1900 to her death. She had undoubtedly a Will of her own. She brought away her daughters from Poona. Her husband admits that she would not take his consent for such things as attending funeral ceremonies, &c. She attended his mother's funerals without his leave, and she persuaded him to leave her three sons with Narayanan and on her death-bed practically advised her daughters to leave their father and live with Narayanan.

In these circumstances there is no question of morality or corruption to influence my decision. If the petitioner retained his right of custody when he became a Brahmo, the daughters must be placed in his custody as nothing has happened since to deprive him of that right. Whether he had such rights then is the question for determination. His declarations in his letter Exhibit II already extracted, the resignation of his appointment in the Christian College, his renunciation of his position as the head of the family by giving up the family lands to Narayanan, his entire and otherwise inexplicable and very reprehensible abandonment of his wife and children till 1905, his wanderings throughout the country, when he was photographed as a *sanyasi*, his discarding the sacred thread, taking a new name, the ceremony of his initiation, and his conduct on the deaths of his parents when he declined to perform the funeral ceremonies on the ground that he is a *sanyasi*, and Narayanan who has become the eldest son on account of his renunciation is the proper person to perform them, living the life of a *sanyasi* apparently lead only to one conclusion. He insists himself that he has become and is stil a *sanyasi*. His own statement is remarkable:

"While I admit that I have been wearing a *Kashaya Garb*, I deny I am a *sanyasi* in the ordinary acceptance of the term. I took up the *sanyasi* with my own interpretation of the prescribed formulas to a sympathetic priest that I chose, and who was fully apprised of my views and motives and I feel bound only by that interpretation. I am not a total innovator in this matter but an imitator of religo-social labourers like Sankara, Ramanuja and Madwa who put what interpretations they chose upon the *Vedic* texts. My object has always been to effect religious and social amelioration according to the best of my lights."

He has not given in his evidence his own interpretation of the formulas to show that the ordinary legal consequences should not follow from his having become a *sanyasi*. But it is clear from Exhibit II and his conduct during the subsequent years that such peculiar interpretation has nothing to do with the question now under consideration whether he has ceased to belong to his natural family.

Mr. Narayana Rao contends that he is not *sanyasi* and relies upon two facts: *first*, he has been made a *sanyasi* by Mr. Subramaniem, Assistant Professor in a College; *secondly*, he was living with his wife. When Mr. Subramaniem was in the witness box, his qualifications or disqualifications for making one a *sanyasi* were not elicited. I am prepared, however, to assume that not being himself a *sanyasi*, he was not competent to initiate the petitioner into the *sanyasa asram*. But I have very little doubt that the petitioner himself was in real earnest and acted in good faith. He still maintains the validity of his initiation into the *sanyasa asram* and I am not satisfied that if a man *bona fide* goes through the ceremony, renounces his family ties, lives a *sanyasi* life, honestly believing he is a *sanyasi*, he is any the less a *sanyasi* on account of the invalidity of his initiation. To hold otherwise would be to make him an outcaste and I am not prepared to decide so when he himself earnestly states he is a *sanyasi* and the opposite side does not raise the question. It is also true he lived with his wife in 1905 or 1906. But he did so, not because he was not a *sanyasi* but he had on account of the promise he had to make, to get her consent. It can only be treated as a violation of his *sanyasa asram*. I must, therefore, hold that he was, what he himself says he was, a *sanyasi* and he, therefore, was not in 1906 when he became a Brahmo the guardian in Hindu Law of his children.

There is undoubtedly the strong circumstance in his favour that he was their *de facto* guardian from 1906 till his wife's death. Such *de facto* guardianship is sufficient to sustain a prosecution under section 361, Indian Penal Code, and as against strangers would entitle him to an order for restoration

to his custody under section 491, Criminal Procedure Code.

It was then suggested that though he may have lost his rights when he became a *sanyasi* it was open to him to resume them. I do not think so. The ordinary rule of Hindu Law is that rights once vested are not divested and he does not re-gain his status in his natural family he has renounced.

In these circumstances, I have now to see what order I should pass under section 491, Criminal Procedure Code. No rules have been passed under section 491 (2) to regulate the procedure. I have found that the children have not been illegally or improperly detained. So section 491 (1) (*b*) does not apply. I have, therefore, to pass orders under clause (*a*). I find then that the petitioner has not proved his right to the custody of his daughters, their adult brothers are living with Narayanan who has educated and brought them up, that there is no allegation that they are not likely to be well treated by him; their mother on their death-bed was willing that they should live with him. After their father, their brothers and Narayanan are their nearest relations and who are in possession of the little family property they have.

On these facts, I am not prepared to grant the prayer that the daughters should be restored to his custody and rejecting that part of the application, direct that the girls be informed that they are free to go where they like to their father, uncle or brothers.

Application rejected.

(S. C. S M. L. T. 289.)

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 377 OF 1909.

(CRIMINAL REVISION PETITION No. 283 OF 1909.)

February 11, 1910.

Present:—Mr. Justice Sankaran Nair.

In re T. S. SUSAI PILLAY AND ANOTHER—PETITIONERS.

Criminal trespass—Property in dispute—Order prohibiting possession being taken by complainant.

A trespass on the property in the possession of the complainant cannot be sustained in face of an order prohibiting him from taking possession.

Petition under sections 435 and 439 of the Criminal Procedure Code, praying the High Court to revise the judgment of the Assistant

First Class Sub-Divisional Magistrate of Trichinopoly in Criminal Appeal No. 24 of 1909, confirming the conviction and sentence passed on the accused in C. C. No. 433 of 1908, on the file of the Court of the Town Second Class Magistrate of Trichinopoly.

Order.—In the face of the order of the 8th July 1908 prohibiting the 1st Prosecution Witness from taking possession of the property in dispute, it is impossible to say that the petitioners committed trespass on the property in the possession of the complainant. I am unable to agree with the lower Courts that the order is vague. I set aside the conviction and sentence. The fine, if levied, will be refunded.

Conviction set aside.

(S. C. 8 M. L. T. 296.)

MADRAS HIGH COURT.

CRIMINAL REVISION No. 714 OF 1909.

(REFERRED CASE No. 43 OF 1909)

April 26, 1910.

Present:—Mr. Justice Miller and Mr. Justice Munro.

EMPEROR

versus

JOSEPH KANGANI AND OTHERS—ACCUSED.

Practice—Arms Act (IX of 1878)—Explosives Substances Act (VI of 1908)—Re-trial necessary for conviction under another Act—Revisional powers of the High Court.

Where a case might properly have been tried under the Arms Act or the Explosives Substances Act, and the Public Prosecutor did not ask for an order for a re-trial:

Held, that the High Court could not convict under either of the enactments without a fresh trial.

Case referred for the orders of the High Court under section 438 of the Criminal Procedure Code, by the District Magistrate of Tinnevelly, in his letter dated 3rd December 1909, R. O. C. No. 2126 Mag. of 1909.

Order.—The case might properly have been tried under the provisions of the Arms Act or the Explosives Substances Act of 1908, but the Public Prosecutor does not ask us now to order a re-trial and we cannot convict the accused under either of those enactments without a fresh trial.

We agree with the District Magistrate that the sentences are inadequate and we set them aside and in lieu thereof sentence the accused to pay fines of Rs. 100 (one hundred) each and in default to undergo simple imprisonment of 2 (two) months each.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL *v.* GOPISETTI.

(s. c. 8 M. L. T. 310.)

MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 95 OF 1905.

April 29, 1910.

Present:—Mr. Justice Miller and Mr. Justice Munro.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—DEFENDANT—APPELLANT

versus

GOPISETTI NARAYANASAMI NAIDU GARU, RECEIVER, NIDADAVOLE AND MEDUR ESTATES—PLAINTIFF—RESPONDENT.

Madras Survey and Boundaries Act (IV of 1897), ss. 11, 12, 24—Decision by a Survey Officer—Date of decision—Communication—Limtation—Starting point.

The date of a decision, as a starting point of limitation, is the date of its communication to the parties and a decision cannot be said to be passed until it is in some way communicated to the parties affected by it.

Annamalai v. *Cloete*, 6 M. 189 and *Seshamma* v. *Sankara*, 12 M. 1, followed.

Where the Survey Officer gives the parties sufficient notice of the day on which he will pass his decision, to enable them, if they choose, to be present and hear it and if the decision is announced on that day, that is the date of communication though the parties may not care to listen.

But where the Survey Officer publishes his decision by sending copies of it to the parties, the date of the receipt of the order is the date of communication.

Appeal against the decree of the District Court of Godavari, in Original Suit No. 10 of 1903.

Judgment.—Under section 25 of Act XXVIII of 1860 (Madras), the starting point of limitation for the appeal by way of suit, allowed by that section was the passing of the Survey Officer's decision and in *Annamalai* v. *Cloete* (1) and *Seshamma* v. *Sankara* (2), it was held that the decision was passed when it was communicated to the parties.

The language of section 13 of Act IV of 1897 (Madras) is somewhat different. The starting point is the date of the decision of the Survey Officer, and in the present case, that is a decision to which the provisions of section 24 are applicable, and section 13 is made by section 25 to apply *mutatis mutandis* in the case of a final decision passed under section 24. The starting point is, therefore, the date of the decision passed under section 24. We find no difficulty in holding that the date of the decision is the date on which the decision is passed; and, therefore, that the starting point is the date of the passing of the decision. The precedents seem, therefore, to be in point, there being no material difference between the earlier and the later acts so far as the present matter is concerned.

Section 24 of Act IV of 1897 requires the decision to be recorded in writing with its reasons and communicated to the parties, but these provisions do not very greatly help us to determine on what date the decision is passed. Both sides rely on section 11 (3) read with section 12 (*a*), the Government Pleader as showing that there is a difference between the date of the order and the date of communication thereof, and Mr. Sundara Aiyar as making it plain that it is only a communicated order that sets limitation running. The somewhat peculiar provisions of section 12 (*a*) may perhaps be explained by the fact that in section 11 (3) the making of the order and its communication are intended to be practically simultaneous: the communication is to be 'forthwith'. Though, therefore, this provision supports the Government Pleader to the extent that it shows that the date of the order and the date of communication may in the contemplation of the legislature be different dates, still it does not support the more important inference that the Act contemplates the starting of limitation before the communication of the order to the parties.

There is some difficulty in the matter, but on the whole we think we ought to follow the authorities to which we have referred, which hold that the date of a decision is the date of its communication to the parties. A decision cannot properly be said to be passed until it is in some way pronounced or published under such circumstances that the parties affected by it have a reasonable opportunity of knowing what it contains. Till then though it may be written out, signed and dated, it is nothing but the decision which the officer intends to pass. It is not passed so long as it is open to him to tear up what he has written and write something else.

We do not say that in all cases the decision under section 24 of the Act (IV of 1897) is passed on the day on which the information required by that section reaches the party to whom it has to be given. There seems to be nothing to prevent the Survey Officer from giving parties sufficient notice of the day on which he will pass his decision, to enable them, if they choose, to be present and hear

(1) 6 M. 189.
(2) 12 M. 1.

it, and if that is done limitation would run from that day if the decision is announced on that day. That is the date of communication though the parties may not care to listen.

But if the course adopted in the present case is taken, and the Survey Officer publishes his decision by sending copies of it to the parties, the date of communication will be different. It will not necessarily be the date on which the copy actually comes into the hands of the party, and on that point the Government Pleader had something to say. But we do not think we ought now to institute an inquiry as to what is the true date of communication in this case; it seems to have been accepted in the Court below that the date of receipt of the order is the date of communication. We, therefore, overrule the contention of the Government Pleader that the suit is barred by limitation. On the merits we are not prepared to say the District Judge has come to a wrong conclusion. It is the case of both parties that two channels Enugakodu and Mattavanikodu formerly existed, and the decision of the question at issue turns upon the position of Mattavanikodu. We find now on the ground a drainage channel dug by the Department of Public Works some five years prior to the Survey Officer's enquiry, and also a channel some distance to the north. It is between these channels that the land in dispute lies. The plaintiff's case is that the drainage channel occupies the bed of the Mattavanikodu. The case for the 1st defendant is that Mattavanikodu was further to the south. But no such channel is now in existence, nor is there any evidence that any such channel ever existed. On the other hand, there is evidence to support the plaintiff's case, and one of the 1st defendant's witnesses admitted that the drainage channel might have been dug on the site of Mattavanikodu as to the relative positions of Enugakodu and Mattavanikodu there is no doubt, for Exhibits H and K show that the former was north of the latter. Again according to the Survey Officer the drainage channel was dug along the lowest line of country, and he assumes, and the assumption is reasonable, that there was along the line an important stream. If this were so, and the stream was known as Enugakodu we should expect to find it given as the northern boundary of Amadalapalli just as it is given as the northern boundary of villages to the west. We think, therefore, that all the probabilities point to the present drainage channel as the site of Mattavanikodu and to the northern channel being Enugakodu. This would also fit in quite well with the boundaries given in the old account for the village of Amadalapalli.

The appeal is, therefore, dismissed with costs.

This decree should be satisfied within three months from this date.

Appeal dismissed.

(s. c. 1 M. W. N. 522; 8 M. L. T. 326.)

MADRAS HIGH COURT.

REFERRED TRIAL NO. 17 OF 1910.

CRIMINAL APPEALS NOS. 137 TO 151, 161 TO 163 AND 205 OF 1910.

August 18, 1910.

Present:—Mr. Justice Munro and Mr. Justice Sankaran Nair.

GADE CHENNAPPAREDDI AND OTHERS—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss. 149, 302—Murder—Common object of a mob—Likelihood of murder being committed.

At the annual Sivarathiri festival at Kottappa Konda, which was attended by innumerable people, a constable S and the 6th accused got drunk and grew disorderly. Both fell down unconscious. The Sub-Inspector with other constables came to the spot and arrested the 6th accused as a murderer. A crowd collected round them. On the way, constable S was struck with a stick and he in return killed one of the crowd with a bayonet. This inflamed the crowd which arrived at the Police Station and demanded the release of the 6th accused which was refused. The 1st accused took a prominent part in the riot from the attack on the Police Station, when he incited the crowd to throw stones and beat the police, to the burning of the tents, the final act in the riot. The constable S then got into the hands of mob and was murdered and burnt: *Held*, that the 1st accused was guilty under sections 302 and 149, Indian Penal Code, because it was a common object of the mob to take vengeance on S, who had bayonetted one of their number and the 1st accused must be taken to have known that S was likely to be murdered if the mob caught him.

Trial referred by the Additional Court of Session of the Guntur Division for confirmation of the sentence of death passed upon the said 1st Prisoner in Case No. 27 of the Calendar for 1909 and appeals against the sentence of the Additional Court of Session of the Guntur Division, in Case No. 27 of the Calendar for 1909.

GADE CHENNAPPAREDDI *v.* EMPEROR.

Mr. *S. Swaminathan*, for the Petitioners.
Mr. *T. Richmond*, Contra.

Judgment.

Munro, J.—Twenty-one persons are concerned in these appeals. They have been convicted of various offences under the Indian Penal Code in connection with a riot which took place at Kotappakonda in the Guntur District on the 18th February 1909. During the riot a constable Seshayya and a Salt peon Mastan were killed, various other Police officers were assaulted, and a Police Station, a Choultry, some Revenue sheds and the tents and furniture of the District Superintendent of Police and Salt officials were set on fire. A general description of the origin and course of the riot is given by the Sessions Judge in paragraphs Nos. 6 to 16 of his judgment. That description has not been challenged before us and it appears to be substantially correct. Most of the appellants were arrested as the result of identification parades. Objections to the *bona fides* of these parades were taken before the Sessions Judge. The Sessions Judge found that objections were unfounded, and that the parades were properly conducted. No attempt, save in the case of the 1st accused, has been made before us to contest this finding, which I have no doubt is correct. I shall now proceed to consider the case of each appellant.

Gade Chennappareddi, appellant in Criminal Appeal No. 150 of 1910 and the 1st accused in the Sessions Court, has been convicted of offences under sections 147 333, 435, 436, 307 and 302 of the Indian Penal Code, these offences being involved in counts Nos. 1, 2, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21 and 23 of the charge and sentenced to death. The evidence of the prosecution witnesses Nos. 1, 7, 8, 10, 13, 17, 20, 21, 22, 23, 24, 26, 27, 28, 32, 72, 80 and 86 leaves no doubt that the 1st accused took a prominent part in the riot from the attack on the Police Station, when he incited the crowd to throw stones and beat the Police, to the burning of the tents which may be taken to be the final act in the riot. The 1st accused was well-known to the Station House officer, the prosecution witness No. 1. His name was mentioned the same night by that officer to the Head Assistant Magistrate, Mr. Kershasp. A telegram directing his arrest was sent to the Police Inspector of Bapatla, and he was arrested on the evening of the 20th February. He attempted to prove an *alibi* in the Sessions Court, but the Sessions Judge rightly refused to believe his witnesses. He was sentenced to death because he was found to have actually taken part in the murder of the constable Seshayya, and because he was the leader of a crowd which committed that and another murder. The evidence, which has been correctly summarised by the Sessions Judge in paragraph No. 60 of his judgment, leaves no doubt as to the guilt of the 1st accused on counts Nos. 1 (section 147, Indian Penal Code), 3 (sections 307 and 149, Indian Penal Code), 9 (sections 333 and 149, Indian Penal Code in respect of Police Inspector, Subbarayalu Chetti), 11 (sections 333 and 149, Indian Penal Code in respect of Police Inspector, Sanyasayya Naidu), 13 (sections 333 and 149, Indian Penal Code in respect of Station House officer, Krishnayya Naidu), 15 (sections 333 and 149, Indian Penal Code in respect of the District Superintendent of Police), 17 (sections 333 and 149, Indian Penal Code in respect of Sub-Inspector, Sriramulu Chetti), 19 (sections 435 and 149, Indian Penal Code in respect of the burning of the tents), 21 (sections 436 and 149, Indian Penal Code in respect of the burning of the Revenue sheds) and 23 (sections 436 and 149, Indian Penal Code in respect of the burning of the Choultry). The other counts on which the 1st accused has been found guilty are counts Nos. 2, 5 and 7. Count No. 2 (sections 436 and 149, Indian Penal Code) relates to the burning of the Police Station, the first act of arson committed in the riot. There is no evidence that the 1st accused himself set fire to the Police Station, and he can only be found guilty on this count if it is held that the Police Station was set on fire in prosecution of the common object of the unlawful assembly, or that the members of the assembly knew that the Police Station was likely to be set on fire in prosecution of the common object. Now there can be no doubt that the common object of the assembly when it first went to the Police Station was to secure the release of the 6th accused in the case who had been arrested by the Police. It is impossible on the evidence before us to predicate that, before the station was actually set on fire by some person or persons, yet as unknown, the assembly had formed any

S. N. DAR, B.A., LL. B.,
Vakil High Court,
SRINAGAR (Kashmir)

intention to burn the Police Station, or knew that it was likely to be burnt. I, therefore, find the 1st accused not guilty and acquit him under count No. 2. Count No. 5 (sections 302 and 149, Indian Penal Code) relates to the murder of constable Seshayya. That the 1st accused is guilty under this count is clear, for there can be no doubt that it was a common object of the mob to take vengeance on Seshayya who had bayonetted one of their number, and the 1st accused must be taken to have known that Seshayya was likely to be murdered if the mob caught him. The Sessions Judge has, however, found that the 1st accused actually took part in the murder of Seshayya, and largely on that ground has sentenced him to death instead of transportation for life, the sentence passed on the other appellants who were found guilty under sections 302 and 149, Indian Penal Code. It, therefore, becomes necessary to examine the evidence bearing upon the actual participation by the 1st accused in the murder of Seshayya who was first beaten and knocked down and burnt. The evidence is that of the prosecution witnesses Nos. 7, 8 and 32. Prosecution witness No. 7 stated that Seshayya was lying on the ground, that some persons threw straw upon him and set fire to it while he was still alive, and that the 1st accused was among those who burnt Seshayya. In answer to questions in cross-examination, he said that the 1st accused piled straw on Seshayya, and, again, that the 1st accused twice or thrice threw straw on Seshayya when he moved. One objection taken to the evidence of this witness is that he did not impart his knowledge of the murder of Seshayya to the authorities at the earliest possible opportunity. It is not clear that the witness did mention his knowledge till after he had identified the 1st accused on the 2nd April at Guntur, though he had been with the Police as early as the 27th February when he took part in an identification parade at Palakalur. I do not, however, attach much importance to this, seeing that he did not previously know the persons whom he says he saw take part in the murder of Seshayya. He appears to have waited until the investigating Police Inspector Mr. Rajagopal Row, who must have had many people to examine, came to take a statement from him in his turn, and I do not think that the fact that he did so would itself be sufficient reason for rejecting his evidence. The other objection taken to his evidence is more important because it is contended that it throws doubt upon the identification of the 1st accused by the witness at Guntur. In the Sessions Court the witness made the following statement in cross-examination:— "When I identified 1st accused, all those people were standing in a line. I said in the lower Court that I identified people in the *Taluk Cutchery* that day. I did not say that I was not shown any except 1st accused when I identified him in Guntur." Exhibit II, a deposition given by the witness before the Committing Magistrate, contains the following:— "I was not shown any except the 1st accused when I identified in Guntur," so that the witness apparently denied in the Sessions Court a statement which he undoubtedly made before the Committing Magistrate, Mr. Robertson. Now the meaning, which appears to have been put upon the statement when it was translated into Telugu and put to the witness in cross-examination, is that when he identified the 1st accused, the 1st accused was not mixed up with others but was made to stand alone. It is this meaning which in this Court also is sought to be put upon the statement. Now if that is what the witness really meant, it is difficult to believe that Mr. Robertson would have used the language he did. The more natural meaning of the English is that the 1st accused was the only accused person shown to the witness when he identified at Guntur, and if this is taken to be the meaning, the witness was entirely right in denying that he had made the statement imputed to him. One apparent difficulty is that the witness in fact identified at Guntur not only the 1st accused, but also the 43rd and 44th accused. At the hearing, counsel for the Crown was unable to suggest any explanation, except that the statement of the witness might have been wrongly recorded by Mr. Robertson. I find, however, that the statement was strictly accurate in the circumstances in which it was made. In the early stages of the preliminary enquiry there were 58 accused persons and these were divided into three batches. These batches were put up separately before the Magistrate, and the present prosecution witness No. 7 and some other witnesses were examined separate-

ly, as against each batch. Thus we find three depositions given by the prosecution witness No. 7. Exhibit II is his deposition against the batch consisting of accused Nos. 1 to 20 before the Committing Magistrate, and of the three accused identified at Guntur, only the 1st accused was in this batch. The accused Nos. 43 and 44 were in the third batch as the 56th and 55th accused, and the prosecution witness No 7 spoke specifically against them in his deposition taken in respect of that batch. Thus the witness clearly meant that of the accused before him when he gave his deposition Exhibit II, only the 1st accused was shown when he identified at Guntur, and that was a correct statement. This view is further supported by the fact that the 1st accused in his statements never suggested any trickery in the matter of his identification, nor did his pleader before the Committing Magistrate attempt to elicit any, but was apparently content with the answer of the witness:—"About a month after the occurrence I identified 1st accused in Guntar". This objection, therefore, also fails, and I see no reason to differ from the Sessions Judge as to the reliability of the evidence of his witness as against the 1st accused. The prosecution witness No. 8 stated that he saw straw piled on Seshayya and set fire to. He identified six persons before the Committing Magistrate, but of them he, in examination-in-chief on the 4th September 1909 before the Sessions Judge, failed to identify the 1st accused and another. He had also identified the 1st accused in a parade on the 8th March 1909. On the 7th September. the witness was confronted with the 1st accused and then explained that he had not identified him on the previous occasion because it was very dark and because he had shaved. He then added that the 1st accused threw straw on the constable and said he must be burnt. Considering the lapse of time the failure at first to pick out the 1st accused is not necessarily fatal to the evidence of this witness though it might not be safe to act on that evidence if it stood alone. Another objection taken to the evidence of this witness is that though he and the prosecution witnesses Nos. 10 and 11 appeared before Police Inspector Shaw the day after the riot and gave some information, neither the Inspector who knew no Telugu nor the Head Constable, the Court witness No. 4, who interpreted to him in such scanty English as he possessed can remember whether the burning of a constable was mentioned. It is quite clear, however, that Shaw's examination of his informant was of the most perfunctory and insufficient character. The prosecution witness No. 32 says the 1st accused was one of those who pursued and beat Seshayya and the only thing urged against him is that he is related to the Station House Officer the prosecution witness No. 1. I think the evidence of the prosecution witnesses Nos. 7, 8 and 32 taken together leaves no reasonable doubt that the 1st accused did actually take part in the murder of Seshayya. Count No. 7 relates to the murder of the Salt peon Mastan. There is no evidence that the 1st accused himself beat Mastan and it is contended that section 149, Indian Penal Code, does not apply as the mob had no common intention to beat the Salt Officials. No doubt, there does not appear to have been such an intention at first, but it developed when a Salt peon, the prosecution witness No. 110, picked up a carbine, and a general attack was made on the Salt Inspector and his peons, with the result that Mastan was so severely injured that he died. The attitude of the 1st accused in the matter is shown by the evidence of the prosecution witness No. 10, who says that, when he gave some water to Mastan after his beating, the 1st accused abused and assaulted him for doing so. I think there are sufficient materials in the case of the 1st accused, especially considering the leading part which he undoubtedly took throughout, to warrant a conviction under the 7th count. The result is that I confirm the conviction on all counts except the 2nd and also the sentence of death and other sentences passed except that the fine of Rs. 500 imposed under section 436, Indian Penal Code, is remitted.

The 4th accused K. Venkatareddi has been convicted under sections 147, 333 and 436, Indian Penal Code, these offences being involved in charges Nos. 1, 2, 9, 11 and 13 already particularised when dealing with the 1st accused. For the same reasons as in the case of the 1st accused, I find this accused not guilty and acquit him under count No. 2 (section 436, Indian Penal Code). There is abundant reliable evidence to warrant the conviction of the 4th accused under the other counts. The defence set up in the Sessions Court was not pressed upon us. I confirm the conviction under sections 147 and 333,

Indian Penal Code, and the sentence of four years' rigorous imprisonment passed under section 333, Indian Penal Code. The sentence of two year's rigorous imprisonment passed under section 436, Indian Penal Code, I set aside.

The 9th accused, D. Venkatareddi, has been convicted under sections 147 and 333, Indian Penal Code, and I think the conviction is right, and that the defence of *alibi* was rightly disbelieved. I confirm the conviction and sentence passed on this accused.

The 11th accused, Nune Nagireddi, has been convicted under sections 147 and 333, Indian Penal Code, and the evidence warrants the conviction. The defence put forward in the Sessions Court was not pressed upon us. I confirm the conviction and sentence.

The 12th accused, Kasa Venkatasawmy, has been convicted under sections 147, 333 and 436, Indian Penal Code. The conviction under section 439, Indian Penal Code, is set aside as in the case of the 1st accused. The conviction under the other sections is warranted by the evidence. The evidence of *alibi* was rightly disbelieved by the Sessions Judge. I confirm the conviction under sections 147 and 333, Indian Penal Code, and the sentence of four years' rigorous imprisonment. I set aside the sentence of two years' rigorous imprisonment under section 436, Indian Penal Code.

The 13th accused, Allam Pakirayya, has been convicted under sections 147 and 333, Indian Penal Code, and the evidence justifies his conviction. His defence in the Sessions Court was not pressed upon us. I confirm the conviction and sentence.

The 14th accused, Nadikattu Venkatareddi, has been convicted under sections 147, 333, 436, 307 and 302, Indian Penal Code. The conviction under these sections is supported by abundant evidence, which has been correctly set out by the Sessions Judge and I think the conviction is right save upon the 2nd count. The *alibi* set up in the Sessions Court was not pressed upon us. I acquit the accused on the 2nd count but confirm the conviction under the other counts. The sentences are confirmed save that the sentence of Rs. 500 fine is set aside as the accused has been acquitted of one of the offences under section 436, Indian Penal Code, with which he was charged.

The 15th accused, Dondeti Atchireddi, has been convicted under sections 147 333, 435, 436, 307 and 302, Indian Penal Code, and there is no reason to doubt that he has been rightly convicted save under the 2nd count. The *alibi* set up in the Sessions Court has been relied upon here, but there is no reason to disbelieve the evidence of the Sub-Magistrate which proves the presence of the accused at the riot. I confirm the conviction and sentences save that the accused is acquitted on the 2nd count and that the fine of Rs. 500 is remitted as in the case of the 14th accused.

The 16th accused, Tota Kotayya, has been convicted under sections 147, 333, 436 and 307, Indian Penal Code. The conviction under section 436, Indian Penal Code, is in respect of the 2nd count and is set aside together with the sentence of two years' rigorous imprisonment. The conviction under the other sections is fully justified by the evidence. The defence evidence of *alibi* was not pressed upon us. This accused appears to be only sixteen years of age. I think it sufficient to sentence him to three years' rigorous imprisonment.

The 17th accused, Kotta Veeranna, has been convicted under sections 147, 333, 435, 436 and 307, Indian Penal Code. The conviction and sentence under section 436, Indian Penal Code, are set aside as in the case of 16th accused. The conviction under the other sections is, I think, right, and is confirmed together with the sentences passed.

The 22nd accused. Pappula Thomas, the 23rd accused, Yanamala Chelamadu, and the 24th accused, Chintabattuni Rayulugadu, have been convicted under sections 147, 333 and 436, Indian Penal Code. The conviction and sentence under section 436, Indian Penal Code, are set aside as the conviction relates to the 2nd count. The convictions under the other sections are supported by strong evidence which is practically the same against all and are clearly right. I confirm them and the sentences passed under section 333, Indian Penal Code.

The 30th accused, Sivalasetti Veerayya, has been convicted under sections 147 and 333, Indian Penal Code. I think the Sessions Judge was right in believing the evidence of prosecution witnesses Nos. 115 and 118. The defence evidence was

not pressed upon us. I confirm the conviction and sentence.

The 32nd accused, Sontem Pulliah, has been convicted under sections 147 and 333, Indian Penal Code, I see no sufficient reason to discredit the evidence of the prosecution witnesses Nos. 27 and 83. The defence evidence was rightly disbelieved by the Sessions Judge. I confirm the conviction and sentence.

The 34th accused, Nallapati Ramasawmy, has been convicted under sections 147, 333 and 436, Indian Penal Code. The offence under section 436, Indian Penal Code, relates to the 2nd count. The conviction and sentence under that section are set aside. The conviction under the other section is clearly right. The defence of *alibi* was not pressed upon us. I confirm the conviction under sections 147 and 333, Indian Penal Code, and also the sentence passed under the latter section.

The 35th accused, Nadipineni Appayya, has been convicted under sections 147 and 323, Indian Penal Code, and I think the conviction is warranted by the evidence. We have been pressed with the evidence adduced to prove an *alibi*. That evidence is to the effect that the accused paid some money at Narasarowpet about 11 A. M. and was seen again in his village about 2 P. M. It is clear, however, from his own statement that the accused set up the case that he started from his village for Narasarowpet which is three miles away, sometime afternoon in order to pay the money. Everything depends upon the hour at which the accused was seen as his village which is only eleven miles from the scene of the riot, and I think the Sessions Judge was right in rejecting the *alibi* evidence. I confirm the conviction and sentence.

The 41st accused, Gunturu Govindu, has been convicted under sections 147, 333, 302 and 435, Indian Penal Code. That he joined in the attack on the Police Station and helped to burn the tents is, I think, well proved by the evidence of the prosecution witnesses Nos. 80, 83 and 10. The main contention has been that it is not satisfactorily proved that he took part in the beating of Mastan. The prosecution witness No. 11 is the only witness who says he did. Other witnesses, who saw Mastan being beaten, do not mention the accused as one of his assailants. On the other hand, there is no reason to disbelieve the Salt Sub-Inspector the prosecution witness No. 13, who recognised the accused among the gang which attacked the Salt party and tells us what the accused said. The fact that the Salt peon, prosecution witness No. 16, is not able to identify the accused is not sufficient reason for rejecting the evidence of the Sub-Inspector. Thus the accused was on the spot and there is nothing improbable in the evidence of prosecution witness No. 11. The evidence shows that owing to the beating which is spoken to Mastan fell down, bled at the head and was covered with blood. The medical evidence shows that his skull was fractured in three places, and there can be no reasonable doubt that his assailants meant or knew they were likely to kill him. As to the *alibi* evidence, it is to the effect that on the morning of the riot the accused was given some rice. All depends on the hour, and no reliance can be placed on this part of the evidence. The accused's village is only twenty miles from the scene of the riot and he could have received rice in the morning and still have been at the scene of the riot by noon. I confirm the conviction and sentences.

The 44th accused, S. Chinna Ramayya, has been convicted under section 435, Indian Penal Code, for taking part in the burning of the tents. The prosecution witness No. 8 says he saw the accused throw a record box into a burning tent. The prosecution witness No. 10 merely says he saw the accused standing near a tent when others were pulling the tents down and setting them on fire. The case thus depends on the evidence of the prosecution witness No. 8, a Mala Christian. It was contended for the accused that the prosecution witness No. 8 had been influenced by one Daniel, another Mala Christian, to identify the accused at the village parade at Panithem on the 14th March 1909. Now in Exhibit XXXV*a*, which is dated the 8th March 1909, Daniel, a resident of Panithem, brought a complaint of assault &c., against the 44th accused and others and alleged that he had been assaulted because he had not agreed to keep quiet as to their presence at the Kotappakonda riot. There can be no doubt, therefore, that Daniel bore a grudge against the accused and might have tried

to influence the prosecution witness No. 8 against him. It has not been shown that it was impossible for Daniel to get into communication with the prosecution witness No. 8 before the identification. The accused is the money-lender of his village and is a middle-aged man and it is somewhat unlikely that he would take an active part in the riot. I think it unsafe to act on the sole evidence of the prosecution witness No. 8. I, therefore, give the 44th accused the benefit of the doubt, acquit him and direct his release.

The 46th accused, P. Chinna Venkatappayya, has been convicted under sections 147, 333, 302 and 435, Indian Penal Code. He is the Village Munsif of Panithem and 25 years old. The evidence of the prosecution witness Nos. 8, 10, 11, and 46, if believed, justifies his conviction. The evidence of the prosecution witness No. 8 was attacked on the ground of Daniel's enmity as in the case of the 44th accused. But the present accused was not one of those complained against in Exhibit XXXV*a*, and the allegation of enmity, which had force in the case of the 44th accused, has little to support it. All that appears is that when a complaint of encroachment by Daniel was made to the 46th accused and the *karnam*, these Officers reported unfavourably to Daniel. The evidence of the prosecution witness No. 8 that the 46th accused threw a record box into a burning tent, receives support from the statement of the prosecution witness No. 10 against whom nothing has been shown, that the 46th accused actually set fire to a tent. There is no reason to reject the evidence of the prosecution witness No. 46, who saw the accused throwing stones at the Police Station, and finally the prosecution witness No. 11 proves that the accused took part in the beating of Mastan. We are asked not to accept the evidence of the prosecution witness No. 11 on the ground that it conflicts with the evidence of the Salt Inspector, Mr. Fearon, the defence witness No. 40. There is an apparent conflict, but as the Sessions Judge has shown, the two versions are not necessarily irreconcilable. The prosecution witness No. 11, who has not been shown to have any motive for giving false evidence, has told the same story consistently since he first gave a statement to the Sub-Magistrate three days after the riot, and I should be prepared to accept his version of the sequence of events rather than that of Mr. Fearon, who was first examined 8½ months after the event. Further the prosecution witness No. 11 was not in cross-examination asked anything regarding the version which the defence presumably expected Mr. Fearon to give. Had he been so cross-examined, he might have been able to explain the apparent inconsistency. The defence set up is *alibi*, and I agree with the Sessions Judge that it is not proved. That in support of the *alibi* a number of false documents were concocted is plain, and the accused's counsel did not attempt to rely upon those documents. The success of the plea must then depend upon the evidence of defence witness No. 100, the Taluk Head Accountant of Sattanepalli, which is 22 miles from the scene of the riot, for the evidence of the other witnesses is conflicting and patently unreliable. The defence witness No. 100 says he saw the accused at Sattanepalli between 4 and 4-30 P. M. on the day of the riot, and again between 6 and 7 P. M. That the accused showed himself to the defence witness No. 100 about 7 P. M. on the day of the riot is not disputed, but it is contended that the witness told a lie when he said he saw the accused between 4 and 4-30 P. M. The witness admits that he did not speak to the accused when he saw him about 4 P. M. He had gone out to ease himself and merely saw the accused on the way. There is thus a possibility that he may have been mistaken. The matter clearly had not impressed itself on his memory seeing that in Exhibit ZZ, he merely reported that he had seen the accused at Sattenapalli on the night of the 18th February, and he admits that he considers that night does not begin till 6 P. M. When Exhibit ZZ was written, the accused had been arrested and the question whether he had been rightly arrested or not was clearly in the mind of the witness. To have been seen at night at Sattenapalli on the 18th February would have been useless for the purpose of establishing an *alibi*, for the accused could easily have got to Sattenapalli before 7 P. M. If, therefore, the witness had really seen the accused about 4 P. M it is unlikely he would have forgotten it when he wrote Exhibit ZZ. I think that the witness is either lying or

is self-deceived. That his standard of veracity is not very high is sufficiently clear from his cross-examination, when he tried to explain how he remembered the night he saw the accused. He said he remembered because he was invited out to dinner and because he was delayed by having to get medicine for a "friend" who was stung by a scorpion. Unfortunately for him the matter was pursued and he had to admit that he could not remember the name of his host and that the man who was stung by a scorpion was a Sudra passer-by whom he had never seen before and never saw again, and whom he left in the lurch after all as his host hurried him off to dinner. There can be no doubt that all this is pure romance. I reject the evidence of *alibi* and confirm the conviction and sentences.

The 5th accused, Beduduri Kottireddi, has been convicted under sections 147, 333 and 435, Indian Penal Code. The conviction under section 436, Indian Penal Code, relates to the second count and it and the sentence of two years' rigorous imprisonment are set aside. That this accused was at the Choultry is proved by the evidence of the Sub-Magistrate, prosecution witness No. 25, and is admitted. It is contended, however, that the accused took no part in the riot. The prosecution witness No. 105, a constable, says the accused was inciting the mob to beat the Police, the prosecution witness No. 114, that he was throwing stones at the Police Station, and the prosecution witness No. 90 that he struck him on the forehead with a stick when he was escaping from the station. No attempt has been made to show any motive for giving false evidence in the case of the prosecution witnesses Nos. 90 and 114 and the Sessions Judge was very favourably impressed with the first of these witnesses. The attempt to prove enmity in the case of the prosecution witness No. 105 entirely broke down. The attempt to prove that the accused could not have been among the rioters also failed. That he left his cart is admitted and there is no satisfactory evidence as to how long he was away. Those, who took part in the attack on the Police Station, must at the least be taken to have known that the grievous hurt was likely to be caused by the stone throwing to some of the Police who were in the Station. The prosecution witness No. 5 had his shoulder dislocated by a blow from one of the stones. I confirm the conviction under sections 147 and 333, Indian Penal Code, and the sentence passed under section 333, Indian Penal Code.

Sankaran Nair, J.—I concur and have only to add a few words as to the general features of the riot. In a clear and exhaustive judgment, Sessions Judge has fully analysed the evidenceand we agree in his conclusions. The annual Sivaratri festival at Kotappakonda is attended by about 50,000 people, and the riot took place on the principal day of the festival. The Judge has found and the prosecution evidence clearly shows that the riot had its origin in a drunken brawl. Syed Hussain, a constable, the 3rd court witness and Timma Reddi, the 6th accused whom the Judge has acquitted, both got drunk in an arrack shop: the constable demanded more drink which Timma Reddy refused, whereon the constable started to take him to the station for being 'drunk and disorderly.' Timma Reddy resisted. Both fell down and were in an entirely helpless condition due to drink. The Sub-Inspector with other constables arrived at the spot having heard that the constable was killed, and, as the Judge points out, his inert body on the ground supported that view. He accordingly arrested Timma Reddy perhaps honestly believing he was a murderer. The crowd knowing the facts and seeing the man wrongly arrested and no enquiry held on the spot got excited and followed the arrested man. On the way a constable, Seshayya, was struck with a stick, and Seshayya struck a man—apparently not the man who struck him—with a bayonet and killed him. This, of course, increased the exasperation of the crowd. On arrival at the Police Station they demanded the release of Timma Reddi which was refused. The Station House Officer proves that the crowd which demanded the release "were mostly drunken." They pelted the Station with stones. The Judge finds and the probabilities support his conclusion that a large portion of the crowd held back from further offences and separated from the mob and the subsequent offences were committed by a gang of 30 to 50 persons. They set fire to the Police Station, caught hold of Seshayya, as he attempted to escape, collected straw which was lying about, piled it on him, set fire to it and burnt him. The other policemen escaped.

Mr. Subba Rao, the Superintendent of Police arrived when the station was almost burnt out. He could do nothing. The mob attacked him and inflicted such severe injuries that he was rendered helpless. He escaped to a choultry which also was set fire to and burnt.

The Joint Magistrate, Mr. Kershasp, arrived soon after. He also was unable to do anything and had apparently to run for his life. According to his *dalayat* and the Sub-Magistrate who was with him "the mob were drunk." The crowd then turned their attention to Mr. Fearon and his men. A catechist, the prosecution witness No. 11, helped him to escape in the guise of a missionary, and one of his men Mastan who was clinging to him, was dragged from him and beaten to death and his tents were burnt. The evidence of this catechist and another catechist, prosecution witness No. 8, also make it clear that but for drink it is very probable there would have been no attack on Mr. Fearon and his men.

From start to finish it is clear that the rioters consisted mainly of men who were drunk and excited by an apparent act of injustice. They were led by *budmashes* like the 1st accused who took advantage of their conditions. As usual with a large Indian crowd, the majority stood looking on without interfering with the rioters who formed a comparatively small body. The latter led by *budmashes* had in their then condition no respect for constituted authority. For this festival four temporary arrack shops were put up. They were opened also the year previous. There was also one toddy shop. There is no evidence that there were liquor shops there before, and the evidence leaves no doubt that these liquor shops really led to this unfortunate riot where at least four or five men were killed, many wounded and all authority set at defiance.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 198 OF 1909.

April 21, 1910.

Present:—Mr. Evans, A. J. C.

Thakur SHEO GHULAM SINGH—PLAINTIFF—APPELLANT

versus

HAUSILA SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

"Under-proprietary right," facts necessary to establish —Sub-Settlement Act (Oudh XXVI of 1866), *R.* 10—*Provisions in the rule not exhaustive—Acknowledgment of under-proprietary right sufficient to establish it.*

The provisions of Sub-Settlement Act (Oudh XXVI of 1866) are not necessarily exhaustive and an under-proprietary right can also be established by evidence of some specific grant or by an acknowledgment by the superior proprietor.

Maharaja Jagat Jit Singh v. *Suraj Bakhsh*, 8 O. C. 145, *Raja Bhagwan Bakksh Singh* v. *Muzhar Hussain*, 9 O. C. 167, *Murad Bakhsh* v. *Raja Mumtaz Ali Khan*, 4 O. C. 31, *Widow of Shunker Sahai* v. *Rajah Kashi Pershad*, 4 I. A. 198, referred to.

Appeal against the order of the Subordinate Judge of Unao, dated the 27th February 1909, upholding the order of the Munsif of Purwa, dated the 21st August 1908.

The Hon'ble Mr. *Mohammad Nasim*, for the Appellant.

Pandit *Gokaran Nath Misra*, for the Respondent.

Judgment.—This is an appeal against a decree of the Subordinate Judge of Unao, upholding a decision of the Munsif of Purwa. The appellant instituted a suit asking for a declaration that Hausila Singh, respondent No. 1, had no proprietary rights, superior or inferior, with respect to certain land specified in paragraph 3 of the plaint, the area of which is 9 *bighas* 4 *biswas* and 19 *biswansis*. Respondent No. 2 Sheo Charan obtained two mortgages from respondent No. 1 of this land dated the 15th July 1889 and the 7th June 1890. The appellant is admittedly a mortgagee of the share in the village in which this land is situate under a deed of 1885 executed by Mahesh Bakhsh *Talukdar* and he is in possession of that share. The Courts below concurrently found that respondent No. 1 was a near relation of the *Talukdar* mortgagor and he had under-proprietary rights in land in suit. This finding is attacked in second appeal. It is conceded that this finding, so far as it is based on certain facts, is binding on this Court, but it is contended that the Courts below have not understood what facts it is necessary to estab-

lish before an under proprietary title can be proved and I am referred to *Maharaja Jagat Jit Singh* v. *Suraj Bakhsh Singh* (1) and *Raja Bhagwan Bakhsh Singh* v. *Mazhar Husain* (2). On behalf of the respondents, I am referred to *Murad Bakhsh* v. *Raja Mumtaz Ali Khan* (3), where a ruling of their Lordships of the Privy Council in *Widow of Shunker Sahai* v. *Rajah Kashi Pershad* (4), was referred to, in which their Lordships held that the provisions of Act XVI of 1866 were not necessarily exhaustive and that a right to sub-settlement can be established otherwise than under the Act. I take it that the law on this subject is quite clear. In *Maharaja Jagat Jit Singh* v. *Suraj Bakhsh* (1). Wells, A. J. C., laid down the points which it is necessary to prove before an under-proprietary title can be established under Rule 10 of the Rules in Schedule attached to Act XXVI of 1866.

These may be called the points to prove an under-proprietary title by prescription. In *Raja Bhagwan Bakhsh Singh* v. *Muzhar Husain* (2), it is laid down that an under-proprietary title can also be proved by evidence of some specific grant or by an acknowledgment by the *taluqdar*. In this case the relationship of the respondent Hausila Singh to the *taluqdar* appears from the following table :—

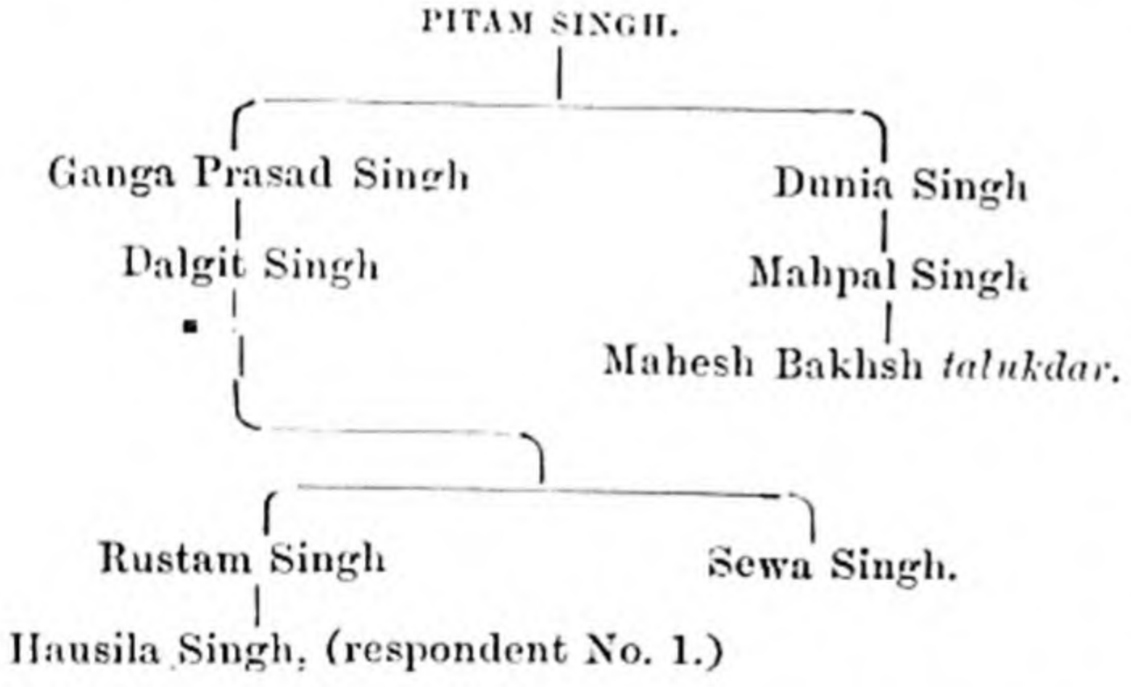

Exhibit A1 is a certified copy of a statement made by Mahpal Singh on the 5th January 1859. In that statement he gave a list of his co-sharers, amongst whom is included Ganga Prasad great-grand-father of the respondent Hausila Singh, and he stated that they were not in possession of any portion of the property but were in the enjoyment of certain *huq huquq*. Exhibit A14 is a statement purporting to be made by Mahesh Bakhsh son of Mahpal Singh on the 24th November 1884 before the District Judge of Lucknow. This statement is to the effect that 15 *bighas* 16 *biswas* of land rented at Rs. 19-13-0, had been given to Rustam Singh and Sewa Singh with power of transfer. A reference to the table noted above shows that Rustam Singh and Sewa Singh are the father and uncle of the respondent Hausila Singh. It is contended on behalf of the appellant that there is not proof that Mahesh Bakhsh *Taluqdar* ever made this statement before the Judge, because there is no evidence of any person present at the time that Mahesh Bakhsh personally appeared and made the statement before the Court. On the other hand, it is contended that it must be presumed, in the absence of any evidence to the contrary, that Mahesh Bakhsh did appear before the District Judge and that he was not personated by any one else and the fact that the description of the person whose evidence was recorded corresponds to the *taluqdar* Mahesh Bakhsh is sufficient proof that he had actually appeared in person and gave his evidence. I may observe that counsel for the appellant has in course of his argument urged that, even if it be assumed that Mahesh Bakhsh made a statement in 1884, he simply told a lie because he wished to defeat the claim which was being made against him for a portion of his estate by some of his relations. I cannot accept this contention. The statement made was one to a certain extent against the interests of the deponent Mahesh Bakhsh and it is obvious that if any person had come and personated the *taluqdar*, this personation could not have escaped undetected by the relations of Mahesh Bakhsh who were suing him for a share of the estate and the fact that no question was put to the witness suggesting that he was not Mahesh Bakhsh, is to my mind, in this particular case, a clear indication that Mahesh Bakhsh was the man who made the statement. Such being the case, without considering any other evidence on the record, I hold that this statement is an admission by the mortgagor and predecessor of the appellant conceding that the father and uncle of the respondent Hausila Singh held some land in under-proprietary title and, in my opinion, this is a sufficient acknowledgment such as is contemplated in *Raja Bhagwan Bakhsh Singh* v.

(1) 8 O. C. 145.
(2) 9 O. C. 167.
(3) 4 O. C. 31.
(4) 4 I. A. 198.

Mazhar Husain (2). I understand that it is not disputed that the land in suit is part of 15 *bighas* odd referred to in this statement. For the foregoing reasons, I hold that the decision of the Court below is correct and I dismiss the appeal with costs.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEALS NOS. 298, 305 OF 1909.

May 11, 1910.

Present:—Mr. Chamier, J. C., and Mr. Evans, A. J. C.

IDAN KHAN AND OTHERS—DEFENDANTS—APPELLANTS

versus

MENDI LAL—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 2—"Decree," definition of—Order striking off certain defendants to be treated as order dismissing the case—Order dismissing the case to be treated as a decree—Appeal, right of, from such an order.

Where a Court, before, deciding a case finally, orders the names of certain defendants to be struck off from the record on the ground that the plaintiff made out no cause of action against them, such order is tantamount to a dismissal of the case against those defendants and the plaintiff can treat the order as a "*decree*". An appeal, therefore, lies against such an order.

Appeals against the order of the Subordinate Judge of Barabanki, dated 21st June 1909, varying the order of the Munsif, Fatehpur, dated 27th April 1909.

Mr. *Wasim*, for the Appellants.

Babu *Basdeo Lal*, Pandit *Gokaran Nath Misra* and Babu *Rajeshwari Prasad*, for the Respondent.

Judgment.—These appeals arise out of a suit brought by a Hindu named Mendi Lal, a resident of Hasanpur Tanda against 76 Muhammadan residents of the same town praying for a declaration that he was entitled to blow a conch and ring a bell at the time of worship in his house and for a perpetual injunction restraining the Muhammadans (defendants) from interfering with the plaintiff's right. The Munsif fixed 10 issues. He proceeded on April 27th, 1909, apparently at the request of the parties to dispose of the first four issues. On the first issue he found that the plaint disclosed a cause of action against the first 6 defendants but no cause of action against the remaining defendants. On the second issue, he found that the suit was not barred by section 9 of the Code of Civil Procedure. On the third issue, he found that notwithstanding an order of a Magistrate forbidding the plaintiff to use the conch and bell in his worship during the *Muharram*, the Civil Court could make a declaration of his rights and on the fourth issue he found that the Civil Court could make a declaratory decree contrary to the order of the Criminal Court. In accordance with these findings he directed that the name of defendants Nos. 7—76 be struck out and at the close of his order he said that he would pass judgment in the case after recording evidence on the remaining issues. Two appeals were then presented to the Subordinate Judge, one by the plaintiff complaining of the action of the Court in striking out the names of defendants Nos. 7—76 and the other by defendants Nos. 1—6 complaining of the decision of the Munsif on the issues which he had taken up. The Subordinate Judge dismissed the appeal of the defendants but he allowed the appeal of the plaintiff and set aside the order of the Munsif striking off the names of defendants Nos. 7—76 and directed him to try the case against all the defendants.

Appeal No. 305 is an appeal by the six defendants whose names were retained by the Munsif and Appeal No. 298 is an appeal by the defendants whose names were struck out by the Munsif, but ordered by the Subordinate Judge to be retained. On behalf of the defendants-appellants whose names were struck off by the Munsif, it is contended that the plaintiff had no right of appeal to the Subordinate Judge inasmuch as the order of the Munsif did not amount to a decree. But the order of the Munsif was tantamount to a dismissal of the case as against these defendants. In the words of the definition of "decree" in the Code of Civil Procedure, it conclusively determined the rights of the plaintiff and these defendants with regard to the matters in controversy between them. It determined that on the facts stated by the plaintiff, the plaintiff was entitled to no relief as against these defendants. We think that the decision of the Munsif as between the plaintiff and these defendants amounted to a decree. On the merits, we think that the Subordinate Judge was right. The plaintiff in paragraph 5 of his plaint says that in the *Muharram* of 1908, the defendants interfered with the conduct of the worship in his house and defendants Nos. 1-6 thereafter filed an ap-

plication in the Court of the District Magistrate and the plaintiff was ordered to stop blowing the conch and ringing the bell during the worship. We understand from this paragraph that the defendants are charged with having actively disputed the right of the plaintiff to conduct worship in the way in which he claims to be entitled to conduct and not merely that they stayed at home and denied that the plaintiff was entitled to conduct worship in this way. It also appears that the plaintiff intended to allege that the first six defendants who went to the Magistrate were acting on behalf of the defendants generally. Even if this construction of paragraph 5 is erroneous, we think that on the facts which have been disclosed it is evidently a case in which the Court would do well to make all the defendants parties to the suit. It is clear that all the Muhammadans of the town are interested in this matter. Counsel for the defendants-appellants suggested that the suit was brought to harrass them. There is no reason to suppose that this was the object of the plaintiff but in order to avoid unnecessary trouble to the defendants, the Court might take action under Order I, Rule 8, of the Code of Civil Procedure and appoint one or more of the defendants to represent the rest of them. Then with regard to the appeal of the first six defendants to the Subordinate Judge, it is unnecessary to decide whether the decision of the Munsif as between them and the plaintiff amounted to a decree. As at present advised, we are disposed to think that it did not. But assuming that it did we think that the Subordinate Judge was right in dismissing the appeal and the further appeal against his decision on that appeal should be dismissed. Both the appeals are dismissed with costs.

Appeals dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL APPLICATION No. 166 OF 1909.

February 8, 1910.

Present:—Mr. Chamier, J. C.

MADHO PRASAD—OBJECTOR—APPLICANT

versus

MAHTAB CHAND—LEASE-HOLDER—RESPONDENT.

Execution of decree, lease granted in—Jurisdiction of Court executing the decree—Lease, grant of fresh, or extension of period of—Collector, power of, in granting lease—Decree, satisfaction of.

In execution of a Civil Court decree, the Collector gave a 12 years' lease of the property of the judgment-debtor subject to the payment of a particular sum which was to go towards the satisfaction of the decree. Subsequently a portion of the property passed out of the possession of the lessee and the Court in accordance with the recommendation of the Collector sanctioned the extension of the lease to a further period of 10 years:

Held, that, after the lease had been given, the decree must be considered to have been satisfied and the Court executing the decree became *functus officio* and had no jurisdiction to authorize the grant of a fresh lease or to extend the term of the original lease.

Application against the order of the Munsif, North Lucknow, dated 14th September 1909.

Pandit *Gokaran Nath Misra*, for the Applicant.

Babu *Bisheshar Nath Srivastava*, for the Respondent.

Order.—This is an application for revision of an order passed by the Munsif, North Lucknow, in rather unusual circumstances. Two decrees were obtained against one Kalka Das whose son is the present applicant. In execution of those decrees, the Civil Court attached certain immovable property and submitted the usual sale statement to Government for sanction. The Deputy Commissioner in September 1901 represented to the Munsif that the amount of the two decrees could be raised by letting the property for a period of 12 years and he recommended that a lease for that period should be granted to one Mahtab Chand. The Munsif on June 18th, 1901, approved of this proposal and the lease was granted. After that a person, who held a mortgage on half of the property leased, brought a suit on the mortgage and had the mortgaged property put up for sale with the result that half of the property included in the lease passed out of the possession of the lessee. The lessee then represented to the Deputy Commissioner that he had made a very bad bargain inasmuch as half of the property had been taken away from him. The Deputy Commissioner thinking that it was a hard case asked the Civil Court to sanction an extension of the lease for 10 years. The Munsif without hearing the judgment-debtor approved of this proposal and a fresh lease has been granted to Mahtab Chand commencing at the expiration of the first lease. It is contended that the Munsif had no jurisdiction to authorize

the grant of a fresh lease. In my opinion, this contention must prevail. Section 326 of the Code of Civil Procedure, 1882, under which the Civil Court authorized the Collector to grant the original lease, provides that when the Collector represents that satisfaction of a decree may be made within a reasonable period by a temporary alienation of the property, the Court may authorize the Collector to provide for such satisfaction in the manner recommended by him. In that case the provisions of section 320 paragraph 2 to section 325C both inclusive are to apply as far as they are applicable. The Deputy Commissioner let the property under sub-head (*a*) clause (2) on payment of a premium, the premium being the amount due under the two decrees. Both decrees were then satisfied and it seems to me that the Civil Court then became *functus officio*. I do not understand how the Civil Court can go on executing a decree which has already been satisfied. If property is put up for sale in execution of a decree and the purchase-money is devoted to the satisfaction of the decree, it is not open to the purchaser, if he find that he has made a bad bargain to come to the Court and ask that other property of the judgment-debtor be put up for sale in order to make good to him the loss which he has sustained. Nor can a person who takes a lease of property which has been attached, paying a premium which satisfies the decree, come to the Court and ask it to give a lease of other property of the judgment-debtor or a second lease of the same property because his first lease has proved to be unprofitable. I am told that the Deputy Commissioner acting on the authority of the Munsif has already executed the new lease. The lease depends for its validity on the sanction of the Civil Court. I allow this application and set aside the order of the Munsif sanctioning a fresh lease. The respondents must pay the costs of the applicants here and in the Court below.

Application allowed.

(s. c. 12 Bom. L. R. 831; 34 B. 506.)

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No, 883 OF 1909.

August 9, 1910.

Present:—Sir N. G. Chandavarkar, KT.. Judge, and Mr. Justice Heaton.

NARAYAN RAM CHANDRA BHATTA—PLAINTIFF—APPELLANT

versus

MANAGER NVGAPPA—DEFENDANT—RESPONDENT.

Mulgeni *lease—Agreeement to pay rent without reduction or enhancement—No such stipulation as to assessment—Increase in assessment does not affect rent—Rent in kind not a debt—Interest Act (XXXII of 1839)—Contract Act (IX of 1872), s. 73—Unliquidated damages, interest on.*

Where by a *qabulayat* the *mulgenidar* tenant in terms agreed to pay a fixed amount of rent in perpetuity, without reduction or enhancement, and there was no such agreement as to the assessment stipulated to be paid by the landlord:

Held, that the amount of assessment mentioned in the *qabulayat* as being payable by the *mulgar* (landlord) must be deemed to refer to the assessment as it then existed, irrespective of the question of its reduction or enhancement thereafter.

Payment in kind is not such a debt as is contemplated by the Interest Act (XXXII of 1839).

Juggomohun Ghose v. *Manikchand*, 7 M. I. A. 263 at p. 280; 4 W. R. (P. C.) 8, referred to.

Where the contract is to pay rent in kind on a certain day, and it is not so paid, a suit to recover the money value of the rent in kind is a suit to recover unliquidated damages under section 73 of the Indian Contract Act (IX of 1872.)

Interest does not run on unliquidated damages.

Framji Hormasji v. *Commissioner of Customs*, 7 B. H. C. A. C. J. 89 at p. 98; *Abdul Rajak Sahib* v. *Hasan Shaib*, (1875) P. J. 210; *Niladhar* v. *Magniram* and *Mansukhdas*, (1875) P. J. 166, referred to.

Second appeal from the decision of the District Judge of Kanara, in Appeals Nos. 153 and 154 of 1908, from the decision of the Subordinate Judge of Kumta, in Suit No. 164 of 1908.

Mr. *Nilkanth Atmaram*, for the Appellant.

Mr. *S. V. Palekar*, for the Respondent.

Judgment.—The landlord called the *mulgar*, who is the appellant, seeks to make the tenant, who is the *mulgenidar*-respondent, liable to pay the enhanced assessment; but the terms of the *qabulayat* do not support that claim. The *khata* was, no doubt, transferred to the name of the *mulgenidar* at the time of the *mulgeni* or perpetual lease; but the transfer had only the effect of making the *khatedar* liable to pay the assessment to

Government—he became the person to whom Government was to look for payment. But the question still remains whether as between the *mulgar* and the *mulgenidar* the liability existed in the latter as *khatedar* by reason of the transfer of the *khata* to his name. That the original liability of the *mulgar* continued, notwithstanding the transfer, is obvious from the provision in the *qabulayat* that the responsibility for payment of the amount of the assessment (Rs. 6-14-6), then payable to Government annually, should rest on the *mulgar*. It is argued that because that specific amount was mentioned the parties must be held to have agreed that the *mulgar's* liability should be limited to that amount and no more. But while by the *qabulayat* the *mulgenidar* in terms agreed to pay a fixed amount of rent in perpetuity "without reduction or enhancement," there was no such agreement as to the assessment. The amount of assessment, Rs. 6-14-6, mentioned in the *qabulayat* as being payable by the *mulgar*, must, therefore, be deemed to refer to the assessment as it then existed, irrespective of the question of its reduction or enhancement thereafter.

As to interest claimed on the arrears of rent sued for it was payable in kind according to the terms of the *qabulayat*. And payment in kind is not such a debt as is contemplated by the Interest Act (Act XXXII of 1839), which requires that there must be a debt or sum certain at the time when the promise was made to bring it within the operation of the Act: *Juggomohun Ghose* v. *Manikchand* (1). There was no debt certain at that time, because the market-value then need not have been necessarily the same as the market-value at the time of the breach of the contract.

But it is contended that interest is recoverable under section 73 of the Indian Contract Act as damages for breach of the contract to pay rent. But where the contract is, as in the present case, to pay rent in kind on a certain day, and it is not so paid, a suit to recover the money value of the rent in kind is a suit to recover unliquidated damages under section 73, and those damages are measured by the market-value of the goods deliverable under the contract on the day when they ought to have been but were not delivered. And to award interest in addition would be to give interest not as but on unliquidated damages, "but interest does not run upon unliquidated damages": *Framji Hormasji* v. *Commissioner of Customs* (2); *Abdul Rajak Saheb* valad *Abu Baker* v. *Hasan Saheb* valad *Rukundin Mahomed Ali Mir Mohidin Saheb* (3) and *Niladhar* alias *Liladhar Lakhshmi & Co.* v. *Magniram and Mansukhdas* (4).

The appellant, however, is entitled to interest from the date of the suit (section 209 of the Civil Procedure Code, Act XIV of 1882). The decree must be amended by awarding interest at six per cent. from the date of the suit to the date of its satisfaction. In other respects the decree is confirmed. Costs in this and the District Court in proportion.

Decree varied.

(1) 7 M. I. A. 263 at p. 280; 4 W. R. (P. C.) 8.

(2) 7 B. H. C.A. C.J. 89 at p. 98.
(3) (1875) P. J. 210.
(4) (1875) P. J. 166.

(s. c. 8 M. L. T. 314.)

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 71 OF 1909.

May 6, 1910.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Krishnaswami Aiyar.

KRISHNA IYER—PLAINTIFF—APPELLANT

versus

BALAMMAL—DEFENDANT—RESPONDENT.

Suit for restitution of conjugal rights—Demand and refusal—Limitation Act (XV of 1877), Sch. II, art. 35—Madras Act (III of 1873), s. 16—Law applicable to persons in determining marital rights and obligations.

A husband sued the wife for restitution of conjugal rights in 1903. The parties entered into a compromise in 1904 whereby they agreed to live thereafter together "according to the custom of the world". But they never lived together at all thereafter. The husband again sued the wife in 1907 for restitution of conjugal rights. The Munsif decreed the claim but the District Court dismissed the suit on the ground that it was barred by limitation as more than two years had elapsed from the first demand and refusal on which the suit of 1903 was compromised and as no subsequent demand and refusal had been alleged or proved:

Held, (1) that article 35 of Schedule II of Limitation Act (XV of 1877) bars a suit after two years from demand and refusal.

Saravana Perumal Pillai v. *Poovayi*, 28 M. 436; *Dhanjibhoy Bomanji* v. *Hirabai*, 25 B. 644; 3 Bom. L. R. 371; *Asirunnessa Khatun* v. *Buzloor Meah*, 34 C. 79; 11 C. W. N. 437, referred to and approved.

(2) That the previous demand and refusal did not furnish the starting point for limitation, after the agreement set forth above.

(3) That the law applicable to the parties, being Hindus, is the Hindu Law under which any agreement between the husband and wife to live apart is forbidden or, at any rate, is not valid.

Tekait Mon Mohini Jemadai v. *Basanta Kumar Singh*, 28 C. 751 ; 5 C. W. N. 673, referred to and approved.

(4) That such an agreement is opposed to public policy and not enforceable.

Meherally v. *Sakherkhanoobai*, 7 Bom. L. R. 602, referred to and approved.

(5) Even under the English Law, agreements providing for future separation are invalid, though such as provide for present separation are valid.

Wilson v. *Wilson*, 9 E. R. 870; *Marshall* v. *Marshall*, 5 P. D. 19; 48 L. J. P. 49 ; 39 L. T. 640 ; 27 W. R. 399 ; *Clarke* v. *Clarke*, 10 P. D. 188; and *Besant* v. *Wood*, 12 Ch. D. 605 ; 44 L. T. 445, referred to.

Second appeal against the decree of the District Court of Trichinopoly, in Appeal Suit No. 94 of 1908, presented against the decree of the Court of the District Munsif of Srirangam, in Original Suit No. 164 of 1907.

Judgment.

Krishnaswami Aiyar, J.—The suit is by a husband for restitution of conjugal rights. The District Judge has dismissed it as barred by limitation. We are unable to agree with him. It is true article 35 of the Limitation Act of 1877, bars the suit for restitution if there has been a demand and refusal more than two years before. The decisions of this Court and of the Bombay and Calcutta High Courts are clear. *Saravana Perumal Pillai* v. *Poovayi*(1); *Dhanjibhoy Bomanji* v. *Hirabai* (2); *Asirunnessa Khatun* v. *Buzloor Meah* (3).

But in this case a suit was brought after a demand and refusal for restitution of conjugal rights, O. S. No. 313 of 1903. And that was compromised on the 25th July 1904. By the compromise, Exhibit I, the parties agreed to live together "according to the custom of the world." The agreement further provides "If on any day subsequent to this and for any reason whatever you (the wife) should not like to live with me, but want to go away from me, I agree to give you Rs. 350." It is impossible to contend after this agreement that the previous demand and refusal furnish the starting point for the running of time. The parties have made up their differences and agreed to live together as husband and wife. Unless there is a fresh demand and refusal time cannot run against the plaintiff's claim for restitution. It is nowhere alleged that subsequent to the agreement there has been a demand and refusal. It is true the wife did not return to conjugal life. But we should be strict in applying article 35 according to the letter. It may be worthy of note, having regard to the difference of opinion between the Allahabad High Court and the other Indian High Courts as to the applicability of the article to the Hindus and Mahomedans, that it does not find a place in the new Limitation Act. We would, therefore, overrule the Judge's view as regards limitation.

We come next to the important question as to whether the agreement itself bars the present suit. According to the strict tenour of the language it has no application to the facts of this case, assuming it to be valid. It requires the parties to come together and only provides for separation on a subsequent day after they have once come together. The wife never joined the husband after the agreement. And it may, therefore, be sufficient to say that under the terms of the agreement there is no defence to the action. But we desire to rest our decision on a broader ground. The parties are Hindus and Brahmans. The law to be applied in determining their marital obligations is the Hindu Law. See section 16 of Madras Act III of 1873. It may be doubted whether under that law any agreement between husband and wife to live apart from each other is valid. It may well be deemed to be forbidden by the Hindu Law. The authorities on the subject are set out and discussed in considerable detail by Mr. Justice Ghose in *Tekait Mon Mohini Jemadai* v. *Basanta Kumar Singh* (4). It is unnecessary to consider whether there are any exceptions recognized by the Hindu Law. It is perfectly clear that the present case is not such an exception. Even apart from the Hindu Law the agreement, we think, must be regarded as opposed to public policy and, therefore, not enforceable. The decision of Mr. Justice Batchelor in *Meherally* v. *Sakerkhanoobai*(5) is a case exactly in point though the parties were Khojas. Even if the question fell to be decided under the English Law there can be no doubt that the agreement in this

(1) 28 M. 436.
(2) 25 B. 644 ; 3 Bom. L. R. 371.
(3) 34 C. 79 ; 11 C. W. N. 437.
(4) 28 C. 751 ; 5 C. W. N. 673.
(5) 7 Bom. L. R. 602.

case to live apart is invalid. It is true that though the old ecclesiastical Courts refused to admit a deed of separation as a bar to a suit for restitution of conjugal rights, it was held by the House of Lords in *Wilson* v. *Wilson* (6) that an agreement for a present separation was enforceable. The decisions in *Marshall* v. *Marshall* (7), *Clark* v. *Clark* (8) and *Besant* v. *Wood* (9), on which Mr. Venkatarama Sastri relied, are not cases of agreement for a future separation like the present case. The English cases are fully discussed by Mr Justice Batchelor in the Bombay case we have already referred to. It is unnecessary to add anything further. Even if we applied the English rule we should be quite prepared to hold that the agreement in this case being one for future separation would be invalid and constitute no answer to a suit for restitution of conjugal rights. We reverse the decree of the District Judge and restore that of the Munsif with costs in this and in the lower appellate Court.

Sankaran Nair, J.—I concur.

Appeal allowed.

(6) 9 E. R. 870.
(7) 5 P.D. 19; 48 L.J.P. 49; 39 L.T. 640; 27 W.R. 399.
(8) 10 P. D. 188; 54 L. J. P. 57; 52 L. T. 234; 33 W. R. 405; 49 J. P. 516.
(9) 12 Ch. D. 605; 40 L. T. 445.

(s. c. 8. M. L. T. 323.)

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1213 OF 1908.

April 7, 1910.

Present:—Mr. Justice Miller and Mr. Justice Munro.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL REPRESENTED BY THE COLLECTOR OF KISTNA—DEFENDANT—APPELLANT

versus

PISIPATI SANKARAYYA AND OTHERS—PLAINTIFFS AND DEFENDANTS—RESPONDENTS.

Madras Revenue Recovery Act (Mad. Act II of 1864), ss. 2 and 42—Sale of land—Public revenue sale not free of encumbrances—Mortgage prior to sale—Sale under the Act, free of encumbrances.

All lands brought to sale on account of arrears of revenue shall be sold free from all encumbrances, and land, which a defaulter has encumbered, is considered to be none the less his property.

Second appeal against the decree of the Subordinate Judge's Court of Masulipatam, in Appeal Suit No. 61 of 1907, presented against the decree of the Court of the District Munsif of Gudivada, in O. S. No. 333 of 1905.

Judgment.

Miller, J.—I think it is beyond doubt that what was sold in this case was land of the defaulter within the meaning of Act II of 1864, and the question is why should not the provisions of section 42 be applied to the sale ?.

The learned Vakil for the 1st respondent with the aid of an ingenious piecing together of *dicta* to be found in *Secretary of State for India* v. *Narayanna* (1), *Narayana Raja* v. *Ramachandra Raja* (2) and *Ramachandra* v. *Pichaikanni* (3) presents for our acceptance the conclusion that the sale is not free of encambrances because the land sold is not by section 2 made security for the public revenue for which it was sold. His construction of section 2 is not established by any of the cases, and I am not prepared to decide that it is correct, but assuming its correctness I cannot see how the plain words of section 42 are to be limited by reference to section 2. A sale may be free of encumbrances whether or not it is held to enforce a first charge the liens being all transferred to the proceeds.

In *Ramachandra* v. *Pichaikanni* (3) the learned Judges, no doubt, observe that the intention is clear that the purchase is free of prior encumbrances, only when the arrear is of public revenue of which the land is the first security by statutory declaration, but there is nothing to suggest that they construed section 2 in the way we are asked to construe it; they were not dealing with that question and their *dictum* was intended to support their view that a sale for an arrear of revenue due under a different statute is not by virtue of section 42 of Act II of 1864 free of encumbrances. I venture to think that if they are right as to the intention of the legislature we must construe section 2 as declaring all the land of a land-holder to be security for all the land revenue payable by him, for the intention as expressed in section 42 is to my mind very plain—very sale of land conducted under the Act is to be free of encumbrances.

The sale in question is a sale of land under the Act, and I would, therefore, allow the

(1) 8 M. 130.
(2) 26 M. 521; 13 M. L. J. 139.
(3) 7 M. 434.

appeal and dismiss the suit with costs of the 1st defendant throughout.

Munro, J.— The 3rd defendant held lands in Kalidindi under one *puttah* and lands in Sana Budravaram under another *puttah*. All these lands were mortgaged to the plaintiff. Arrears of revenue having subsequent to the mortgage accrued on the lands in Kalidindi those lands were attached and sold at auction by the Revenue authorities and as the proceeds did not cover the whole of the arrears due, the lands in Sana Rudravaram were attached and sold for the balance and were purchased by the 2nd defendant. The plaintiff then brought the suit out of which this second appeal arises to have the revenue sale of the Sana Rudravaram lands set aside and also for a declaration that the lands remained subject to his mortgage. The District Munsif refused to set aside the sale but gave a declaration that the sale was subject to the plaintiff's mortgage. This decree was confirmed by the Subordinate Judge on appeal. The present second appeal is by the Secretary of State for India in Council and questions the propriety of the above declaration.

The villages of Kalidindi and Sana Rudravaram are in the same district. Act I of 1890 has, therefore, no application, and the point at issue must be decided solely in accordance with the provisions of Madras Act II of 1864. Under section 5 of that Act an arrear of revenue may be recovered by the sale of the defaulter's movable and immovable property and also by execution against the defaulter's person. There is nothing in the section to restrict the land that may be sold thereunder to the land on which the arrear of revenue has accrued. It is clear, therefore, that for the arrear which accrued on the 3rd defendant's land in Kalidindi the lands included in his Sana Rudravaram *puttah* were liable to be sold if in the eye of the law they were his property at the time of the sale. The only ground on which it is suggested that they were not his property is the fact that they had been mortgaged to the plaintiffs prior to the sale.

Section 42 of Act II of 1864 provides that all lands brought to sale on account of arrears of revenue shall be sold free of all encumbrances. From this it is clear that land may be sold for arrears of revenue notwithstanding the fact that the defaulter has created an encumbrance upon it and as under section 5 it is only land belonging to the defaulter that can be sold for an arrear due by him it follows that under the Act land which a defaulter has encumbered is considered to be none the less his property.

The 3rd defendant's land in Sana Rudravaram was, therefore, liable to be sold for the Kalidindi arrears and under section 42 of Act II of 1864, the sale must be considered to have been free of the plaintiff's mortgage. It is contended that the result is inconsistent with the provisions of section 2 of the Act. That section lays down that the land among other things shall be regarded as the security for the public revenue. This language does not necessitate our reading the section as meaning that any particular land is security for the public revenue only in so far as that revenue is assessed upon itself. The Courts below relied upon *Narayana Raja* v. *Ramachandra Raja* (2). That case is not, however, on all fours with the present case, for there it was held that owing to a prior Civil Court sale the defaulter had no interest in the land at the time of the revenue sale. I would, therefore, reverse the decrees of the Courts below and dismiss the suit with costs of the 1st defendant throughout.

Appeal allowed.

(s. c. 8 M. L. T. 326.)

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 809 OF 1909.

August 19, 1910.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Krishnaswami Aiyar.

LOD GIRIDHARA DOSS GOVINDA DOSS COMPANY BY PROPRIETOR LOD KRISHNA DOSS GOVINDA DOSS—PLAINTIFF—PETITIONER

versus

POTTI NAICKEN AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act XIV of 1882), s. 257A — Agreement after decree—Death of debtor—Legal representative not on the record.

Where the judgment-debtor was dead and his legal representative was not brought on the record, an agreement made by a person other than the judgment-debtor or his representative to pay more than the judgment-debt is not invalid.

Govind Krishna Gujar v. *Sakaram Narayan*, 28 B. 333 at p. 387; 6 Bom. L.R. 344; and *Kesu* v. *Genu*, 23 B. 502, followed.

HANS SINGH *v.* CHET SINGH.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the District Munsif of Ranipet, in Small Cause Suit No. 251 of 1909.

Judgment.—The 2nd defendant is dead and his representative has not been brought upon the record. The 1st defendant was not the judgment-debtor or his representative. It has been held that section 257A of the old Code of Civil Procedure, Act XIV of 1882, did not strike at an agreement to pay more than the judgment-debt by a person other than the judgment-debtor or his representative. [See *Govind Krishna Gujar* v. *Sakaram Narayan* (1); *Kesu* v. *Genu* (2) and *Kamatchi Chetty* v. *Veyapuri Pillai*, S.A. No. 3072 of 1903 on the file of this Court]. We agree with that view. We set aside the District Munsif's decree as regards the 1st defendant and pass a decree against him in accordance with the plaintiff's prayer with costs here and in the Court below.

Decree set aside.

(1) 28 B. 383 at p. 387; 6 Bom. L. R. 344.
(2) 23 B. 502.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 104 OF 1910.

August 24, 1910.

Present:—Mr. Lindsay, O. A. J. C.

HANS SINGH—PLAINTIFF—APPELLANT

versus

CHET SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), s. 45—Joint mortgagees, effect of payment to one—Discharge of mortgage debt—Consent of all mortgagees necessary to effect a valid discharge.

One of several joint mortgagees cannot give a valid discharge without the consent of the others.

Ram Chandra v. *Goswami Rajjan Lal*, 32 A. 164; 7 A. L. J. 99; 5 Ind. Cas. 129, followed.

Barber Maran v. *Ramana Goundan*, 20 M. 461, dissented from.

Ahinsa Bibi v. *Abdul Kader Saheb*, 25 M. 26 at p. 39, referred to.

Appeal against the order of the District Judge, Hardoi, dated the 13th January 1910, reversing the order of the Munsif, Bilgram, dated the 25th January 1909.

Babu *Salig Ram*, for the Appellant.

Pandit *Gokaran Nath Misra*, for the Respondents Nos. 1 and 2.

Judgment.—This second appeal arises out of a suit brought by the plaintiff-appellant for possession of a share of *zemindari* property against five defendants. The Court of first instance decreed the claim, but this decree was reversed in appeal by the District Judge.

The facts found are as follows:—

On the 19th July 1902, Hazari Singh, the third defendant, executed a mortgage with possession in favour of the plaintiff, Hans Singh, and the fourth and fifth defendants, Laltu and Niranjan. The mortgage money as expressed in the deed amounted to Rs. 1,000 but both Courts have decided that the amount actually advanced was Rs. 500 only, the balance having been left with the mortgagees to redeem a previous mortgage in favour of one Madari. This latter mortgage was not, however, redeemed by Hans Singh, Laltu and Niranjan. On the 24th January 1904, a sum of Rs. 589 was paid to the mortgagees, Laltu and Niranjan. Of this sum, according to the endorsement recorded on the deed, Rs. 400 in cash was received from the mortgagor Hazari through Chet Singh who figures as the first defendant in the suit, the balance, Rs. 189, was provided by means of a promissory-note executed by the mortgagor Hazari. According to the endorsement, this sum was received by all three mortgagees. Hans Singh, however, in his plaint denied ever having received any portion of this money and denied having been present on the occasion when it purports to have been paid. It has been found as a fact that Hans Singh never got any of this money, that he was not present and that the mark said to have been made by him below the endorsement in token of his having received his share of the money was not made by him. After this payment was made to Laltu and Niranjan, the mortgage deed was returned to Hazari, the mortgagor. On the 24th September Hazari sold the property to Chet Singh and Pahlwan Singh and made over the mortgage deed to them. On the 3rd June 1903, these persons paid off the mortgage debt due to Madari, the first mortgagee and so these defendants (Nos. 1 & 2) claim to be absolute owners of the property. The plaintiff's case was that as there was no valid discharge of the mortgage executed in favour of himself and Laltu and Niranjan jointly, he was entitled to get possession of a one-third share. The Munsif

decreed the claim subject to payment by him of Rs. 179 being one-third of the money paid by Chet Singh and Pahalwan Singh in the redemption of the mortgage in favour of Madari which was anterior in date to that in favour of the plaintiff. As already remarked, the District Judge in appeal reversed the decree and dismissed the suit. The learned Judge came to the following findings:—

(1) That Hans Singh was not present when the money was paid and accepted by Laltu and Niranjan, that he got no share of this money and that he never signed the endorsement and

(2) that the payment to Laltu and Niranjan constituted a valid discharge of the mortgage-debt as there was no fraud. It is with the correctness of the second finding that we are concerned in this appeal. The contention for the appellant is that it is erroneous in law. The learned Judge was asked to hold that one of several joint mortgagees could accept payment of the whole of the mortgage-debt so as to discharge the property from the burden of the mortgage debt. He was of opinion that this was a sound proposition of law provided that there was no fraud. He then went on to find that there was no fraud committed on Hans Singh, because although he was not present, and although the mark purporting to be his was made by others for him, it was honestly believed that Hans Singh was a consenting party. The Judge finally decided that Hans Singh did in fact assent to the redemption, a finding which it is difficult to reconcile with his previous finding that Hans Singh was not present, never signed the endorsement and never got any share of the money. There is no evidence to support the finding that Hans Singh consented to the redemption of the mortgage. As for the proposition that one of several joint mortgagees can give a valid discharge without the consent of the others, the High Court of Allahabad has decided in the case of *Ram Chandra* v. *Goswami Rajjan Lal* (1) that such a proposition is untenable. The facts of that case are similar to the facts of the case now under consideration. There the money was advanced by two mortgagees in equal shares, here there were three mortgagees equally interested in the amount advanced.

The ruling in *Barber Maran* v. *Ramana Goundan* (2), which is relied on here by the respondents, was distinguished and it may be noticed that the correctness of this Madras ruling has been questioned in a later ruling of the same Court [*Ahinsa Bibi* v. *Abdul Kader Saheb* (3)].

I follow the Allahabad ruling and find that the payment to Laltu and Niranjan did not constitute a discharge of the mortgage and that the appellant's rights as a mortgagee are still subsisting. At the hearing of the appeal, I was inclined to doubt whether the plaintiff could recover owing to the fact that the defendant Chet Singh received the mortgage-debt at the time of his purchase from Hazari. I was disposed to think that Hans Singh might be held guilty of negligence in the matter of the custody of the mortgage bond and that he was precluded from recovering because the deed came into the hands of a third person as the result of such negligence. On further consideration, I think this view is not correct. The deed was in favour of three persons and could not be in possession of all three at one and the same time, so it would be impossible to attribute negligence to Hans Singh in such circumstances. Another point to be noticed is that Chet Singh cannot be heard to say that he purchased without knowledge of the circumstances in which the so-called redemption was made for the endorsement shows that it was he who paid over Rs. 400 in cash to Laltu and Niranjan on behalf of the mortgagor Hazari Singh. I find that the decision of the lower Court to the effect that there was a valid discharge of the mortgage is wrong. I accept the appeal, set aside the decree of the lower appellate Court and restore the decree of the Court of first instance. The appellant is entitled to costs both here and in the Court below.

Appeal accepted.

(1) 32 A. 164; 7 A. L. J. 99; 5 Ind. Cas. 129.

(2) 20 M. 461.

(3) 25 M. 26 at p. 39.

AMIR ALI KHAN *v.* KULSUM BEGAM.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 95 OF 1909.

June 27, 1910.

Present:—Mr. Piggott, J. C. and Mr. Lindsay, A. J. C.

Nawab Syed AMIR ALI KHAN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Musammat KULSUM BEGAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 132 and Orders XVI and XXVI—Process, refusal to issue, on wrong and insufficient grounds—Exclusion of evidence—Ground for remand—Summonses, power of Court to refuse to issue—Cross-examination, fixation of limit of time for.

An application for issue of summons to a witness must as a rule be granted by the Court and the question whether the application is made within a reasonable time is only to be decided when afterwards, owing to the failure of the witness to attend the Court, an adjournment is prayed for by the party summoning such witness. Process may not be issued if the witnesses are described vaguely. But if witnesses do not appear after being served the party calling them has the right to have them re-summoned.

A Court has no power to fix a limit of time within which the cross-examination of a particular witness is to be finished and where such a limit was fixed and the examination concluded it was held a good ground for remand.

Mr. *O'Conor*, for the Appellants.

Mr. *O'Neill*, for the Respondents.

Judgment.—This case coming up for hearing to-day, Mr. O'Conor for the appellants has taken up first the ground set forth in the ninth paragraph of the memorandum of appeal, namely, that the Court below by refusing wrongly and on insufficient grounds to issue various processes applied for on behalf of the plaintiffs-appellants has deprived the said appellants of the evidence of fourteen material witnesses in this case. We have felt one difficulty of a general character in dealing with this matter. On the one hand, it is impossible for us to proceed to decide in appeal any case as to which we are satisfied that relevant evidence has been wrongly excluded, and on the other hand, we cannot help feeling that it is a serious matter in a case of this sort, after an elaborate judgment has been pronounced dealing with all the points in issue, to pass any orders the effect of which will be to allow one of the parties to produce fresh evidence with the judgment of the lower Court before it. We have been disposed, therefore, to deal somewhat strictly with the appellants in this matter. As regards one witness, Nawab Ata Ali Khan, we are clearly of opinion, that the order of the Court below cannot be sustained and that the appellants have made out a case for an order granting them an opportunity to examine this witness. The facts on this point are to be found on pages 29 and 104 of the printed record. The examination of witnesses in this case had commenced on May 18th, 1909, and the case for the plaintiffs was, as a matter of fact, closed on May 31st. Three days previously, that is to say on May 28th, 1909, the plaintiffs presented an application to the effect that one Nawab Ata Ali Khan, who was an important witness in the case, had not previously been summoned because he was known to be absent on a pilgrimage in Arabia. It was stated that the said witness had now returned to Lucknow and that his presence there had only come to the plaintiffs' knowledge that morning. An application was accordingly made to the Court to issue a summons for the attendance of this witness on the following day. It is not necessary for us to consider whether upon an application made under such circumstances, the equity of the case might not have demanded that the Court should grant the plaintiffs any necessary adjournment nor, on the other hand, have we to consider whether the Court might not reasonably have required the facts stated in the application to be verified by an affidavit. We have simply to consider whether the order passed by the learned Subordinate Judge is one which can be maintained. The order was that the application be rejected, the only reason given being that the plaintiffs' conduct in connection with the case had been dilatory, and that it was too late to apply at this stage for the issue of a summons. It has been clearly laid down by the Court, in *Abdul Hafiz Khan* v. *Ajudhia* (1), that an application for issue of summons must be granted, the discretion of the Court coming into play only when the question arises whether the Court will grant an adjournment of the case later on, because of the failure of the witness to attend, or of the failure of the process serving establishment to effect service of summons in reasonable time. The question never arose because the learned Subordinate Judge hastily rejected the application altogether without making any attempt to issue summons. We are bound to hold that he had no discretion under the Code to pass such an order as this, and as regards this witness at any rate, the

(1) 2 O. C. 34.

plaintiffs will have to be allowed a further opportunity of calling him.

There was another witness, Mirza Nadir Hussain, whose case stands on a very similar footing, but is in one respect distinguishable. It appears that this witness is a resident of Hyderabad, Deccan, but that on the 29th May, 1909, the plaintiffs became aware that he happened to be present in Lucknow. That day was a Saturday and at a late hour an application was presented to the Court asking for the issue of a summons for the attendance of this witness on the following Monday morning, that is to say, on May 31st. There has been some little doubt, in our minds, as to whether it was possible to draw a distinction on the ground that the issue of process in accordance with the ordinary routine of the Court could scarcely have been effected before the Court rose for the day. On the whole, however, we prefer to maintain the general principle that on an application for summons being presented, the Court should ordinarily direct process to issue, leaving the question whether such application had been made within reasonable time to be decided later on in case it should appear that the attendance of the witness could not be secured without an adjournment. At the same time, we think that a distinction can and ought to be drawn between the case of this witness Mirza Nadir Hussain and that of Nawab Ata Ali Khan, though on a different ground. The position taken by the plaintiffs themselves as regards Mirza Nadir Hussain was that so long as he was residing in Hyderabad and did not happen to be personally present within the jurisdiction of the Court, they did not think it advisable to call upon the Court to take any steps towards securing his evidence. We think that the plaintiffs may reasonably be held bound by their own attitude in this matter, and that any orders which we may pass with reference to this witness should be conditional upon his being induced once more to set foot within the jurisdiction of the Court.

The next question raised is as regards three gentlemen relatives of the family, who had been named by the plaintiffs in the list of witnesses whom they desired to have summoned, these are Nawab Saiyed Ali Khan, Nawab Jafar Ali Khan and Nawab Kazim Ali Khan, whose names appear as Nos. 21, 22 and 32 respectively, the list of witnesses put in by the plaintiffs with their application of April 28th, 1909. We find that summonses were actually served on these gentlemen, but that they failed to appear in Court. A person representing himself to be some sort of a servant or agent of theirs came to Court on the date on which the witnesses should have been present, and tendered for the inspection of the Court certain medical certificates purporting to explain the inability of the witnesses in question to appear in person. We do not desire to go into further detail in this matter or to criticise the procedure actually adopted by the learned Subordinate Judge. Nor is it necessary for us to say whether, if the question of these three witnesses stood alone, we should have considered ourselves bound to send the case back solely in order to have their evidence taken. We are content to say that we are not altogether satisfied that the plaintiffs were not reasonably entitled to ask for a further opportunity of producing before the Court these three witnesses, whose evidence on account of their relationship to the parties concerned appears *prima facie* of considerable importance. As we have decided on other grounds to send the case back for further evidence, we propose also to direct that the plaintiffs shall be allowed an opportunity of producing these three witnesses before the Court

The next group of witnesses with which we have to deal consists of six out of ten witnesses specified in an application presented by the plaintiffs before the Court on May 23th, 1909. For reasons which we shall presently explain, we do not propose to go into detail regarding the procedure adopted by the lower Court with reference to this application. It is enough to say that the six witnesses, with reference to whom the application is now pressed, had all been included in the original list of witnesses placed before the Court by the plaintiffs with their application of April 28th, 1909, and that on the grounds upon which the matter has been dealt with by the lower Court, it seems difficult to maintain the order of the learned Subordinate Judge. We are, however, of opinion that the question before us is not merely one as to the propriety or otherwise of the orders passed by the Court below, or of the validity of the reasons by which they are supported. We have to consider, on the materials before us

as a whole, whether as a matter of fact the learned Subordinate Judge ought to have ordered fresh summonses to issue for these witnesses, and whether we ought to do so now. These questions we are disposed to answer in the negative except as regards one of the witnesses, simply on the ground that neither in the application of April 28th, 1909, nor in that of May 26th, 1909, were such particulars given in respect of the said witnesses as would justify the Court in ordering summonses to issue. Rule 176 of the rules issued by this Court for the guidance of subordinate Courts lays down clearly the particulars which the issuing officer shall require from the parties concerned before issuing for service any summons or other process and by that rule the learned Subordinate Judge at any rate was bound. We think the chief mistake made by him in this matter was in allowing processes to issue at all in accordance with the application of April 28th, 1909, for persons so vaguely described as Enayet Ullah, father's name not known, Mohalla Ram Narain, Cawnpore City, and the like. It is also to be noticed more particularly that the descriptions given of the witnesses in the later application of May 26th, are no fuller or more complete than those of the earlier application. In one or two cases there has been a slight alteration in the address but that is all. The parentage is not given in the case of a single one of the six witnesses with whom we are now concerned. We must take into consideration also the fact that processes having actually issued on the application of April 28th, their futility had been demonstrated by the fact that the witnesses concerned had failed to appear. We are of opinion that on this ground the learned Subordinate Judge would have been justified in refusing to accept this application, and that we, therefore, should now decline to take any action regarding it, except so far as concerns the last of the witnesses in the list. This gentleman is described as "Mir Saiyed Hussain, pleader of the Munsif's Court at Cawnpore," and although we are of opinion that the plaintiffs might reasonably have been expected before putting in their application to take the necessary steps for ascertaining the parentage of this witness, we think that the description given was so far sufficient that the Court might well have allowed summonses to issue. The plaintiffs' application will be granted with regard to this witness and refused in respect of the remaining five on the same list.

There remains the case of three *pardanashin* ladies in respect of whom an application was made to the Court on behalf of the plaintiffs on May 15th, 1909, for their examination on commission. Now the discretion of the Court as regards the examination of witnesses on commission is evidently not quite the same as that in the matter of issue of summonses as a comparison between the wording of Order XVI and Order XXVI of the Code of Civil Procedure will clearly show. Moreover, this application of May 15th, 1909, stood upon a peculiar footing in this respect that the Court could not grant it without virtually at the same time granting adjournment of the case in one form or another. The position was this:—By an order of January 22nd, 1909, the learned Subordinate Judge who then had cognizance of this suit fixed the 18th to 20th May for examination of the plaintiffs' witnesses and the 24th and 25th, for the examination of those of the defendants. He gives as his reason for fixing such distant dates that he desired to have before him any evidence which might require to be taken on commission at the time when he entered upon the task of taking oral evidence himself. We think this was a reasonable order, convenient to the Court itself and also to the parties, and one which it was within the discretion of the Court to pass. In saying that the parties must make such arrangements that the taking of evidence on commission shall be completed by a certain date, the Court is virtually exercising its own discretion in the matter of fixing dates for hearing, and that is a discretion with which we shall certainly not interfere so long as it has been reasonably exercised. What followed was certainly curious. The plaintiffs took out a commission for the examination of five *pardanashin* ladies. They got one of them examined at great length between May 3rd and May 10th, and then made up their minds that they would not insist upon the examination of any of the others. After this they came into Court with their application of May 15th, 1909, which makes no attempt to suggest any reason of any sort or kind why the names of the three ladies therein mentioned had not been included in

the plaintiffs' original list, but merely claims as if it were a matter of right that the Court shall now proceed to issue a commission for their examination. We are of opinion that the Court had discretion to reject that application, and it seems to us to have made a sound exercise of its discretion. The only difficulty we have felt in the matter has been in connection with an order which the Court itself proceeded to pass, after rejecting the application for the issue of a commission the effect of which is that the Court would be prepared to take the evidence of these ladies if they should appear before the Court in a covered palanquin. In consequence of this order, the plaintiffs promptly applied to the Court to issue summonses for the attendance of these ladies, and the main point now taken before us on behalf of the appellants is that the Court should not have rejected this further application. We are, however, of opinion that the Court was justified in rejecting that application by reason of the terms of section 132 of the Code of Civil Procedure. The ladies concerned were, as stated by the plaintiffs themselves, women who according to the customs and manners of the country ought not to be compelled to appear in public. In respect of such ladies it is expressly provided that they are exempt from personal appearance in Court. That being the case, the Court should not issue summonses calling upon such ladies to appear personally before it and the learned Subordinate Judge was right in refusing to issue such summonses; whether he had or had not made a mistake in saying what he did about his being prepared to take the evidence of the ladies if they chose voluntarily to appear before him in a covered palanquin is not a matter with which we are concerned. We are of opinion that the appellants have made out no satisfactory case for the taking of the evidence of these three witnesses at the present stage. One further point was mentioned before us in argument although not expressly taken in the memorandum of appeal. A witness named Jafar Hussain Khan was produced for the defendants and cross-examined at considerable length on behalf of the plaintiffs. At a certain stage in the cross examination, the learned Subordinate Judge made the following note: - "The plaintiffs' pleader has been very long with this witness. So I allow him half an hour more within which to finish the cross-examination." Half an hour later accordingly, the cross-examination was brought to a conclusion, in spite of a protest on the part of the learned pleader for the plaintiffs that he had not yet put all the questions he desired. It is not necessary for us in this connection to enter into any general discussion as to the discretion and powers of Civil Court in dealing with cross-examinations which appear to them on any reasonable ground either irrelevant, or in any other respect a mere abuse of the privileges of the bar. One thing is clear in this particular case, and that is that no reason whatsoever has been assigned by the Court below for interrupting this cross-examination beyond the mere fact of its length. We are unable to accept this as an adequate or valid reason for the order which the learned Subordinate Judge proceeded to pass. If the point had been taken in the memorandum of appeal, we should have felt constrained to send back the case on this ground alone. As matters stand, the case will have to be sent back on other grounds and although the point was not directly raised in the memorandum of appeal, we have allowed it to be argued and we propose to direct that the plaintiffs shall be allowed to complete their cross-examination of this witness. The result is that we remand the case to the Court below with directions as follows :—

The witness Jafar Husain Khan will be re-summoned and the plaintiffs will be given an opportunity of completing his cross-examination. The plaintiffs will be allowed an opportunity of producing in evidence Nawab Ata Ali Khan, Nawab Saiyed Ali Khan, Nawab Jafar Ali Khan, Nawab Kazim Ali Khan and Mir Saiyed Hassan pleader, and any processes which they may apply for to secure the attendance of these witnesses will be issued by the Court below in the ordinary course. As regards Mirza Nadir Husain Khan we direct that his evidence shall be taken if the plaintiffs find themselves in a position to produce him before the Court, and that process shall be issued for his attendance if the plaintiffs are able to present an application to the Court supported by affidavit showing that this gentleman is at the time present within the jurisdiction of the Court; but the hearing of the case on

remand shall not be delayed on account of any measures taken merely for securing the attendance of this witness. It has been pressed upon us by Mr. O'Neill on behalf of the respondents that, if we permit additional evidence to be taken as above directed on behalf of the plaintiffs-appellants, his clients should also be allowed an opportunity of producing evidence in rebuttal. We think it unnecessary to say more at the present time except that we are not prepared to give Mr. O'Neill the only thing he asks for at present, namely, a general permission to the respondents to produce such rebutting evidence as they may think proper after the additional witnesses specified in this order have been examined. The question of the propriety of an order permitting the respondents to tender specified witnesses on particular grounds may perhaps require to be further considered by this Court hereafter.

Case remanded.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 144 OF 1906.

May 23, 1907.

Present:—Mr. Chamier, J. C., and Mr. Sanders, A. J. C.

Babu CHANDRABHAN SINGH—PLAINTIFF—APPELLANT

versus

Babu DEBI BAKHSH SINGH—DEFENDANT—RESPONDENT.

Oudh Estates Act (*Act I of* 1869), *ss.* 8, 22, *cl. II*—*Primogeniture, rule of*—*Lineal primogeniture, rule of succession by*—Gaddi nashini, *meaning of*—*Succession in the case of impartible estates.*

The word "*gaddi nashini*" means as a rule succession by a single heir.

The rule of primogeniture in section 8 of Act I of 1869 means lineal primogeniture which implies the succession of the senior line in preference to the junior line and consequently in cases of estates entered in Lists Nos. 3 and 5 of the said Act, the line prevails over the degree.

Where an estate is governed by the provisions of the Oudh Estates Act, the limitations in the *sanad* are superseded by the Act.

Appeal against the order of the Subordinate Judge, of Tehsil Biswan, District Sitapur, dated 13th September 1906.

The Hon'ble Rai *Sri Ram* and Babu *Ramapat Ram*, for the Appellant.

Mr. *Mohammad Nasim*, for the Respondents.

Judgment.

Chamier, J. C.—This was a suit by the appellant for possession of estate known as Rajpur Keotana and Thangaon and for some miscellaneous property described in List C attached to the plaint.

The pedigree of the family to which the parties belong is given in the judgment of the Court below.

The Rajpur-Keotano estate was conferred upon Raghuraj Singh by the Government in 1860, and his name was entered in Lists I and V prepared under section 8 of Act I of 1869. The estate of Thangaon was conferred upon Hanuman Bakhsh on whose death it passed to Narpat Singh and eventually to Raghuraj Singh. The property detailed in list C attached to the plaint was acquired by Raghuraj Singh. He died in 1892 and all the property in suit passed into the possession of his widow Brij Nath Koer. She died in 1904 and the defendant succeeded in obtaining possession. The present suit was brought in 1905.

It was admitted before us by Babu Sri Ram, the learned Advocate for the plaintiff that Sheo Gopal, was the eldest of the three sons of Gur Bakhsh Singh and that his client's claim to the Thangaon estate and the property entered in List C which are not affected by Act I of 1869 depends upon proof of the custom set up by the plaintiff. At the first hearing of the suit the plaintiff's pleader stated that the custom referred to in the plaint was a family and tribal custom, *i.e.*, a custom prevailing among the Bais Thakurs of the Rae Bareli District and that it was a custom of "lineal primogeniture." He could not say whether or not the custom was in derogation of the Hindu Law. At a subsequent hearing of the suit, the plaintiff's pleader said: "I made an omission when I defined the custom. By the tribal custom I mean the custom in the tribe, *i e.*, the Bais clan in which the "rule of *gaddi nashini* prevails." A further explanation was given in this Court by Babu Sri Ram who said that the plaintiff meant that whenever the rule of *gaddi nashini* or succession by a single heir prevails in Bais family in the Rai Bareli District, the heir is ascertained by the rule of lineal primogeniture, *i.e.*, continual descent to the eldest member of the eldest branch to the exclusion of nearer members of younger branch,

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Fourteen witnesses were produced to prove this custom. They asserted the existence of the custom in general terms and attempted to prove five instances in which the custom was followed.

The first was the succession of Shanker Baksh to his grandfather, Raghunath Singh, to the exclusion of his uncle Bishnath Singh. The Subordinate Judge is mistaken in supposing that Shankar Bux took the estate under Act I of 1869. This may be a true instance of a succession by a lineal primogeniture but little is known of the circumstances under which Shankar Bux succeeded in getting the estate.

The second was the succession of Beni Madho to his grandfather, Sheo Prasad, to the exclusion of his uncle Gur Bux Singh but this instance broke down for Jugraj Singh plaintiff's witness No. 16 stated that Ram Narain the eldest son of Sheo Prasad survived his father and that Beni Madho succeeded Ram Narain.

The third instance was the succession of Balbhaddar Singh to his grandfather, Kamta Bakhsh, a Bais Talukdar in the Rae Bareli District. But as Kamta Bakhsh's name appears in List III prepared under section 8 of Act I of 1869, the succession was according to section 22 of the Act. This is not an instance of succession according to a custom. Moreover, if the custom existed in this family Kamta Bakhsh's name would have been entered in List II not in List III. This tends to show that the rule of *gaddi nashini* did not prevail in this family before 1869.

The fourth instance was the succession of Bhagwant Singh to his grandfather, Bisheshur, to the exclusion of his uncle Sitla Bakhsh. List III under Act I of 1869 shows that Thakur Bakhsh was the owner of the Kusurua estate in 1869 (see also Rae Bareli Settlement Report 1905 p. 174). The Bisheshur Bakhsh mentioned by the witnesses died only a few years ago. The estate seems to have descended according to Act I of 1869. This is not an instance of the alleged custom. The entry of the estate in List III tends to show that the rule of *gaddi nashini* did not prevail in the family before 1869. The supposed fifth instance is the same as the fourth.

Thus only one instance of succession according to lineal primogeniture has been proved apart from the Oudh Estates Act. I agree with the Court below that it is impossible to hold that the custom set up by the plaintiff has been proved and, therefore, the plaintiff's claim to the Thangaon estate and the property entered in List C was rightly dismissed. The question whether the plaintiff is entitled to the Rajpur-Keotana estate is one of some difficulty and importance.

The estate was conferred upon Raghuraj Singh by a primogeniture *sanad* in the form given in Sykes' Compendium of *Talukdari* Law at pp. 386-387 containing the following provision: "It is another condition of this grant that in the event of your dying intestate or any of your successors dying intestate, the estate shall descend to the nearest male heir according to the rule of primogeniture." When the Oudh Estates Act was passed, the name of Raghuraj Singh was entered in Lists Nos. 1 and 5 prepared under section 8 of the Act with the result that the succession to the estate was thereafter governed by the Act. Babu Sri Ram contended that the *sanad* governs the succession to an estate in List III as soon as clause II of section 22 of the Act is reached. He referred us to the case of *Sheo Singh* v. *Raghubans Koer* (1), in which the Mahewa estate was decreed to the plaintiff on the strength of a primogeniture *sanad*; but it will be seen that their Lordships proceeded in that case on the ground that the Act had never applied to the estate, Balbhaddar Singh having taken the estate by devise before the Act was passed. The Act undoubtedly became applicable to the estate now in question and it follows, therefore, that the limitation in the *sanad* granted to Raghuraj Singh was superseded by the Act and that the succession to the estate is governed by Clause II of section 22 of the Act without reference to the *sanad* [see *Brij Indar Bahadur Singh* v. *Rani Janki Koer* (2)]. In that case the person, whose estate was in dispute, had received a *sanad* which provided that the estate should in case of intestacy descend to "the nearest male heir according to the rule of primogeniture." Rani Janki Koer as a woman could not have succeeded under that *sanad* but she was held to be entitled to the

(1) 32 I. A. 634; 27 A. 634; 15 M. L. J. 352; 9 C. W. N. 909; 2 C. L. J. 194; 8 O. C. 317.

(2) 5 I. A. 1; 1 C. L. R. 318.

estate under clause II of section 22 of the Act. It was contended on behalf of the defendant that the effect of clause II of section 22 of the Act was to relegate the parties entirely to the ordinary law, in this case the *Mitakshara*, and that we should determine the question of succession according to that law as if the estate had never been subject to the Act or entered in List 3 under section 8. As authority for this contention, we are referred to the case of *Narindra Bahadur Singh* v. *Achal Ram* (3), in which it was said that the effect of clause II was "simply to refer the parties to the law which would govern the descent when the special provisions of the Act are exhausted." But I understand that by the words "special provisions" their Lordships meant the first ten clauses of section 22 of the Act. The result would be that an estate passing to an heir under clause II of section 22 would pass out of the Act altogether, a result not in accordance with the decision in *Jagdish Bahadur* v. *Sheo Partab Singh* (4). It is difficult to believe that the legislature intended that estates entered in Lists Nos. 3 and 5 should descend as partible estates under clause II of section 22. In the case last cited it was held that estates in List II descend under clause II as impartible estates and I am of opinion that the same must be held regarding estates in Lists III and V with this qualification that whereas estates in List II descend to a single heir to be determined by custom if proved or in default of a custom in the manner explained in the case of *Narindra Bahadur* v. *Achal Ram* (3), estates in Lists Nos. 3 and 5 descend according to "the rule of primogeniture." In other words, the rule of primogeniture must be observed in applying the ordinary law to estates in Lists Nos. 3 and 5 just as any custom that is proved to be binding on the parties must be observed in applying the ordinary law to estates in List No. 2.

This does not by any means imply the abrogation of the ordinary law. For example, in applying the rule of primogeniture to the estate of a Hindu in List Nos. 3 or 5, regard must be had to the parental system of the Hindu Law whereby the descendants of the grandfather must be exhausted before recourse is had to the line of the great grand-father.

(3) 20 I. A. 77; 20 C. 649.

(4) 28 I. A. 100; 23 A. 369; 11 M. L. J. 178; 3 Bom. L. R. 298; 5 C. W. N. 602.

The question is whether the words, "rule of primogeniture" in section 8 of the Act denote the succession of the eldest or first born among several claimants equally entitled under the ordinary law or the succession of the representative of the senior line, however remote he may be *i. e.*, lineal primogeniture. It is common ground that the words do not denote the succession of the first born or the eldest collateral regardless of line and degree.

It is only by establishing lineal primogeniture as to the rule of succession applicable to estates in List No. 3 that the plaintiff can succeed for the defendant is older than the plaintiff and is nearer in degree to Raghuraj Singh.

Babu Sri Ram on behalf of the plaintiff contended that subject to any custom that may be proved, all impartible estates descend under the Hindu Law in accordance with the rule of lineal primogeniture. He relied upon the cases of *Narajanti* v. *Venkata Chalapati* (5); *Kachi Kaliyana* v. *Kachi Yuva* (6); *Mahesh Chunder* v. *Satragan Dhal* (7).

The first of these cases related to a Polliam or Paleiyam which was described in *Naragunty Lutchmeedavamah* v. *Vengama Naidoo* (8) as being in the nature of a *Raj* which may belong to an undivided family but is not the subject of partition and can be held by only one member of the family at a time. This Paleiyam had been held by the Privy Council in 1861 to be the property of the undivided family to which parties to a suit belonged. The principal plaintiff was the paternal uncle and nearest heir of the 10th Pleiyagar. The defendant had been let into possession on the death of the 10th Paleiyagar as the surviving representative of the eldest branch of the family and pleaded that he was entitled to retain possession under the rule of primogeniture. The High Court held that the property was still joint and the parties were still members of an undivided family. The question was (see p. 265) how the rule of primogeniture should be applied. The Court laid stress on the fact that separate possession but not separate ownership is the characteristic of property which although impartible is *ex-hypothesi* joint, that, therefore, the senior branch of the family retained its owner-

(5) 4 M. 250.

(6) 28 M. 508; 2 A. L. J. 845; 2 C. L. J. 231; 10 C. W. N. 95; 7 Bom. L. R. 907; 15 M. L. J. 312; 1 M. L. T. 12.

(7) 29 C. 343.

(8) 9 M. I. A. 66 at p. 86, 1 W. R. (P. C.) 30.

ship though out of possession, and the undivided interest of a member in that branch passed by survivorship to his descendants, and they held that when impartible property passes by survivorship from one line to another, it devolves on the nearest co-parcener of the senior line. In the second case also stress was laid upon the fact that the estate in question was the impartible property of an undivided family [see the report of the case in the High Court in *Kachiyva Rangappa Kalakka Thola Udayir* v. *Kachi Kalyana Rangappa Kalakka Tholla Udayar* (9)] and the decision was upheld on the same ground.

In the third case the decision rested on the evidence of a custom that no descendant of a younger branch could take until all the elder branches were exhausted. In the present case no such custom has been proved.

In both the Madras cases the Court referred to and distinguished the Tipperah case of *Neelkisto Deb Burmono* v. *Bur Chunder Thakur* (10). The decision in that case also rests upon proof of a custom but at p. 541 of the report their Lordships make some observations which are pertinent to the present case and serve to distinguish it and the Tipperah case from the Madras cases. They say "The truth is, the title to the Throne and the Royal lands is, as in this case, one and the same title; survivorship cannot obtain in such a possession from its very nature. * * * As there can be no such survivorship, title by survivorship, where it varies from the ordinary title by heirship, cannot, in the absence of custom, furnish the rule to ascertain the heir to a property which is solely owned and enjoyed, and which passes by inheritance to a sole heir." In one of the Madras cases, it was said that the Tipperah case was distinguishable on the ground that it was governed by the law of the *Dayabhaga* which does not recognise survivorship as determining the devolution of property. This is true, but the rule of inheritance by survivorship under the *Mitakshara* also applies only to joint property. In the present case the Rajpur-Keotana estate was in the hands of Raghuraj Singh as his separate property. His father was dead and he had no children. His uncle Narpat Singh received a separate grant from Government so also did the children of his deceased uncle Jugraj Singh [for the history of the family see *Narpat Singh* v. *Ali Hossein* (11)]. The estate being the separate property of Raghuraj Singh, the Madras decisions, which rest on the rule of survivorship, are not applicable.

The plaintiff has, in my opinion, failed to show that there is any rule of Hindu Law by which impartible estates, which are not the property of a joint family, descend by the rule of lineal primogeniture.

Therefore, the plaintiff in order to succeed must show that the word primogeniture in section 8 of the Act denotes lineal primogeniture. It was contended on his behalf that it has been held twice by the Privy Council that the word is used there in this sense.

The first case referred to was that of *Achal Ram* v. *Udai Partab* (12). That case related to an estate entered against the name of Pirthipal Singh in Lists Nos. 1 and 2, which, on the death of Pirthipal Singh before 1869, had devolved on his widow and after her death on their daughter. On the death of the daughter, her husband Achal Ram, who had no right whatever, had taken possession of the estate. The plaintiff was a collateral relative of Prithipal but not the nearest collateral. In order to succeed he had to establish a rule of a descent by lineal primogeniture. There was no evidence that the estate had ever descended according to such a rule. The argument of the plaintiff before their Lordships was that as Prithipal Singh's name was in List, II it should be presumed that the heir was to be ascertained by the rule of lineal primogeniture. Their Lordships repelled this contention saying that they were of opinion that "when a *Talukdar's* name is entered in the second list and not in the third list, the estate although it is to descend to a single heir is not to be considered as an estate passing according to the rule of lineal primogeniture". The other case relied on was that of *Narindra Bahadur Singh* v. *Achal Ram* (3), in which Lord Hobhouse said: "The estate is in Oudh, and was granted by the Crown to one Prithipal Singh after the confiscation, and it is placed in class 2 of Act I of 1869, and not in class 3. The

(9) 24 M. 562 at p. 609.

(10) 12 M. I. A. 523; 3 B. L. R. 13; 12 W. R. (P. C.) 21.

(11) 11 C. 1.

(12) 11 I. A. 51; 10 C. 511.

effect of that is that the estate is labelled as one which according to the custom of the family descends to a single heir, but not necessarily by the rule of lineal primogeniture. It may be, and it has so happened in this case, that the heir according to lineal primogeniture is more remote in degree from the ancestor than other collaterals, or other persons in the line of heirship. If so, the degree prevails over the line according to the classification under the Act; though if two collaterals, or persons in the line of heirship, are equal in degree, then as the property can only go to one, recourse must be had to the seniority of line to find out which that one is." It must be admitted that it was not necessary for their Lordships in either case to decide the question whether an estate in List No. 3 devolves under clause 11 of section 22 according to the rule of lineal primogeniture, but they had to consider incidentally the effect of the entry of an estate in list No. 3 and the language used by both Sir Barnes Peacock and Lord Hobhouse suggests strongly that they were of opinion that degree prevailed over line in the case of an estate in List No. 2 but that line prevailed over degree in the case of an estate in List No. 3. It must be borne in mind that the application of the rule of primogeniture prescribed by section 8 is limited to cases of succession by ascendants and somewhat remote collaterals of the deceased and it is obvious and also admitted that the words "rule of primogeniture" do not import the succession of the first born or eldest ascendant or collateral regardless of line and degree. It appears, therefore, that if primogeniture implies no more than the succession of the first born persons standing in the same degree of relationship to the deceased, the rule of succession is the same for estates in Lists Nos. 3 and 5 as for estates in List No. 2 if the personal law is the same and no custom is proved.

When the Legislature used the words "rule of primogeniture" they must have intended some known rule of succession the details of which in its application to collateral succession could be ascertained. There was no such rule known to the Hindu or Muhammadan Law apart from special customs, the details of which are scarcely ever alike. They were providing a rule of succession which would be applicable to Hindus, Muhammadans and Christians alike and in the circumstances I do not think it is an extravagant assumption that they had in the mind the rule of primogeniture as applied to the succession of real estate in England. It has been part of that rule since the time of Edward the First if not that of Henry the Third, that all the lineal descendants of any person deceased represent their ancestor, *i. e.*, stand in the same place as the person himself would have done had he been living (see Hale on the Common Law, Ed. of 1794, Vol., Chap. 11, Pollock and Maitland's History of the English Law, Vol. 2 p. 257 and authorities there cited). I gather from the language used by their Lordships in the two cases last mentioned that they considered that this rule of representation applied to the succession of estates in List No. 3, if so, the rule applies to estates in List No. 5 also.

For these reasons, I would hold that the Rajpur-Keotana estate, *i. e.*, villages in List A attached to the plaint devolved upon the appellant upon the death of Brijnath Koer. I would allow the appeal in part and give the appellant a decree for possession of that estate with mesne profits from October 25th 1904 the amount to be determined in execution of decree. In other respects, I would dismiss the appeal and I would order the parties to pay and receive proportionate costs in both Courts.

Sanders, A. J. C.—I concur with my learned colleague.

When in clauses (1) (2) (3) (4) (6) &(10) of section 22 of the Oudh Estates Act, the rule of succession by lineal descent is prescribed, it does not appear too far fetched an assumption that the Legislature intended that on clause 11 of the same section being reached, the persons entitled to succeed in the case of estates in Lists Nos. 3 and 4 should be ascertained according to the rule of lineal primogeniture.

Appeal partly allowed.

ANTHARYAMI PATNAIK *v.* HARIBANDHU SABUTO.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 743 OF 1910.

October 6, 1910.

Present:—Mr. Justice Krishnaswami Aiyar.

ANTHARYAMI PATNAIK—PLAINTIFF—APPELLANTS

versus

HARIBANDHU SABUTO AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act XIV of 1882), *s.* 13—*Suit to declare plaintiff's right as* karnam—*Prior suit between parties for invalidation of* pattahs *granted by plaintiff—Decision that plaintiff was not* karnam—Res judicata.

Plaintiff sued for declaration of his right as hereditary *karnam* of a certain temple. In a prior suit between the parties (wherein plaintiff was 3rd defendant) it was sought to invalidate certain *pattas* granted by plaintiff in respect of the temple lands.

An issue was raised as to whether plaintiff was *karnam* of the temple and was decided against him :

Held, that the present suit was barred as *res judicata*.

Obiter—The suit will not be *res judicata* if it were based on a subsequent appointment of plaintiff as *karnam*.

Second appeal against the decree of the District Court of Ganjam, in Appeal Suit No. 343 of 1908, presented against the decree of the Court of the District Munsif at Aska, in Original Suit No. 306 of 1908.

Facts appear from the following judgment of the lower appellate Court :—

1. Plaintiff sued for a decree declaring that he was the hereditary *karanam* of the temple of Sri Narayanaswami at Narayana Patna and to recover Rs. 30 for emoluments from 1st defendant and for other reliefs.

2. The District Munsif dismissed the suit with costs on the ground that it was barred by *res judicata*. Plaintiff appeals.

3. The only question arising for decision in this appeal is :—

> Whether the present suit is barred as *res judicata* by the judgment passed in Original Suit No. 624 of 1900 on the file of the District Munsif of Aska and in Appeal Suit No. 230 of 1902 on the file of this Court ?

4. In Original Suit No. 614 of 1900, the present plaintiff was 4th defendant (see judgment I passed in that suit). That suit was brought on behalf of the above-named temple to declare that the *patta* granted by the present plaintiff and another (3rd defendant in that suit) in respect of the temple lands was invalid and to recover rent due for *Fasli* 1309. Issue III related to the genuineness and *bona fide* character of the *patta* granted by the present plaintiff and another. This issue included the sub-issues contained in para. 81 of the judgment, *viz.*, (*p*) "Whether the *patta* granted by defendants Nos. 3 and 4 is *bona fide*," and (*q*) "Whether on the date of the said *patta* the 4th defendant was the *karanam*". The finding was—"The 4th defendant is not the *karanam* appointed by the committee. He was only set up as *karanam* by 3rd defendant and any act done by him in the matter of the temple management and its suits cannot be illegal and invalid".

5. In Appeal No. 230 of 1902, this Court held on the said point: "I, therefore, find that 4th defendant is neither the *de facto* nor the *de jure karanam* and that 2nd plaintiff is". (Exhibit H para. 6) The decree of this Court was confirmed by the High Court.

6. Plaintiff's present suit seeking for the declaration that he is the *karanam* of the same temple is, therefore, barred by *res judicata*.

7. The lower Court's decree is confirmed and this appeal dismissed with costs. Vakil's fee Rs. 15.

Judgment.—I am quite clear that the suit is barred by *res judicata*. There was a previous suit between the same parties; the plaintiff in the present case was then defendant, and a distinct issue was raised as to whether he was the *karnam* at the time; and both the original and appellate Courts on that occasion came to the conclusion that the plaintiff was not either the *de facto* or the *de jure karnam*. Mr. Narayana Murthi contends that the present suit is based upon a subsequent appointment as *karnam*. If this were so, I quite agree the former decision would not operate as *res judicata*. I have given him full liberty to make use of the private copy of the plaint which he wished to rely on as showing the exact nature of the present suit. Even with this advantage, he is unable to show that there is any allegation in the plaint of a subsequent appointment as *karnam*. All that the plaint states is that the defendants got the work of *karnam* done by the plaintiff. That might or might not be true. It does not certainly amount to an

aversement of appointment of the plaintiff.

I dismiss the appeal.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 784 OF 1910.

October 6, 1910.

Present:—Mr. Justice Krishnaswami Aiyar.

VENKATRAMANA AITHALA—PLAINTIFF—APPELLANT

versus

NAGAPPAYA AND OTHERS—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Mulgeni-*tenure*—*Sudden enhancement of Government assessment*—*Liability of tenant to contribute rateably to the increase*—*Madras Revenue Recovery Act (Act II of* 1864).

Where Government assessment on land let under *mulgeni*-tenure is suddenly increased, the landlord alone should bear the whole increase under the provisions of the Madras Revenue Recovery Act, and the tenant cannot be called on to contribute rateably towards the increase.

Vedyapurna Thirthaswami v. *Uggana*, 20 M. L. J. 640 (F. B.), 1 M. W. N. 333; 8 M. L. T. 173; 7 Ind. Cas. 321, followed

Second appeal against the decree of the District Court of South Canara, in Appeal No. 282 of 1908, presented against the decree of the Court of the District Munsif of Kundapur, in Original Suit No. 135 of 1907.

Facts are fully set forth in the following judgment of the lower appellate Court:—

Plaintiff as *mulgar* sued to establish the liability of his *mulgeni*-tenants to pay the excess assessment imposed on the land at recent settlement.

2. Apparently the *mulgeni* rent is 10 *muras* of rice and Rs. 3-3-0 equal to some 50 odd rupees now-a-days. The old assessment was Rs. 19-5-8. The new assessment is Rs. 60-9-0. Hence plaintiff has to pay Rs. 60 and get only Rs. 50 for his land.

3. His suit failed and he appeals.

4. The appeal must fail. Defendants are *mulgeni*-tenants and their arrangement with plaintiff is final and unalterable. It is not open to the Court to say that despite the fact that the *mulgeni* rent is fixed at a certain rate for ever, yet it shall be henceforth increased.

5. It is not open to the Court to say to the tenants 'you and not the landlord shall pay any part of the Government demand,' because Revenue Recovery Act throws the whole burden of paying the Revenue on the registered *puttahdar*, and expressly lays down that any tenant who pays Government Revenue on behalf of his landlord, can recover it from his rent due to the landlord."

6. There is no escape from these provisions. The Civil Court cannot apportion and bid the tenant pay his share. He is entitled to say: "My *mulgeni* is so much and I won't pay more. I paid this much to Government for my landlord and I will recover it from him" and those rights I cannot interfere with, even if I would. The appeal is dismissed with costs. But I will repeat here for plaintiff's benefit what I believe to be the only remedy for this disastrous situation. As things stand, plaintiff can only get Rs. 50 a year for the land, while he must either pay Government Rs. 60 and lose Rs. 10 a year or he must suffer it to be sold for arrears of revenue or he may pay up the arrears and then surrender it to the state. He obviously will not go on paying Rs. 60 and receiving only Rs. 50 for that will amount to a big sum in time.

7. If he allows the land to be sold for arrears, the *mulgeni* will be extinguished, for the land is sold free of encumbrances. Hence, of course, the *mulgenidars* will never let it be sold. If he relinquishes it, the *mulgeni* is extinguished, for the sub-lease dies when the lessor ceases to own the property let. The land then becomes land available for *darkhast*. It will be given to the *mulgenidars* presumably on *darkhast*. They will then become *mulgars* and will pay full enhanced assessment. They will pay more than they paid as *mulgeni* but will in return acquire full *muli* rights, so they will not lose. The *mulgar* will escape paying Rs. 10 a year or whatever the excess of revenue over *mulgeni* may be, and so far he will gain. But then the effect of the re-settlement will have been to deprive him absolutely of the property. Now the property before settlement brought in a profit. This land yielded 10 *muras* of rice at Rs. 3 a *mura*, which is Rs. 30, and about Rs. 3 besides, and the assessment was about Rs. 20. So plaintiff got about Rs. 13 a year profit and he had in addition the remote possibility of the *mulgeni* some day reverting to him. This was worth a little. So the effect of the settlement

has been to deprive him of about Rs. 14 a year if we value this remote right at Re. 1. If, then, he while relinquishing the property is allowed to take back on *durkhast* such small portion of it as will bring him in a net income of Rs. 14 a year, he will be in the same position he was in before settlement. The *mulgeni*-tenants, who have made the property more valuable, will, as they should, get it for themselves and will get the *puttahs* in return for the enhanced assessment. Every one will thus have reason to be content and no one will lose anything I suggest to plaintiff that he try to settle this matter in this way, because there is no other.

Judgment.—This case is covered by the recent Full Bench decision, *Vidyapurna Thirthaswami* v. *Uggana* (1). I dismiss the second appeal.

Appeal dismissed.

(1) 20 M. L. J. 649; 1 M. W. N. 333; 8 M. L. T. 173; 7 Ind. Cas. 321.

(s. c. 1 M. W. N. 662.)

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 390 OF 1909.

August 12, 1910.

Present:—Mr. Justice Wallis and Mr. Justice Krishnaswami Aiyar.

NADAMUNI NARAYANA IYENGAR—DEFENDANT—APPELLANT

versus

VEERABHADRA PILLAI *alias* RANGA-RATNAM PILLAI MINOR—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act XIV of 1882), s. 244—Stranger auction-purchaser, suit against, to set aside sale not maintainable—Auction-purchaser not representative of decree-holder.

It is well settled that as between the judgment-debtor and the decree-holder, an objection to the sale in execution can only be taken in execution and section 244, Civil Procedure Code, prohibits a suit by a party or his representative against an auction-purchaser to raise a question which as between the judgment-debtor and the decree-holder must have been determined under that section. The auction-purchaser derives his rights from the sale which the party to the execution proceeding should not be permitted to impeach except by application to the executing Court. A suit against an auction-purchaser is not maintainable as section 244 is a bar to set aside the sale except in a proceeding between the parties.

A stranger purchaser in execution of a money decree can never be treated as representative of the decree-holder. He purchases the rights of the judgment-debtor in the property attached and not those of the decree-holder between whom and himself there is no privity of estate.

The true rule is that where the decree is a mortgage decree the purchaser in execution will be the representative of the judgment-debtor. Where property is attached and sold under a money decree, a stranger purchasing the property obtains the rights of the judgment-debtor in the property but is not the representative even of the judgment-debtor; still less can he be the representative of the decree-holder.

Second appeal against the decree, dated 4th December 1908, of the District Court of Trichinopoly, in Appeal Suit No. 172 of 1908, presented against the decree, dated 11th March 1908, of the Court of the District Munsif of Srirangam, in Original Suit No. 80 of 1904.

Mr. *T. Narasimma Iyengar*, for the Appellant.

Mr. *T. Rangachariar*, for the Respondent.

Judgment.

Wallis, J.—This is a suit to recover a temple office which is alleged to be hereditary in the plaintiff's family and which was purchased at a Court auction by the defendant in execution of a decree against a previous holder of the office. The plaintiff obtained a decree in the lower appellate Court on the ground that the office was one of personal service and that the attachment and sale were bad as opposed to section 266 (*f*) of the Code of Civil Procedure. It is now contended that such a suit is barred by the operation of section 244 of the Civil Procedure Code and should have been dismissed. It is well settled that as between the judgment-debtor and the decree-holder, this is an objection which can only be taken in execution and it is also well settled that the provisions of section 244 prohibit a suit by a party, or his representatives against an auction-purchaser to raise a question which as between the judgment-debtor and the decree-holder must have been determined under that section: *Basti Ram* v. *Fattu* (1), *Daulat Singh* v. *Jugal Kishore* (2) and *Mayan Pathuti* v. *Pakuran* (3). These decisions are not based on the ground that the auction-purchaser is the representative of the decree-holder within the meaning of the section, but upon the general intention of the Legislature as manifested in the section. The view that the auction-purchaser may be treated as the representative of the decree-holder in

(1) 8 A. 146.
(2) 22 A. 108.
(3) 22 M. 347.

cases arising between him and the judgment-debtor was, no doubt, taken in *Manikka Odayan* v. *Rajagopala Pillai* (4), relying on *Sadhu Taraganar* v. *Hussain Sahib* (5), in preference to the authorities cited the other day. But as pointed out in *Krishna Satapasti* v. *Sarasvatula Sambasiva Row Patulu* (6), *Sandhu Taraganar* v. *Hussain Sahib* (5), does not support so general a proposition, as in that case the decree-holder was the auction-purchaser and the parties in question were his representatives by virtue of their purchase from him. The decision in *Manikka Odayan* v. *Rajagopala Pillai* (4), should, I think, have been supported on the ground that the application raised a question between the representatives of the judgment-debtor and the decree-holder in which the auction-purchaser had been added as a party interested. *Prosunno Kumar Sanyal* v. *Kali Das Sanyal* (7), *Hira Lal Ghose* v. *Chundra Kanto Ghose* (8). In the present case we must reverse the decree of the lower appellate Court and restore that of the District Munsif with costs here and in the lower appellate Court.

Krishnaswami Aiyar, J.—A decree was passed against the plaintiff's father in O. S. No. 90 of 1894 on the file of the Srirangam Munsif for maintenance making the emoluments of the Mirasi office of Accountant in the Srirangam temple liable. The decree was executed against the plaintiff after the death of his father and it must be taken that due notice was issued to the plaintiff of the proceedings in execution. The office of Accountant was itself attached and, assuming that the attachment was irregular, no exception having been taken to the attachment, the attached property was sold on the 16th July 1897 and the sale confirmed. The defendant, who purchased the office in execution, obtained possession of it in November 1903. The plaintiff constitutes the present suit for the surrender by the defendant of the Mirasi office on the ground that the sale was null and void. The plaintiff having obtained a decree in the District Court, the defendant has preferred this second appeal. It seems to me that the suit is not maintainable. The plaintiff was a party to the execution proceedings and the only mode in which he can impeach the sale is by an application to the executing Court to set aside the sale. It is argued for the plaintiff that the sale is a nullity because the decree did not direct the sale of the office and the office was inalienable. There was a personal decree against the plaintiff's father and even assuming that the office was not charged with the liability, it could be proceeded against in execution of the money decree. Supposing that the office was inalienable, on which I do not express an opinion, it was competent to the executing Court to deal with the question whether the office was saleable. No exception having been taken in execution to the sale, we must take it that the sale was rightly held. The defendant cannot be ousted from possession until the sale is duly set aside. No attempt having been made by the plaintiff to impeach the sale in execution and the sale having been confirmed, it is not competent to the plaintiff to disturb the possession of the auction purchaser by suit. See *Mayan Patuthi* v. *Pakuran* (3) and *Kishory Mohum Roy* v. *Mahomed Mujaffar Hussein* (9). The auction purchaser derives his rights from the sale which the party to the execution proceeding should not be permitted to impeach except by application to the executing Court. The true principle has been sometimes overlooked and the bar to the suit of the judgment-debtor against the stranger purchaser or *vice versa* rested on section 244 of the Code of Civil Procedure, the suit being supposed to raise a question between the parties to the suit or their representative. See *Dhani Ram* v. *Chaturbhuj* (10), and *Daulat Singh* v. *Jugal Kishore* (2).

But this latter view appears to me to be erroneous. The mistake arises from a confusion between two ideas. One is that section 244 being a bar to setting aside the sale except in a proceeding between the parties, the suit against the purchaser is not maintainable until it is so set aside. The other is that section 244 bars the suit as the purchaser is the representative of the decree-holder. It seems to me the former view is correct. Section 335 would be inconsistent with the latter. We cannot treat this suit as an application under section 244 to set aside the sale as the decree-holder who would

(4) 30 M. 507 ; 2 M. L. T. 347 ; 17 M. L. J. 291.
(5) 28 M. 87.
(6) 31 M. 177 ; 3 M. L. T. 306.
(7) 19 C. 683 ; 19 I. A. 166.
(8) 26 C. 539 ; 3 C. W. N. 493.
(9) 18 C. 188.
(10) 22 A. 86.

be affected by it is not a party. It is perhaps unnecessary to discuss the question whether section 244 is a bar to the present suit though I have no hesitation in expressing my concurrence with the decision in *Krishna Satapasti* v. *Sarvatula Sambasiva Row* (6). It seems to me that the view upheld in *Manikka Odayan* v. *Rajagopala Pillai* (4), that the auction-purchaser is the representative of the decree-holder in execution of a money decree is not tenable. *Sandhu Taraganar* v. *Hussein Sahib* (5), which was the case of a purchaser from the decree-holder who purchased in execution of his own decree, is different from the case of a stranger purchaser. It is difficult to see how a stranger purchasing in execution of money decree can ever be treated as the representative of the decree-holder. He purchases the rights of the judgment-debtor in the property attached and not those of the decree-holder between whom and himself there is no privity of estate. It may sometimes be that the purchaser carries more than the interest of a judgment-debtor as for example when the judgment-debtor has done something with the property in fraud of the decree-holder. The stranger purchaser cannot be the representative of both the parties. The true rule is that where the decree is a mortgage decree, the purchaser in execution will be the representative of the judgment-debtor. Where property is attached and sold under a money decree a stranger purchasing the property obtains the right of the judgment-debtor in the property but is not the representative even of the judgment-debtor; still less can he be the representative of the decree-holder. The authorities cited by the learned Judges in *Manikka Odayan* v. *Rajagopala Pillai* (4), are against the view which they have enunciated. See *Bashir Uddin* v. *Jhori Singh* (11); *Mammod* v. *Locker* (12); *Chinnammal* v. *Authinatha Iyengar* (13). It appears to me that *Sadhu Taraganar* v. *Hussain Sahib* (5) was relied on under a misapprehension as pointed out in *Krishna Satapasti* v. *Sarasvatula Sambasiva Row* (6). Nor do the other cases, *viz.*, *Kasinatha Ayyar* v. *Uthumansa Rowthan* (14), *Ishan Chunder Sirkar* v. *Beni Madhub Sirkar* (15) and *Prosunno Kumar Sanyal* v. *Kali Das Sanyal* (7), support the judgment in *Manikka Odayan* v. *Rajagopala Pillai* (4). Section 244, therefore, does not bar the suit.

I would, however, in the view already expressed, set aside the decree of the District Judge and dismiss the suit with costs throughout.

Appeal allowed.

(11) 19 A. 140. (12) 20 M. 487.
(13) 10 M. L. J. 228.
(14) 25 M. 529; 12 M. L. J. 1.
(15) 24 C. 62; 1 C. W. N. 36.

(s. c. 1 M. W. N. 669.)

MADRAS HIGH COURT.

CIVIL SUIT No. 156 OF 1909.

September 28, 1909.

Present:—Mr. Justice Wallis.

BEE JAN BEE AND ANOTHER—PLAINTIFFS

versus

FATIMA BEEBEE AND OTHERS—DEFENDANTS.

Muhammadan Law—Will by deceased—Consent of heirs on death bed—Gift—Possession—Gift to wife by husband—Contract Act (IX of 1872), s. 253—Terms of partnership.

The consent of the heirs of a Muhammadan testator given before his death is not sufficient to validate his Will.

Quæri.—Whether the consent given at the request of the father on the death-bed by his family can be an assent voluntarily given?

Under Muhammadan Law a gift is invalid if it is not followed by delivery of possession. But a gift to a wife by the husband is an exception to this rule.

In the absence of any evidence as to the terms and conditions obtaining in a partnership all partners are entitled to share equally in the profits of the partnership business and must contribute equally towards the losses sustained by the partnership.

Mr. *Ibrahim Saheb*, for the Plaintiffs.

Mr. *V. Ragunathasastry*, for 1 to 3 Defendants.

Mr. *V. V. Srinivasa Iyengar*, for the 4th Defendant.

Mr. *David* and *Brightwell*, for the 5th Defendant.

Mr. *V. S. Govindachari*, for the 6th Defendant.

Judgment.—This is a suit by two of the daughters of the deceased Mohideen Saheb for a declaration that the Will left by him is illegal, void, invalid and inoperative under the Muhammadan Law and for the partition of his estate.

The first issue is "did the plaintiffs and other heirs of the deceased consent to the dispositions of his Will during his death illness, and if so, is such Will valid?" Now

there is a conflict of evidence on the points as to whether the decease, before his death called all the members of his family together and got their consent to the Will. Two members of the family, the present plaintiffs, probably under the influence of their husbands deny that there was any such interview or any consent given. All other members of the family say that there was such a consent. They are not very highly educated people and there are discrepancies in their evidence. But, on the whole, I accept the evidence of the inquiry which I may observe is against their own interest and I have no doubt that such an incident did take place and that the father called in his wife and his children and that they signified their consent to the provisions of the Will.

That, however, does not dispose of the question because it is contended for the plaintiffs that, even if this be so, such consent given before his death is invalid and inoperative under the Muhammadan Law. Now, the fourth defendant who is the chief beneficiary under the Will relies upon a passage in Mr. Amir Ali's book, Volume I, page 486, 2nd Edition in which it is said that "The voluntary assent given by the heirs during the last illness of the testator is irrecoverable because the heir is supposed to have then acquired a right."

Now, is there any such exception as that that a consent given during the last illness is sufficient to validate the Will? It seems to me that such an important exception as that would certainly have found expression in the recognised treatises on Muhammadan Law and Text books. And there is absolutely nothing in the cases to support it to which I have been referred *viz. C. V. A. Kuttiumah* v. *V. P. Biathumah* (1), *Ranee Khajooroonissa* v. *Musammat Roushan Jahan* (2), *Bafahun* v. *Bilaikhanhum* (3) and *Fahmida Khanam* v. *Jafri Khanum* (4), Muhammad Abdur Rahman's Institutes of Mussalman Law, Article 472, Wilson's Digest and Baillie's Digest, page 615, none of which recognises any such rule as this. Therefore, with all deference to the high authority of Mr. Ameer Ali, I am unable on the strength of his statement alone to hold that a consent of the heirs of a Muhammadan testator given before his death is sufficient to validate his Will. I may observe that Mr. Amir Ali speaks of "Voluntary Assent" and it would be a question whether a consent given at the request of the father on the death-bed by his family would be said to be an assent voluntarily given. It is not necessary to go into that question. I find on this issue that the plaintiff and other heirs of the deceased did consent to the disposition of the Will but that his Will is not validated thereby. It follows that the relatives are entitled to a portion of the deceased's estate. But certain questions arise as to what the estate of the deceased consisted of.

First, as regards the jewels. There was certain amount of evidence given for the plaintiffs that the deceased left certain jewels under his watch and chain. But that is denied by the fourth defendant, and the witnesses on his side. I am not prepared to accept on this point the evidence of the witnesses for the plaintiffs whose evidence as to no consent have been given I have been constrained to disbelieve and, on the whole, I find that it is not proved by satisfactory evidence that any jewels other than the watch and chain belonged to the deceased and came into the hands of the 4th defendant. That disposes of the question of jewels. Then there is the question of the house No. 223, Angappa Naick street which was, in 1893, conveyed was purchased by the deceased *benami* in the account of one Sheik—to the wife of the deceased and was some years later conveyed by her to the 4th defendant. The deceased and his family continued to dwell there until the time of his death and he also apparently paid the taxes and expenses for the upkeep of the house. It is contended that under Muhammadan Law this gift to his wife was invalid because he did not vacate possession. The answer is that the case of gifts to wives by husbands is an exception to the rule. It was decided in this Court long ago in *H. H. Azeemunnissa Begum* v. *Clement Dalte, Esq. Receiver of the Carnatic property* (5), which was a case where a gift to his wife by the husband was held valid against the creditors of the donor and also against subsequent purchasers for valuable consideration from the donor. A similar

(1) (1865) 2 M. C. 350.
(2) 3 I. A. 291; 2 C. 184; 26 W. R. 36.
(3) 30 C. 683.
(4) 30 A. 153; A. W. N. (1908) 55, 5 A. L. J. 169.
(5) 6 M. H. C. R. 455.

rule is laid down in *Bava Sait* v. *Mahomed*(6). What happened was sufficient to satisfy the requirements of the Muhammadan Law. I find that this gift is a perfectly valid one and that this house does not form part of the estate of the deceased. The next question is as to the partnership. The question is whether the 4th defendant was taken into partnership by his deceased father during his life-time, and, if so, on what basis the partnership is said to be wound up after the death of the father.

In support of the partnership we have an advertisement which was published in the *Madras Mail* by the fourth defendant himself in November 1906, stating that he had entered into partnership with his father. He tells us that the advertisement was inserted at the instigation of his father. It is not suggested that he signed it. It is absolutely impossible that an advertisement of that sort should not have come to the father's knowledge. I believe the evidence of the 4th defendant on this point. Then we have further the letter written to the Bank of Madras by the deceased, all of which is in his own handwriting except the signature of the 4th defendant showing the members of his firm. In it the 4th defendant is entered as one of the members of his firm and as a signing member. It is true that the other brother the 3rd defendant was also entered as a member of the firm, but he does not now claim to be a partner, and I do not think that this fact effect the value of his evidence as regards to the 4th defendant's partnerships. In the Will which was made 18 months before the death of the deceased it is distinctly stated that the 4th defendant was a partner with his father. Further it is perfectly clear that the deceased who was in the possession of the old established business was anxious to keep his business going and that the 4th defendant was a good business man and was the person most likely and best fitted to carry it on satisfactorily. It is exceedingly probable that he would have taken the 4th defendant into partnership. I have no hesitation in finding that 4th defendant was taken into partnership. Against this the plaintiffs rely upon certain cash book which was kept by the deceased. Now it is quite true that the entries in this cash book do not supply any evidence of partnership: on the contrary the drawings of the 4th defendant and his brother are entered as salary and also one entry which is debited to him is entered as "loan". There is also no evidence that during the partnership there was ever any taking of effects or any division of profits. We must bear in mind, however, that we are dealing with a united family living under the directions of the father. It may well be that the 4th defendant did not assert his right as partner to make any division of property and was content with Rs. 20 or Rs. 30 which he drew every month. This book it is to be observed is entirely in the handwriting of the deceased himself who chose to keep it in two ways although otherwise, the 4th defendant was a partner. Weighing the evidence for the partnership with the evidence against it, the evidence is distinctly in favour of the view that the deceased did take the 4th defendant into partnership. There is no evidence as to the terms and conditions upon which the deceased admitted the 4th defendant into partnership. Therefore, we must be guided by the provisions of the Contract Act, section 253, cl. 2 provides that "All partners are entitled to share equally in the profits of the partnership business, and must contribute equally towards the losses sustained by the partnership." The 4th defendant is entitled to a half share of the profits since November 1906. But the further question arises as to the terms upon which they entered into partnership in November 1906. The deceased was the sole owner of the business and the stock-in-trade. It seems to me that there is no evidence that he ever transferred his interest in the stock-in-trade to the 4th defendant and, therefore, the value of the stock-in-trade of the partnership as it existed in November 1906, must be taken as the capital brought into the business by the deceased. It is not suggested that the 4th defendant himself brought in any capital to the business. It will be necessary to take an account of the partnership and in that account an endeavour must be made to ascertain what was the value of the stock-in-trade at the time when the 6th defendant was admitted into the partnership. The suit will be referred to the Chamber for the purpose of taking the necessary accounts.

There was a question of Government promissory-notes alleged to have formed part of the estate of the deceased. Notes to the extent of Rs. 5,000 appear to have been paid over to the widow Khatija Bi Bi. That was in

(6) 19 M. 343.

consideration of her share in her husband's estate. Then there is some question of Government promissory-notes of Rs. 2,000 which are said to have been realized by the 4th defendants subsequent to the death of his father. This is not denied by him, and it is clear that they were standing in his name. His account of them is that he got them from his mother and that they were the proceeds of some of her inheritance. Whether that is true or not I am quite convinced that these promissory-notes did stand in his name during the life-time of the deceased, and there is absolutely no satisfactory evidence that they formed part of the estate of the deceased. It is perfectly true they were purchased during the life-time of the deceased and formed part of the estate of the deceased. The costs of the parties will be paid out of the estate. The partnership will be wound up for the purpose of realizing the share of the deceased in it. For that purpose and also for the purpose of partition of the estate of the deceased amongst his heirs, the case must be referred to Chambers.

Suit referred to chambers.

(s. c. 1 M. W. N. 673.)

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 1542 OF 1909.

October 27, 1910.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Aiyling.

SENUGA PANDIA THEVAN—DEFENDANT—APPELLANT

versus

VEERABHADRA MOOPAN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Madras Estate Land Act (VIII of 1865)—Madras Estate Land Act (I of 1908)—Landlord and tenant—Right of tenant to improvements—Suit under old Act—Applicability of new Act.

A tenant brought a suit under Act VIII of 1865 to restrain the landlord from interfering with his cultivating betel on his *patta* land. The first Court dismissed the suit but the Sub-Judge on appeal decreed it. The *zemindar* appealed: *Held*, that, the new Act applied to the improvements of the tenant and that the second appeal should be dismissed.

Facts.—The plaintiffs, *ryots* of the *zemindar* of Seithur brought the suit for a declaration of the right of the plaintiffs to cultivate betel without the permission of the *zemindar* defendant, in his *putta* lands and for a perpetual injunction to restrain the defendant from preventing the plaintiffs cultivating *kodikal* crop on their lands. The defendant contended that the plaintiffs are not entitled to raise any crop other than paddy and that the attempt on the plaintiff's part to cultivate such a crop is against the custom prevailing in the *zemin*, that the tenants who hold *varam* lands cannot cultivate *kodikal* crop without reference to the *zemindar* and it is usual to cultivate *kodikal* only in Pannai lands and that if the tenants wanted to cultivate betel in *putta* lands the *puttadar* of the land will be given an exchange of Pannai land of the *zemindar* for cultivation of paddy. The plaintiffs claimed their right to cultivate *kodikal* crop without reference to the *zemindar* on two grounds:—*First*, that as owners of the *kudivaram* right they have the right to cultivate any kind of crop on the lands; *secondly*, that it has been the long custom in the *zamin* to raise such crops without reference to the *zemindar*. On the evidence, the District Munsif came to the conclusion that in the absence of any specific custom or consent of the *zemindar* the tenants had no right to raise *kodikal* crop, relying on *Venkayya* v. *Ramasami* (1), *Narayana Ayyangar* v. *R. G. Orr.* (2), *Kakaria Abbayya* v. *Raja Venkata Papayya Rao* (3), and on the question of custom he found that the plaintiffs have failed to prove the same. On appeal the Sub-Judge took the following statement from the respondent: "The defendant concedes the right of the *puttadars* to directly cultivate betel provided the *zemindar* consents. The exchange arrangement being only a matter of convention or practice is not intended to keep any reservation of betel cultivation to the *zemindar* alone." This exchange theory having been given up, there was only the permission theory and the Sub-Judge held, relying on *Venkayya* v. *Ramasami* (1), that raising betel crop on *nunja* land is neither contravening any agreement or understanding between the parties nor putting the land to unhusbandlike use or to use that would amount in the eye of law to waste and, therefore, the plaintiffs were entitled to cultivate *kodikal* crop without the consent of the defendant. The *zemindar* appealed to the High Court.

Mr. *N. R. K. Tatachariar*, for the Respondents:—

(1) 22 M. 39.
(2) 26 M. 252.
(3) 29 M. 24; 16 M. L. J. 8.

I raise the preliminary objection that this second appeal ought to be dismissed. Section 8 read with section 187 of the new Estates Land Act gives the right to the tenant to use land in his holding without materially impairing the value of the land or rendering it unfit for agricultural purposes notwithstanding any contract to the contrary between the landlord and the tenant made before or after the passing of that Act.

Mr. *P. S. Sivaswami Iyer*, for the Appellant:—

This suit relates to *faslis* previous to the coming into force of the Estates Land Act and the Sub-Judge has held the old Act applicable.

Judgment.—The suit is to obtain a perpetual injunction against the defendant restraining the latter from interfering with the plaintiff in his cultivation of the betel vine. Sections 11 and 187 of the Estates Land Act which came into force on 1st July 1908, make it quite clear that the tenant is entitled to use the land in any way he likes notwithstanding any contract entered into either before or after the passing of the Act, provided he does not thereby infringe the rules of the law. The preliminary objection taken by the respondent that the second appeal must be dismissed by virtue of the above mentioned provisions of the Estates Land Act must, therefore, prevail and their second appeal will be dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 840 OF 1909.

October 14, 1910.

Present:—Mr. Justice Abdur Rahim.

DANTULURI RAGAVARAJU—

PETITIONER

versus

KANJALURI RAMASAWMY AND ANOTHER —RESPONDENTS.

Transfer of Property Act (IV of 1862), s. 55 (1), cl. (g)—Contract Act (IX of 1872), s. 69—Payment of Government revenue by party interested in saving property—Private sale of property—Liability of vendor—Contribution.

Where plaintiff, who was interested in saving property from sale for non-payment of Government revenue, paid the revenue and the property was in the meantime sold by the owner, the liability of the vendor for payment of Government revenue having accrued due before the sale:

Held, that the person paying the revenue was entitled to be re-imbursed by the vendor.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the District Munsif of Cocanada, in Small Cause Suit No. 570 of 1909.

Judgment.—I think the District Munsif was wrong in not giving a decree to the plaintiff as against the 3rd defendant as well. He was the vendor and under section 55, sub-section (1) clause (*g*) of the Transfer of Property Act, he was liable to pay the Government revenue which had become due before the date of the sale and the plaintiff having paid the amount in order to save the property from sale, he is entitled to recover the same from the 3rd defendant (section 69, Contract Act). The petition is, therefore, allowed so far as it seeks relief against the 3rd defendant and the decree will be modified accordingly. The 3rd defendant must pay the costs of this petition. The petition is not pressed against the 1st defendant and is dismissed with costs against him.

Decree modified.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 724 OF 1910.

October 6, 1910.

Present:—Mr. Justice Krishnaswami Aiyar.

OLAYAT GOVINDA PODUVAL—

APPELLANT

versus

KOOTATHIL DOMODARAN MOOTHU PODUVAL AND OTHERS—RESPONDENTS.

Malabar Law—Civil Procedure Code (Act XIV of 1882), s. 30—Decree against Karnavan—*Suit against* Karnavan *under s. 30, Civil Procedure Code—Right of* an anandravan *to avoid the decree by a separate suit—Fraud.*

Where a suit was brought against the *Karnavan* of a Malabar *tarwad* in his representative capacity under section 30 of the Civil Procedure Code of 1882, and the suit was decreed against the *karnavan* after contest, it is not competent to an *Anandravan* to avoid the decree by means of a suit in the absence of allegations of fraud.

Vasudevan v. *Sankaran*, 20 M. 129, followed.

Second appeal against the decree of the District Court of North Malabar, in Appeal Suit No. 479 of 1908, presented against the decree of the Court of the District Munsif of Cannanore, in Original Suit No. 54 of 1908.

Facts of the case appear from the

following judgment of the lower appellate Court :—

The main question for decision in this appeal is whether the decree obtained by 1st defendant against 2nd defendant in Original Suit No. 505 of 1900, Cannanore, and its appeal and second appeal is binding on plaintiff, who is 2nd defendant's *Anandravan*.

2. The first contention is that 2nd defendant did not represent his *tarwad* in that suit. Not only was he impleaded as *karnavan*, but permission to sue him as representing the members of his *tarwad* was obtained under section 30, Civil Procedure Code. I cannot accept plaintiff's Vakil's contention that plaintiff cannot obtain permission under section 30, Civil Procedure Code, to sue one defendant as representative of others, nor the contention that a separate permission is again required when an appeal is filed. These contentions are opposed to the language of section 30 and also to common sense and are unsupported by any authority.

3. A decree having been obtained against 2nd defendant as *karnavan*, it is binding on plaintiff his *anandravan* so long as the suit was honestly defended. Second defendant engaged a District Court Vakil for the suit in Cannanore, and carried the litigation up to the High Court and even borrowed money for expenses. Plaintiff also assisted him in borrowing money. No doubt 2nd defendant filed a false document, but the rest of his defence was sufficient to secure dismissal of 1st defendant's suit in the original Court. Plaintiff is now unable to adduce any better evidence and there is not a single circumstance to warrant the allegation of fraud. If there is any fraud or collusion it must be on plaintiff's part for this suit appears to have been brought in collusion with 2nd defendant. I find that plaintiff has failed to prove any fraud or collusion in 2nd defendant's conduct of the prior suit, the decree in which is consequently binding on plaintiff.

4. The appeal is dismissed with costs.

Judgment.—The case is governed by the judgment in the Full Bench case *Vesudevan* v. *Sankaran* (1). I cannot allow the appellant to attack it. I dismiss the second appeal.

Appeal dismissed.

(1) 20 M. 129.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 908 AND 909 OF 1908.

September 29, 1910.

Present :—Mr. Justice Munro and Mr. Justice Sankaran Nair

IN No. 908

SINGANI MUPAN AND OTHERS—APPELLANTS

versus

KRISHNA CHAR—RESPONDENT.

IN No. 909

NARASIMHA CHAR—APPELLANT

versus

VELAYE AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act XIV of 1882), s. 549—Order to furnish security made by appellate Court—Non-compliance with the order—Dismissal of appeal—Second appeal to High Court against the order.

No second appeal lies to the High Court against an appellate Court's order dismissing an appeal for non-compliance with its order directing the appellants to furnish security for the respondent's costs within a time fixed.

Leka v. *Bhanna*, 18 A. 101, followed.

Second appeal against the decrees of the Subordinate Judge's Court of Salem, in A. S. Nos. 87 and 103 of 1903, presented against the decrees of the District Munsif of Namakkal, in Original Suits Nos. 24 of 1904 and 217 of 1903.

Facts of the case appear from the following judgment of the lower appellate Court :—

The respondents filed petitions under section 549 of the Civil Procedure Code in the District Court of Salem.

2. On 16th June 1906, the petitions were shown to the appellants' pleader who agreed to file replies thereto on or before 30th June following. He did not do so accordingly.

3. The appeals were transferred to this Court for disposal.

4. The repondents filed fresh affidavit that the 1st appellant left the British Dominions for good. He was also examined and cross-examined.

5. The appellants not having submitted replies on or before the 30th June 1906, as directed, they would not be entitled to any concession now. Still I granted time till 13th January 1908 by the following order, dated 7th January 1908.

"No reply, statement nor a counter-affidavit filed since 30th June 1906.

"The respondent filed an affidavit under date 6th January 1908, that Narasimha

Chariar left for Hyderabad with his family more than 18 months ago.

"The respondent was examined and cross-examined this day and he swore to the above facts.

"None of the appellants present in Court.

"Time, however, is granted till Monday next to produce in Court costs of the respondent in both Courts".

6. On 13th January 1903, I enlarged the time till to-day for payment of costs.

7. The costs not having been paid the appeals will stand dismissed with costs under section 549 of the Civil Procedure Code.

Judgment.—Following the decision in *Leka* v. *Bhanna* (1), we hold that no appeal lies.

The second appeal is dismissed with costs.

Appeal dismissed.

(1) 18 A. 101.

(s. c. 3 Bur. L. T. 43.)

LOWER BURMA CHIEF COURT.

REGULAR CIVIL APPEAL No. 351 OF 1908.

November 26, 1909.

Present:—Mr. Justice Robinson.

MAUNG CHIT PE—APPELLANT

versus

MA TIN—DEFENDANT.

Buddhist Law—Marriage of minor without parent's consent—Subsequent co-habitation in parent's house—Proof of consent.

A, a minor girl, who eloped from her parents' house with B, returned to her parents' house and lived and co-habited there with B, and ate together with him there:

Held, that it was a perfectly valid marriage according to Burmese Buddhist law and that the subsequent consent of the parents may be presumed from their conduct towards A and B.

Quære—Whether the consent of the parents is essential to the validity of the marriage of a minor child?

Crown v. *Chan Mya*, 1 L. B. R. 297, doubted.

Mr. *R. N. Burjorjee*, for the Appellant.

Mr. *Halkar*, for the Defendant.

Judgment.—Plaintiff sues for restitution of conjugal rights. He and defendant eloped willingly some two or three years ago. They returned after 5 days and went to defendant's parents' house. Her mother refused to let them live there and sent her daughter off with plaintiff. They then went and lived in plaintiff's house.

While plaintiff was away at Moulmein riding in the races, defendant left him and has since lived with her mother. It is admitted that after these two had lived openly together as man and wife for some time, they used to go and visit defendant's mother and eat together in her house. The defendant alleges that plaintiff beat her on several occasions, that he took away the bangles and bracelets he had given her and that he took a lesser wife with whom he is now living. She urges that the marriage was not valid because she was a minor and her parents did not consent.

The points to be decided are whether the marriage was invalid for this reason and whether if valid restitution should not be decreed by reason of plaintiff's ill-treatment of her and because he took a lesser wife.

As to the ill-treatment there is no evidence except that of defendant herself while it is flatly denied by plaintiff. Plaintiff admits that there were quarrels because she went out at nights several times to Pwes even after he forbade her to go and that they abused each other. Defendant says plaintiff's father was aware of the ill-treatment. There is no other proof, however, and I cannot hold any such ill-treatment has been established as would justify the refusal of a decree.

As to his taking a lesser wife also there is practically no evidence and plaintiff has denied it. Defendant merely says she heard plaintiff had taken a lesser wife and says Ma On Nyun and Ko Hla Byu told her. Ma On Nyun says defendant told first about the lesser wife. Ko Hla Byu says the lesser wife told him. I am quite unable to accept this as proof that plaintiff has taken a lesser wife. If he had, it may be that he cannot compel her to return to him to live *in the same house* as the lesser wife, see *Ma Ka U. v. Po Saw* (1) but as it is not proved that he has taken a lesser wife I need not consider the point further.

There remains the question whether the marriage was invalid by reason of defendant's minority and the want of consent of her parents. As to her age it seems established that she is now about 20 years old but assuming that she was at the time of elopement a minor is the consent of her parents essential? It was held to be essential in *Crown* v. *Chan Mya* (2) by two of the learned

(1) 4 L. B. R. 340.

(2) 1 L. B. R. 297.

Judges and in spite of the opinion of the Chief Judge in that case that the matter did not need consideration I should be bound to refer the point to a Full Bench if I proposed to take a different view. I do not, however, think it necessary to do so for in this case it is admitted that after the marriage had become an accomplished fact plaintiff and defendant went to her parents' house and partook of meals there. The marriage was in fact recognized and accepted and it is only now urged that it was invalid as an excuse to try and avoid a decree in this case. Defendant eloped with plaintiff because she loved him; they lived together openly as husband and wife and that was considered and accepted to be their relationship between them by her parents and his and also by their friends and acquaintances.

I, therefore, hold there was a valid marriage and that plaintiff was not guilty of such ill-treatment of defendant or of taking a lesser wife and that I would not be justified on these grounds in refusing him a decree. Defendant swears there was no divorce.

I grant plaintiff a decree and direct that defendant do return to and live with her husband the plaintiff and render him conjugal rights Defendant must pay plaintiff the costs of this suit as taxed.

(s. c. 3 Bur. L. T. 44)

LOWER BURMA CHIEF COURT.

CIVIL REVISION No. 19 OF 1909.

August 6, 1909.

Present:—Mr. Justice Lowis.

MAUNG GLAY—APPLICANT

versus

S. O. S. ODEYAPPA CHETTY—RESPONDENT.

Insolvent Act (45 and 47 Vict. Ch. 52), ss. 7, 27—Exemption from attachment of insolvent's salary after deducting amount payable per mensem to Official Assignee—Exemption on footing of necessaries.

When an Insolvency Court, acting under the provisions of the Indian Insolvent Act, directs the Insolvent to pay a portion of his salary per mensem to the Official Assignee, the remainder of his salary is to be regarded on the same footing as necessaries which are exempted from attachment.

A Court cannot, therefore, in execution of a decree against the Insolvent direct the attachment of any portion of his salary remaining over after payment to the Official Assignee of the amount ordered to be said.

Appeal against the order of the Small Cause Court, Rangoon, dated the 18th January 1909, passed in Civil Miscellaneous No. 1583 of 1908, dismissing the application of the applicant (petitioner) for removal of attachment on salary in Civil Regular Suit No. 3135 of 1908.

Mr. *Hamlyn*, for the Appellant.

Mr. *Naidu*, for the Respondent.

Judgment.—In May 1908 respondent sued applicant in the Small Cause Court, Rangoon, on a promissory-note and on the 11th June of the same year obtained a decree for Rs. 152-13 and costs against him. In the following November applicant applied to this Court to be made an insolvent. He filed his schedule on the 4th November 1908, showing the amount of the above decree among his scheduled debts, and got a vesting order on the 5th of the same month. On the 23rd November respondent applied for execution of the Small Cause Court's decree, and on the 24th the Judge of the Small Cause Court issued a prohibitory order to the Bombay Burma Trading Corporation (applicant's employers) attaching a moiety of applicant's salary. On the 1st December respondent petitioned this Court on the insolvency side in connection with applicant's insolvency, stating that his debts had not been correctly stated in his schedule and that he had concealed jewellery and on the 6th January 1909, this Court in exercise of its insolvency jurisdiction postponed applicant's personal discharge for a year and continued protection on his paying the Official Assignee Rs. 20 per mensem out of his salary. Shortly before this *viz.*, on the 21st December 1908, applicant had applied to the Court of Small Causes for the removal of the attachment and prohibitory order in regard to his salary on the ground that he had been adjudicated an insolvent. On the 18th January 1909, the Judge of the Small Cause Court held that applicant's contention that the residue of his income was not liable to attachment in execution of a decree of the Small Cause Court was unsound, and dismissed his application. Application has now been made in this Court for the revision of the Small Cause Court's order of dismissal. Apart from all other considerations, the Judge's decision was manifestly inequitable, for it gave the respondent an advantage over all the other scheduled creditors in the

matter of recovery from the insolvent applicant, and it seems to me inconceivable that it should have been the intention of the legislature that priority of this kind should be possible. As I read section 27 of the Indian Insolvent Act, the intention is that so much of the Insolvent's salary as the Court does not think fit to order the insolvent to pay to the Official Assignee shall stand on the same footing as the necessaries specially exempted from the provision of section 7 of the Act, and be free from attachment. This was clearly the interpretation put upon section 27 by my learned colleague when he passed his order of the 6th January 1909, for he fixed Rs. 20 as the amount to be paid in to the Official Assignee out of applicant's salary of Rs. 103 per mensem after a full consideration of what was the minimum applicant could carry on with for the purpose of meeting necessary expenditure on house rent, children's clothing and schooling and domestic expenses, which he fixed at Rs. 83 per mensem in all. The only point that to my mind can be urged in favour of the Judge's order now appealed against is that this Court's order of 6th January 1909, directing the payment of Rs. 20 per mensem to the Official Assignee was subsequent to the Small Cause Court's order of 24th November attaching applicant's salary. I do not, however, think that this really affects the case, for it seems to me that, even assuming that the whole of the applicant's salary was liable to attachment before the order of the 6th January, that order *ipso facto* removed this liability and operated as a bar to all further proceedings in attachment. The order of the Small Cause Court dismissing applicant's application is set aside. The Court should withdraw its prohibitory order of the 24th November 1908 attaching a moiety of applicant's pay. Applicant will get his costs.

(s. c. 3 Bur. L. T. 45.)

LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL No. 57 OF 1909.

August 31, 1909.

Present:—Sir Charles Fox, KT., Chief Judge, and Mr. Justice Lowis.

MA GYI AND OTHERS—APPELLANTS

versus

MAUNG PO HMYIN AND OTHERS—RESPONDENTS.

Partition by arbitration—Award not binding on the heirs who were not parties to the agreement—Minor.

It is a fundamental principle that no one is bound by any contract or by a decision in any proceeding to which he, or some one through whom he claims, was not a party.

A partition by arbitration may be binding on a minor but only when he is not injuriously affected thereby, when it is fair and when he has been duly represented.

Appeal against the decree of the District Court of Hanthawaddy, dated the 11th March 1903, passed in Civil Suit No. 104 of 1908, dismissing the appellants' (plaintiffs') suit for the recovery of Rs. 3,05,097-12-0.

Mr. *Lentaigne*, for the Appellants.

Mr. *Palit*, for 1st to 5th Respondents.

Mr. *Dantra*, for 6th to 9th Respondents.

Judgment.

FOX, C. J.—U or Maung Po Ka died on the 25th December 1905, leaving the following survivors, *viz.*:—

(1) Ma Saw Me and Maung Po Sein, children by his first wife, Ma The Nu, from whom he had been divorced.

(2) Ma Gyi his second wife and her children by him *viz.*, Ma Hnin Gywe, Maung Tha Hling Ma E, Ma Mya Nyun. All of these children, except Ma Hnin Gywe, were minors when Maung Po Ka died.

(3) Ma Kin his third wife and her children by him, *viz.*, Ma Hla Me and Ma On May, both of whom are minors. Ma Kin says that she and Maung Po Ka adopted a son Maung Myat Koung.

Another woman, Ma Hla Min, claimed to have been also a wife of Maung Po Ka.

On the 5th Lazok of Tabodwe 1167 B. E., corresponding to the 12th February 1906, Ma Gyi, Ma Saw Me, Maung Po Sein, and Ma Kin entered into an agreement under which first of all certain specified properties were acknowledged by the parties to be the separate properties of Ma Gyi and Ma Kin. The agreement then provided that the other property of Po Ka should be divided into five parts—one of which was to be taken by Ma Saw Me and Maung Po Sein, and the remaining four-fifths was to go to Ma Gyi and Ma Kin in equal shares. Partition of the properties according to this agreement was to be effected by eight persons named in the agreement.

MA GYI *v.* MAUNG PO HMYIN.

An award in writing, dated the 18th July 1906, was signed by seven of these persons, the eighth signed his name on the English translation of it. On the 4th December 1906, Maung Po Sein and the representatives of Ma Saw Me who had died, made an application to the District Court to have the award filed in Court and a decree passed according to it. On the 17th December 1906, Ma Gyi and her children filed the suit from the decree in which the present appeal is made. The application to file the award and the suit were apparently treated by the District Court as one matter and they were heard together. The order upon the application followed the order in the suit.

By the time the suit was filed Maung Tha Hlaing was no longer a minor. The plaint sets out the facts and prays for a declaration that the award is not legal and binding on the plaintiffs and heirs of Po Kaand for an order that it be set aside; for a declaration that Maung Tha Hlaing is the *auratha* son of Po Ka and as such is entitled to a fourth of his entire estate; for declarations as to the shares of other persons admitted to be entitled shares —for declaration that Maung Po Sein, Ma Saw Me, Myat Koung and Ma Hla Min were not entitled to any share of the property left by the deceased. Administration by the Court was also asked for.

The grounds on which the award was attacked were (1) because Ma Hnin Gywe and Maung Tha Hlaing were not parties to the agreement which led up to it, (2) because the minor children of Po Ka were neither parties to it nor properly represented before the arbitrators, (3) because at the arbitration witnesses were examined in the absence of some of the arbitrators, some of whom did not attend the meetings of the arbitrators regularly, (4) because the arbitrators failed to give Ma Gyi an opportunity of producing evidence she wanted to produce, (5) because four only of the arbitrators signed the award on the date entered on it.]

Of the above grounds those based upon Ma Hnin Gywe and the minor children of Po Ka not having been parties to the agreement and not having been represented at the arbitration will be dealt with first.

A partition of property amongst some only of the persons entitled to share in it can obviously be of no effect against the others who are entitled to share. In the present case, however, the eldest son of Po Ka and the latter's two widows were parties to the agreement, and these persons were *prima facie* the only persons who were entitled to present enjoyment of property left by Po Ka. I assume at present that Maung Po Sein and not Maung Tha Hlaing was the only son entitled to claim the rights accorded by Burmese Buddhist law to the *auratha* child. According to the decision of the Special Court of Lower Burma in *Ma On* v. *Ko Shwe O* (1), it was open to the eldest son of a Po Ka to claim immediately after the latter's death his share—a quarter of the whole estate. According to the learned Judges the remainder of the property vested in the surviving widows of the deceased for themselves and the other children, as to half, absolutely, and as to the rest, for life with power of disposal in case of family necessity. I leave out of consideration all questions of division between the two widows. The learned Judges used the expressions, the remainder of the property vests in the surviving parent for himself or herself and the remaining children," but it may be open to doubt whether they meant to lay down that the children other than the *auratha* did not acquire a vested interest in the sense expressed in section 19 of the Transfer of Property Act or section 106 of the Indian Succession Act. The position of the surviving parent as to one-fourth of the property, or as to one-half if the *auratha* does not claim their share he or she is entitled to claim, is very similar to that of a female heir under the Hindu law. Mr. Mayne says that the next reversioner, that is, the presumptive heir in succession, has only a contingent estate. Mayne's Hindu Law, para. 646.

Whether it be a vested or a contingent estate, I think that there can be no doubt that on the death of one parent the children of Burmese parents take an interest in the joint property of their parents which will be recognized by the Courts. If the surviving parent can only dispose of a part of the property in case of necessity, the reversioners must have the right to prevent that portion from being alienated when there is no necessity and possibly a right to prevent the property from being wasted. Although they cannot obtain a share in the property themselves, they could, it appears to me, safeguard their

(1) (1886) L. B. S. J. 378.

rights as presumptive heirs by a suit for a declaration under section 42 of the Specific Relief Act, for their position is similar to that of the presumptive heir in illustration (*c*) to that section.

If, then, the children of Po Ka had a recognizable interest in his property no partition of the property to which all were not parties could be effective as against those who were not. It is a fundamental principle that no one is bound by any contract or by a decision in any proceeding to which he, or some one through whom he claims, was not a party. The agreement between the widows and the children of the first wife in the present case may have considerably affected the interests of the other children, for it in the first place dealt with property of considerable value as *thinthi* or separate which may, in fact, have been joint, and if so, the property to eventually come to the other children must have been considerably diminished.

Ma Hnin Gywe was the only other child of full age at the time. She at least has right to say that the agreement and the award which followed on it is not binding on her. The minor children have a stronger claim to having the award set aside as against them. No doubt, a partition by arbitration may be binding on a minor, but only when it is fair, and when he has been duly represented. (Trevelyan on Minors, 3rd edition, page 207.)

In the present case the minors were not represented at all. The respective mothers did not purport to act as the guardians of their children, but even if they had done so, they would not have been proper representatives, for their interests clashed to some extent with those of their children. The more property they obtained as *thinthi*, the less would come as of right to their children. In the view I take of the case, it is unnecessary to go into the question of whether there was misconduct on the part of the arbitrators, or any other ground for holding the award invalid.

I would allow the appeal, set aside the decree of the District Court, declare the award not binding on the parties, and direct that the estate of U Po Ka be administered by the Court. I think the respondents should be ordered to pay the appellants' costs of this appeal.

Lowis, J.—I concur.

Appeal allowed.

(s. c. 3 Bur. L. T. 47.)

LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL No. 63 OF 1903.

August 23, 1909.

Present:—Sir Charles Fox, KT., Chief Judge, and Mr. Justice Parlett.

GEORGE GILLESPIE & Co., LTD.—APPELLANTS

versus

MAUNG MAUNG AND ANOTHER—RESPONDENTS.

Specific performance—Contract—Public policy.

The plaintiff Company engaged the first defendant, an Inspector of Land Records, to purchase certain land in the name of the second defendant as their agent and agreed to pay a certain remuneration. The lower Court dismissed the suit for specific performance on the ground that the contract was against public policy: *Held*, reversing the decree, that the District Judge had invented a new head of public policy and the dereliction of duty on the part of the first defendant was not a thing contrary to law or something having the force of law.

Egerton v. *Lord Brownlow*, (1853) 4 H. L. C. 1; 23 L. J. Ch. 348; 18 Jur. 71; *Janson* v. *Driefontein Consolidated Mines Ltd.* (1902) L. R. M. A. C., 484; 71 L. J. K. B. 857; 87 L. T. 372; 51 W. R. 142; 7 C. C. 263, referred to.

Appeal against the decree of the District Court of Bassein, passed on the 25th March 1903, in Civil Regular Suit No. 3 of 1903, dismissing the appellant-plaintiff's suit for specific performance of an agreement to settle the land valued Rs. 14,500.

Mr. *Higinbotham*, for the Appellants.

Mr. *Guy Rutledge*, for the Respondents.

Judgment.

Fox, C. J.—There can be no doubt that the District Judge's findings on the facts are correct. The plaintiff Company, wanting land in the neighbourhood of Bassein for the purposes of a rice mill, sent a Manager there to enquire and try to get some. He went to the Land Records office and there met the first defendant who was the Inspector of Land Records for that part of the country. The latter offered to assist in getting land for the Company and it was agreed between him and the Manager that he was to buy land for the Company, the latter remunerating him for his services, but that transfers were to be taken in the name of the 2nd defendant who is his sister-in-law. The object of this last stipulation is manifest.

Lands, including the land which is the subject-matter of the suit, were purchased by the 1st defendant and transferred to the 2nd defendant, as contemplated by the agreement.

The plaintiff Company provided the purchase money and paid the remuneration to the first defendant, everything, however, being carried out in the name of the 2nd defendant, as if she were the real purchaser and agent of the plaintiff Company. Subsequently she nominally, but the 1st defendant really, refused to transfer the land in suit to the Company. The latter brought this suit to compel specific performance of the contract. The District Judge found in favour of the Company on the facts, but declined to enforce the contract on the ground that a contract of employment at a large fee of an Inspector of Land Records as an agent to purchase and sell revenue paying paddy land within his circle was, in his opinion, a contract opposed to public policy which should, therefore, not be enforced.

In the words of Lord Davey in *Janson* v. *Driefontein Consolidated Mines, Limited* (1), "public policy is always an unsafe and treacherous ground for legal decision." In the same case Lord Lindley says: "A contract or other transaction which is against public policy, *i.e.*, the general interest of this country, is illegal; but public policy is a very unstable and dangerous foundation on which to build until made safe by decision."

The Lord Chancellor quoted with approval the following passage from the judgment of Baron Parke in *Egerton* v. *Lord Brownlow* (2): "It is the province of the statesman, and not the lawyer, to discuss, and of the Legislature to determine, what is best for the public good, and to provide for it by proper enactments. It is the province of the Judge to expound the law only: the written from the statutes: the unwritten or common law from the decisions of our predecessors and of our existing Courts, from text writers of acknowledged authority, and upon principles to be clearly deduced from them by sound reason and just inference; not to speculate upon what is best, in his opinion, for the advantage of the community. Some of these decisions may have, no doubt, been founded upon the prevailing and just opinions of the public good; for instance, the illegality of covenants in restraint of marriage or trade. They have become part of the recognized law, and we are not, therefore, bound by them, but we are not thereby authorized to establish as law everything which we may think for the public good, and prohibit everything which we think otherwise."

The Lord Chancellor himself said, amongst other things,—"I do not think that the phrase 'against public policy' is one which in a Court of law explains itself. It does not leave at large to each tribunal to find that a particular contract is against public policy. * * * In treating of various branches of the law learned persons have analyzed the sources of the law, and have sometimes expressed their opinion that such and such a provision is bad because it is contrary to public policy; but I deny that any Court can invent a new head of public policy."

In the present case the District Judge has practically done this. Whatever one may think of the moral standard of a person who employs the servant of another to do work for him without first obtaining the permission of the servant's employer, it is going very far to say that when the servant has done the work partially, and has acquired benefits and remuneration under it, the Court will not compel him to complete the work, because it would be against public policy that a contract for services between a servant and any one except his master should be enforced.

The District Judge laid special stress upon the fact that in the present case the servant was a servant of the Government and an Inspector of Land Records, and that the contract was to purchase lands in the circle in which he exercised his functions. No doubt it was highly improper of the first defendant to enter into such a contract, and it is difficult to believe that the plaintiff Company's Manager could have thought that it was justifiable for a man in the first defendant's position to engage in buying and selling land for remuneration. Both parties must have known that if the first defendant's superior officers became aware of his doing this, he would be dismissed from Government service. Nevertheless it would be inventing a new head of public policy as a ground for refusing to give effect to contracts if the dereliction of duty on the part of the first defendant was not a thing contrary to law or something having the force of law. It has not been contended that there is any positive law which forbids a Government servant in the position of the first defendant

(1) (1902) L. R. M. A. C. 484; 71 L. J. K. B. 857; 87 L. T. 372, 51 W. R. 142; 7 C. C. 268.

(2) (1853) 4 H. L. C. 1; 23 L. J. Ch. 348; 18 Jur. 71.

from buying and selling land either in his circle or elsewhere.

In my opinion, the District Judge's ground for refusing to grant the plaintiff Company a decree cannot be supported.

If the case is considered as between the plaintiff Company and the 2nd defendant, that is to say, if the contract is looked upon as really between the Company and her, no question of public policy arises. By the written agreement she agreed to sell to the Company's agent the land which she declared she bought as an agent of the Company.

In my judgment the decree of the District Court must be reversed, and a decree passed against the defendants in terms of the prayer of the plaint, and ordering them to pay the plaintiff Company their costs of the suit and of this appeal.

In view of the evidence in the case establishing clearly that the first defendant was the real purchaser of the land, and that the 2nd defendant merely lent her name, and has been throughout a mere *benamidar* for the first defendant, I think that the plaintiff Company is entitled to a conveyance deed executed by, or by the Court on behalf of, both the defendants under rule 34 of Order XXI of the Code of Civil Procedure.

Parlett, J.—I concur.

(s. c. 3 Bur. L. T. 49.)

LOWER BURMA CHIEF COURT.

SECOND CIVIL APPEAL No. 231 OF 1908.

August 19, 1909.

Present:—Mr. Justice Lowis.

MAUNG TU NE—PLAINTIFF—APPELLANT

versus

MAUNG THET PYO AND OTHERS—DEFENDANTS—RESPONDENTS.

Sale—Verbal sale followed by possession—Validity of sale.

Where the 2nd and 3rd respondents had sold certain land to the 1st respondent and the sale was verbal but was followed by possession and mutation of names: *Held*, that such sale was valid and the appellant, who was a subsequent purchaser of the same land by a registered deed, could not recover the land from the 1st respondent.

Tun Zan v. *Maung Nyun*, 4 L. B. R. 26, followed.

Appeal against the decree of the District Court of Prome, dated the 19th August 1908, passed in Civil Appeal No. 77 of 1908, dismissing the appeal of the appellant (plaintiff) against the decree of the Township Court, Paungde, in Civil Suit No. 48 of 1908.

Mr *R. M. Das*, for the Appellant.

Mr. *Palit*, for the Respondents.

Judgment.—In this case appellant sued for the recovery of certain land which he said he had bought from second and third respondents by a registered deed of sale. Both the lower Courts found concurrently that appellant was not entitled to the relief claimed by him, inasmuch, as the sale referred to was a *benami* transaction and there was a prior valid sale of the land to first respondent. In appeal to this Court it has been urged that the sale to the first respondent was not valid (*a*) because it was not effected by means of a registered deed and (*b*) because the consent of both second and third respondents had not been obtained to it. As regards the second point both lower Courts found that, as a matter of fact, the consent of both respondents had been obtained to the sale. The sale was admittedly not made on a registered deed. It was a verbal transaction and was never reduced to writing. It was, however, followed by possession and mutation of names in favour of the first respondent and first respondent, has in a suit, the appeal from which is being disposed of at the same time as the present appeal, been given a decree against the second and third respondents for specific performance in the shape of the execution of a deed of sale. The facts are much the same as those dealt with in *Tun Zan* v. *Maung Nyun* (1) for here, as in that case, the second purchaser (appellant) had previous notice of the sale. In fact, as the learned Advocate for first respondent has pointed out, the facts are more in his client's favour than they were in that of the successful party in *Tun Zan* v. *Maung Nyun* (1), as, besides the undertaking to sell, there had been a mutation of names and actual delivery of possession to his client. It has been contended by appellant's Advocate that the cause of action in *Tun Zan* v. *Maung Nyun* (1) arose before the 1st January 1905, when the Transfer of Property Act came into force in Lower Burma generally. I do not, however, consider that this fact alters the principle laid down in that ruling in any way. It appears to me clear that if that principle, as it should, no doubt, be, is applied, I am bound to uphold the decision of the lower appellate Court. The appeal is dismissed with costs.

Appeal dismissed.

(1) 4 L. B. R. 26.

MA THAW *v.* MCKENZIE.

(s. c. 3 Bur. L. T. 49.)

LOWER BURMA CHIEF COURT.

CIVIL MISCELLANEOUS APPEAL NO. 42 OF 1909.

January 20, 1910.

Present:—Mr. Justice Parlett.

MA THAW AND ANOTHER—APPLICANTS

versus

T. C. McKEKZIE AND OTHERS—RESPONDENTS.

Transfer of case—Difficult questions of law—Insufficient ground for transfer.

The fact that the case will involve difficult questions of law is not alone a sufficient ground for the transfer of a case.

Mr. *McDonnell*, for the Applicants.

Mr. *Fatker*, for the Respondents.

Judgment.—This is an application for a withdrawal to this Court of a suit instituted in the District Court of Myaungmya against three Judicial Officers, serving at the time the cause of action arose in Wakema. The suit is for damages sustained by reason of alleged unlawful arrest and imprisonment.

The grounds on which withdrawal is asked for are, *first*, that the suit involves the determination of several intricate points of law, and *secondly*, that petitioners fear that they are not likely to get as impartial a trial at Wakema as in this Court.

The last ground is supported by affidavits to the effect that petitioners' apprehension is based on the position which the defendants occupy in the locality where the cause of action arose. The District Court is at Myaungmya, not Wakema. Two, at least, of the defendants are no longer stationed at Wakema. This ground, however, is not pressed, and, in my opinion, is not shown to be tenable.

Reliance is placed on the first ground, that the case will involve difficult questions of law, and reference is made to several rulings, on which the decision will depend, to show that this is so. In my opinion, however, it is not shown that the questions of law involved are so difficult and intricate that the District Court is not likely to be competent to decide them correctly. I have, moreover, been referred to no reported case where the difficulty of the questions of law involved was alone held to justify the withdrawal of a case. Thus in *Doucett* v. *Wise* (1) the case was withdrawn because not only were difficult points of English Law involved, but the case appeared generally to be an unfit case to be tried in the *mofussil*, the reasons being that the defendant and most of the witnesses were British subjects, and most of the witnesses were legal and mercantile residents of Calcutta, whose examination on commission would be both expensive and inconvenient.

In *Thakoor Kapilnath Shahai Deo* v. *Government* (2), not only were difficult questions of law involved, but the Judge, in the course of the proceedings, had acted with such great want of discretion and with such unusual hardness that the plaintiff might well think it would be impossible for him to deal with the case impartially.

In *In re West Hopetown Tea Company, Limited*, (3), a case was transferred partly because serious questions of law were likely to arise which it would be difficult to discuss in the District Court in the absence of the authorities, but also because there had been an irregularity in the case which alone would have justified the calling for the record, and the Judge had further recorded an order which it might be difficult for him to re-consider if the matter came before him again.

Finally in *Son Survomongola Debi* v. *Harendra Lall Roy* (4), it was distinctly stated that the case might not have been transferred had the ground of the importance and difficulty of the question involved stood alone, and the transfer was made because in addition, not only was the balance of convenience manifestly in favour of such a course, but the circumstances were such that in fact a trial in the *mofussil* would have placed insuperable difficulties in the way of the defence.

No such further considerations are alleged in the present case.

Though the first defendant does not oppose the application, the second and third defendants do so.

Sufficient grounds have not, in my opinion, been shown to grant the application, which is accordingly dismissed with costs. Advocate's fees two gold *mohurs*.

Appeal dismissed.

(1) 1 Indian Jurist (New Series 1866), 94.

(2) 10 B. L. R. 168.

(3) 9 A. 180.

(4) 1 C. W. N. 109.

DUBASH KADER *v.* FAKEER MEERA.

(s. c. 3 Bur. L. R. 56.)

LOWER BURMA CHIEF COURT.

CIVIL REGULAR SUIT NO 10 OF 1909.

August 16, 1909.

Present:—Mr. Justice Bell.

D. K. DUBASH KADER AND OTHERS—PLAINTIFFS

versus

T. K. FAKEER MEERA—DEFENDANT.

Civil Procedure Code (Act V of 1908), *O. II, R.* 2—*Claim for arrears of rent or* mesne profits *not barred by a previous suit for possession of the same property—Different causes of action*:

In cases governed by the new Code of Civil Procedure, the relief sought in a claim for arrears of rent or *mesne profits* of immovable property and the relief sought in a suit for the recovery of that immovable property must be regarded as based upon distinct and separate causes of action, and hence the restrictive provisions of Order II, Rule 2, do not affect the claimant's right to bring two separate suits for the recovery of the property and for arrears of rent or *mesne profits* which become due before the suit for the recovery of the immovable property was instituted.

Ma Nyein v. *Ma Kon*, 3 L. B. R. 56, discussed.

Venkoba v. *Subbana*, 11 M. 151; *Lalessor Babin* v. *Janki Bibi*, 19 C. 615 at p. 617; *Mohan Lal* v. *Lala Sheosunkar Sahai*, 12 C. 482, referred to.

Mr. *Cowasjee*, for the Plaintiffs

Mr *Ormiston*, for the Defendant.

Judgment.—This is a suit to recover rent for April 1906 and compensation for use and occupation from the 1st May 1906 to the 30th November 1907 of four rooms in No. 46, Merchant Street, at Rs. 250 per mensem, in all a sum of Rs. 5,000.

According to the plaintiffs, the defendant was their tenant in the above premises from the 1st October 1905 at a monthly rental of Rs. 250 and paid rent up to the end of March 1906. During that month the plaintiffs gave him notice to quit by the 30th April 1906. He refused to do so and on the 18th August they sued to eject him. The defendant filed a written statement denying their right to eject him; but on the 13th December 1907 a decree was passed in the plaintiffs' favour, which was upheld on appeal. On the 7th January 1908, before the appeal had been heard, the present suit was filed claiming rent for one month and compensation for use and occupation for the remainder of the period in suit at the same rate, as being a fair and reasonable rate.

All the above facts, including the reasonable nature of the rate claimed, are admitted by the defendant and he accordingly admits his liability to pay compensation at the rate claimed from the 18th August 1907. He pleads, however, that the plaintiffs are not entitled to recover anything from him either as rent or by way of compensation for use and occupation during any period anteior to that date, on the ground that the 2nd paragraph of section 43 of the Code of Civil Procedure, 1882, is a bar to such a suit. In support of this contention Mr. Ormiston, who appeared for the defendant, relied upon the decision of a Bench of this Court in the case of *Ma Nyein* v. *Ma Kon* (1).

Mr. Cowasjee for the plaintiffs attempted to distinguish that case from the present one and he further contended that, even if it were not distinguishable, it no longer could be said to be law, as the act which applied to the present case was the new Code of Civil Procedure, which had altered the law on this point. As regards the latter portion of this argument Mr. Ormiston contended that the new Code had not altered the law, but that even if it had, a right had accrued to his client under the old Code before the new Code came into force, *viz.*, a right not to be sued in respect of the period prior to the 18th August 1906, which was preserved to him by section 6, clauses (*c*) and (*e*), of the General Clauses Act, 1897.

I do not propose to deal with the first branch of Mr. Cowasjee's argument, as I am not satisfied that this case is distinguishable, except, perhaps, as regards the one month's rent, from that of *Ma Nyein* v. *Ma Kon* (1), and as it seems to me that the present case is governed by the new Code and that under the provisions of that Code a suit is maintainable for the disputed portion of the plaintiffs' claim.

The first of these question as argued before me was divided into two separate parts or questions, *viz*:—

1. Has section 6 of the General Clauses Act, 1897, abolished the old rule of construction which has been recognised as well in India as in England, that alterations in procedure always are retrospective in effect and apply to pending proceedings unless there be a declared intention to the contrary or good reason against it?

If it has not, and the rule still holds good that no person has a vested right in any course of procedure or in a state of the law which leaves an injured party, without or

(1) 3 L. B. R. 56.

with only a defective remedy, is the right, which the defendant claims under the repealed section 43, not to be sued in respect of the period prior to the institution of the suit for ejectment, a right of the character just mentioned or is it such a right as is referred to in section 6 of the General Clauses Act?

I confess I can see nothing in the language of section 6 of the General Clauses Act to justify the view that its enactment was intended to abolish the old rule as to the retrospective effects of alterations in procedure. When enacting that section, the Legislature must have been aware that in applying the rule in question the Courts have consistently denied the applicability of the word "right" in a number of cases to which it undoubtedly would apply if used in a wide and popular sense. If the restricted meaning placed upon the word by the Courts had not commended itself to the Legislature, section 6 would have been so framed as to indicate in plain language that a wider meaning was to be attached to the word in future. Instead of that the language was followed of section 38 (2) of the Interpretation Act, 1899 (52 and 53 Victoria, C. 63), which it has not occurred to any one in England to treat as affecting the rule under consideration. Moreover, section 154 of the present Code of Civil Procedure would seem to be superfluous, if the word "right" in the General Clauses Act, section 6, had the meaning contended for by Mr. Ormiston. The express saving by that section of present rights of appeal would have been unnecessary, if the Legislature had regarded alterations in procedure as no longer having a retrospective effect and had not wished to provide against the risk of the Courts treating the right to an appeal which had already accrued as merely a matter of procedure.

It has next to be considered whether the "right" claimed in the defence to this suit falls within the protective provisions of section 6 or is merely a matter of procedure. What is this alleged right? It is the right not to be sued for a sum of money, which, apart from the restrictions on the bringing of suits that are contained in section 43 of the old Code, admittedly is due to the plaintiffs and is recoverable by them by means of a suit. It seems to me that that section, which was concerned solely with the prevention of undue multiplicity of suits, deals only with matters of procedure and cannot possibly be regarded as creating substantive rights. This inference is drawn from the nature of the subject-matter, but I think the language of the section points no less clearly in the same direction. It provides that the person who has a cause of action "shall not afterwards sue in respect of the portion" of his claim "so omitted." It does not enact that his right to that portion of his claim is extinguished, as is carefully done in cases where the right of a plaintiff, who has been in default about bringing a suit, is intended to be extinguished (*see*, for instance, section 28 of the Limitation Acts of 1877 and 1908.)

A further reason for regarding these provisions for restraining multiplicity of proceedings merely as matters of procedure is that, in the new Code, they have been relegated to the first schedule, which, as the language of section 128 of the Code clearly indicates, provides only for matters relating to procedure.

In these circumstances I do not think it is necessary to go through the cases dealing with this point, and I will merely say that it seems to me that a consideration of the cases cited on pages 338 to 342 of Maxwell on Interpretation of Statutes (4th Edition) and in Messrs. Woodroffe and Ameer Ali's notes to section 158 of the new Code, leads to the same conclusion, which is, that the present case must be dealt with under the provisions of the new Code of Civil Procedure. The only point that remains for consideration is whether, under the provisions of that Code, a person who has instituted a suit against his tenant for his ejectment from certain immovable property, can afterwards bring a separate suit against that tenant for rent and compensation for use and occupation of that property for a period antecedent to the date of institution of the suit for ejectment.

In *Ma Nyein* v. *Ma Kon* (1) a Bench of this Court held that under the Code of 1882 a person who had sued for possession of immovable property could not afterwards sue for mesne profits of that property for a period antecedent to the date of institution of the earlier suit, and the question which now has to be considered is—whether the law on this point has been altered by the new Code.

So far as the present point is concerned,

the new Order II, Rule 2, is identical with section 43 of the old Code, and if the judgment of the Bench had rested solely upon language of that section their decision clearly would be a binding decision as to the effect of the new Code. They had, however, also to take into consideration section 44, Rules A and B (now Order II, Rules 4 and 5) and section 45 (now Order II, Rule 3) of the Code and it seems to me that these last two sections have been carefully altered in such a manner as to remove the grounds upon which the decision of the learned Judges was based. That the Legislature should have so acted is not unnatural, having regard to the fact that the point in question is one upon which the different Courts in India were at variance, so that it was advisable to make it clear which of the rival views should prevail in future throughout the country.

The learned Judges admitted that, on the face of section 44, Rule A, its language was not altogether easy to reconcile with the view which they took of the meaning of the term "cause of action" in section 43; and that the wording of section 45 did not diminish their difficulty. They, however, pointed out that the language of the latter part of section 44, *i.e.*, Rule B, and also of the latter of Rule A showed that the words "cause of action" were not used in their ordinary meaning in Rule A, so that sections 43 and 44 really were quite consistent with one another in the view which the Bench took of the meaning of the term "cause of action" in section 43. Even, however, if that were not the case, they considered that the obscurity of section 44 was no reason for disregarding the plain rules given in section 43.

These arguments, in my opinion, do not apply to the Rules of the new Order II. To take the smallest point first, the position of section 44, Rule A, which Fox, J., regarded as unnatural, if it were intended as an exception to the Rule in section 45, has been altered, for it now is Rule 4 and so follows the general rule in Rule 3, which has re-placed section 45. This is its natural place, if it is intended to set out an exception to or modification of the general rule laid down in Rule 3, section 44. Rule A, also, has been separated from section 44, Rule B, and the present Rule 5 is as distinct from Rule 4 as it is from Rule 2, so that no inference can now be drawn from the language of Rule 5 as to the meaning of the term "cause of action" in Rule 4 to any greater extent than it can be drawn as to the meaning of that term in Rule 2. Furthermore, the old clause (*c*) of Rule A, on which Fox, J., relied as showing that the term "cause of action" could not have been used in its usual sense in that Rule, as it treated claims for remedies as separate causes of action, has been carefully excised from the present Rule 4. In its place there has been inserted a new clause (*c*) which, to my mind, shows clearly that the Courts are not in future to treat the relief sought in any of the claims mentioned in the preceding clauses of the new Rule 4 as based upon the same cause of action as that on which a suit for the recovery of the immovable property is based. If this were not the intention of the Legislature, either clauses (*a*) and (*b*) would have been omitted as superfluous, or their contents would have been brought into the present clause (*c*) as specific instances of the claims therein generally referred to, or else clause (*c*) must have begun with some such words as "all other claims."

I do not think it is necessary to review in detail the decisions of the High Court of the North-Western Provinces on the point under consideration as they seem to me to be covered by what has been said above. As for the decision of the High Court of Madras in *Venkoba* v. *Subbana* (2), which is casually referred to, though not apparently relied upon as necessary to his decision of that point, by one of the learned Judges who decided *Ma Nyun's case* (1). I confess that, like the High Court of Bengal in *Lalessor Babin* v. *Janki Bibi* (3), I fail to see how the decision of the Judicial Committee on the facts with which they had to deal in the case of *Madan Mohan Lal* v. *Lala Sheosunkar Sahai* (4), supports the conclusion at which the Madras Court arrived.

It seems to me, therefore, that, in cases governed by the new Code of Civil Procedure the relief sought in a claim for arrears of rent or mesne profits of immovable property must be regarded as based upon distinct and

(2) 11 M. 151.
(3) 19 C. 615 at p. 617.
(4) 12 C. 482.

separate causes of action, and hence the restrictive provisions of Order II, Rule 2, do not affect the claimant's right to bring two separate suits for the recovery of the property and for arrears of rent or mesne profits which became due before the suit for the recovery of the immovable property was instituted.

There must accordingly be a decree for the full amount claimed, *viz.*, Rs. 5,000 with costs. I allow interest on this sum of Rs. 5,000, pending suit at 9 per centum per annum and interest on decree at 6 per centum per annum. *Suit decreed.*

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s. c. 3 Bur. L. T. 59.)

LOWER BURMA CHIEF COURT.

CIVIL MISCELLANEOUS APPEAL No. 75 OF 1908.

August 4, 1909.

Present:—Sir Charles Fox, KT., Chief Judge, and Mr. Justice Parlett.

K. R. S. S. CHOKALINGAM CHETTY —APPELLANT

versus

K. M. R. M. S. SOOBRAMONIAN CHETTY AND ANOTHER—RESPONDENTS.

Civil Procedure Code (Act XIV of 1882), s. 108—Application to set aside ex parte decree—Applicant sued as partner but not served personally—Sufficient cause.

When a defendant, against whom an *ex parte* decree has been passed as one of the partners without the summons having been served on him individually, applies for the setting aside of the *ex-parte* decree and he denies that he is a partner of the other defendants, the Court should set aside the *ex parte* decree and re-hear the case on its merits. It should not put upon the defendant the burden of proving that he is not a partner before setting aside the *ex parte* decree. To do so would be trying in the miscellaneous application a question arising on the hearing of the case on its merits. Such procedure is not contemplated by section 108 of the Code of Civil Procedure (1882).

Appeal against the decree of the Judge on the Original Side, dated the 4th June 1908, passed in Civil Suit No. 50 of 1909, dismissing the application to set aside an *ex parte* decree.

Mr. *Dantra*, for the Appellant.

Mr. *J. R. Das*, for the Respondents.

Judgment.

FOX, C. J.—It appears to me that the learned Judge has overlooked some fundamental principles which are at the root of all procedure in civil cases. If a party wishes to have another party held liable to him, he must give the other party an opportunity of appearing and contesting the claim and if he appears the plaintiff must prove the defendant to be liable on the claim when the case is heard.

Under the Code the general rule is that a summons must be served on each defendant, but it was provided in the Code of 1882, that if the defendants were partners and the suit related to some matter in respect of which the partnership was asked to be held liable, the summons might be served on one of the partners only, or on the person having the management of the business. This exception, however, could not have been intended to interfere with the main principles that every defendant is entitled to notice of the claim against him, and an opportunity of contesting it, and to have it proved in his presence if he appears. It is based upon it being the usual course for a manager or a partner in a business to inform his principals or his fellow-partners about important matters affecting the business But when a plaintiff sues persons as partners who are not in fact partners, or one or more of whom disputes or dispute liability as a partner or partners with the others, the basis of the provision disappears. If the person served with the summons does not communicate the fact to such a person, he may have had no opportunity of appearing and contesting his liability, and a decree may be passed against him without his knowledge. The only remedy open to him in such a case is to apply to the Court to have the decree set aside, so that he may have the opportunity of contesting the claim so far as he is concerned.

In an application under section 108 of the Code of 1882, the questions to be determined were whether the summons was duly served on the defendant applying under the section, and if so, whether that defendant was prevented by any cause from attending.

If a person, sued as a partner, applies on the ground that he was not served with a summons and because he contests his being a partner, he is entitled to say that the question of his being a member of the partnership sued is one to be determined in the suit. His position as defendant against whom the Court could not pass a decree in a contested suit unless the plaintiff satisfied it that he was a partner, could not be altered by the plaintiff's mere allegation in his plaint that he was a partner and obtaining a decree against him without actual notice to him.

By the procedure which the learned Judge

adopted, the burden of proving that he was not a partner was placed on the applicant, whereas if a summons had been served on the applicant, and he had appeared and contested being a partner the burden of proving this would have been on the plaintiff.

Section 108 did not contemplate any question triable in the suit being tried in an application under it. The applicant was entitled to say that the proviso to section 74 did not apply in his case, and that the summons had not been duly served on him, and that at least he was prevented by sufficient cause from appearing as he had received no notice of the suit.

The order of the learned Judge will be set aside.

The decree as against the applicant K. R. S. S. Chokalingam Chetty will also be set aside, and the suit will be re-admitted as against him. The costs of this appeal will follow the ultimate result of the suit against the appellant.

Lowis, J.—I concur.

Order set aside.

(s. c. 3 Bur. L. T. 60.)

LOWER BURMA CHIEF COURT.

CIVIL MISCELLANEOUS APPLICATION No. 94 OF 1909.

January 3, 1910.

Present:—Mr. Justice Parlett.

BOHITRAM AND ANOTHER—DEFENDANTS—APPLICANTS

versus

CHIMUNBUX BHOWSINGHA—PLAINTIFF RESPONDENT.

Transfer of case from one city to another—Balance of convenience—Sufficient cause.

An application to transfer a case from one city to another should not be granted where there is no balance of convenience on the side of a trial in the other city nor are there grounds to suppose that greater justice would be done by a trial there.

A plaintiff should not without sufficient cause be deprived of the right given him by law to select the Court in which he will sue.

Tula Ram v. *Harjiwan Das*, 5 A. 60; *Khatija Bibi* v. *Taruk Chunder Datta*, 9 C. 980; 13 C. L. R. 182; *Geffert* v. *Rack Chand Mohta*, 13 B. 178, approved.

Mr. *J. R. Das*, for the Applicants.

Mr. *Dantra*, for the Respondent.

Judgment.—Plaintiff sued the defendants to recover the balance of the price paid for and charges incurred on rice and paddy supplied to the defendants by the plaintiff.

This is an application under sections 22 and 23 of the Code of Civil Procedure for the transfer of the case to the Small Cause Court, Calcutta.

Both the parties are represented in Rangoon by duly constituted attorneys.

The grounds urged for the defendants are:

(1) That both they and plaintiff are residents of Calcutta and the Head offices of both are in Calcutta.

(2) That all the negotiations between the parties were carried on in Calcutta and the arrangements under which plaintiff acted as their commission agent were also made in Calcutta.

(3) That the final settlement of accounts between them took place in Calcutta.

(4) That defendants cannot leave Calcutta to give evidence in Rangoon without dislocating their whole business.

(5) That all account books, vouchers and papers connected with this case are at Calcutta, and cannot be sent to Rangoon without great loss to the defendants and

(6) That all defendant's witnesses are in Calcutta.

For the plaintiff it is urged

(1) That defendants have appointed an attorney in Rangoon for the purpose of prosecuting and defending all suits filed by or against them.

(2) That though the plaintiff happened to be in Calcutta at the time this suit was filed, he is not a resident of that city but carries on business in various parts of India and Burma which he visits from time to time and that his Head office is in Rangoon.

(3) That defendants opened negotiations by communicating directly with plaintiff's Head office in Rangoon, and the final arrangements under which he commenced to act as their commission agent were made in Calcutta only because plaintiff at the time happened to be there. But under the arrangement all payments were to be made to plaintiff in Rangoon.

(4) That defendants have from time to time inspected plaintiff's accounts and

settled them in Rangoon. Only one settlement was effected in Calcutta, and that at defendant's special request and plaintiff does not admit that it was a final settlement.

(5) That orders for goods were sent by defendants direct to plaintiff's (Head) office at Rangoon, without reference to plaintiff's (branch) office at Calcutta, and all such orders were carried out in Rangoon.

(6) That all accounts relating to transactions between the parties are entered only in plaintiff's books in Rangoon, and all his witnesses are in Rangoon.

(7) That defendants have made payments to plaintiff by *hundis* and telegraphic transfers to Rangoon and plaintiff has received and credited them at Rangoon in his books there. Such payments as were made to plaintiff's Calcutta branch were to defendant's knowledge only received for remittance to Rangoon and were so remitted at their expense and

(8) That the transfer of the suit to Calcutta would entail great loss, inconvenience and delay to plaintiff, as all his account books and papers, as well as his witnesses are in Rangoon.

The defendants would not ask for a transfer of the case, if plaintiff agreed to the issue, of an open commission to Calcutta to examine the defendants and their witnesses, plaintiff, however, would agree to its issue only for the examination of the defendant's witnesses.

Plaintiff urges that the suit should be tried where defendants must discharge their liabilities that is in Rangoon, and that it should not be transferred unless it is shown that it is for convenience of both parties. There appear to be few reported cases on the point.

In *Tula Ram* v. *Harjiwan Das* (1), an application praying for an order to determine that a suit instituted in Mainpuri should proceed in Surat was refused, where sufficient cause was not shown for depriving the plaintiffs of the right given them by law to select in which Court they will sue and there was no balance in favour of greater justice or convenience on the side of the Surat Court.

Again in *Khatija Bibi* v. *Taruk Chunder Datta* (2), it was laid down that a plaintiff has the right to bring his suit in whatever Court the law allows, and section 23 of the Code of Civil Procedure (1882) was only intended to provide for cases where on grounds of expense or convenience or for some other good reason the Court thinks the place of trial ought to be changed. An order was refused because looking at the allegations on both sides it was very difficult to say where the balance of convenience lay.

In a later case, *Geffert* v. *Rack Chand Mohla* (3), it was pointed out that extreme caution should be exercised in refusing to allow a plaintiff to continue his suit in the Court in which he has instituted it, and that such a step is only justifiable when justice is more likely to be done between the parties.

In the present case there is clearly no balance of convenience on the side of a trial in Calcutta nor are there grounds to suppose that greater justice would be done by a trial there. There is, therefore, no reason to refuse to allow plaintiff to continue his suit in Rangoon.

The application is dismissed with costs. Advocate's fees two gold *mohurs*.

Application dismissed.

(1) 5 A. 60.

(2) 9 C. 980; 13 C. L. R. 182.

(3) 13 B. 178.

(s. c. 3 Bur. L. T. 62.)

LOWER BURMA CHIEF COURT.

SECOND CIVIL APPEAL No. 268 OF 1909.

December 13, 1909.

Present:—Sir Charles Fox, KT., Chief Judge, and Mr. Justice Parlett.

MEEYAPPA CHETTY AND ANOTHER—DEFENDANTS—APPELLANTS

versus

MAUNG BA BU, MINOR, BY HIS GUARDIAN *ad litem* MA HME—PLAINTIFF—RESPONDENT.

Purchase by father in name of son—Benami *purchase*—*Presumption.*

In India, when a piece of land is bought by a parent in the name of his son with his own money, the *prima facie* presumption is that it was bought *benami* in the name of the son, and if it is alleged to have been purchased for the advancement of the son, the burden of proving that fact lies on the party asserting it.

Appeal against the decree of the Divisional Court of Hanthawaddy, passed on the 14th August 1909, in Civil Appeal No. 27 of 1909, reversing the decree of the District Court of Hanthawaddy which dismissed the respondent's (plaintiff's) suit in Civil Suit No. 90 of 1907.

S. N. DAR, B. A. L
Vakil High Court
SRINAGAR (Kash

EMPEROR *v.* TUN ZAN.

Mr. *J. R. Das*, for the Appellants.

Judgment.—The minor plaintiff, through his mother as his next friend, sued as a pauper to recover possession of some land which had been sold in execution of a decree against the mother and others. The basis of the claim was that the land had been given to the plaintiff by his father. No deed of gift was produced, but the property had been purchased by the father when the plaintiff was about 5 years of age, and the conveyance of it had been to the plaintiff. It is quite clear that the purchase-money came from the father, and that the property was in the possession of, and was enjoyed by, the parents as long as the father lived and that the mother enjoyed it and dealt with it as her own after his father's death.

The District Court found that there had been no delivery of possession to the plaintiff, and that the parents had never treated it as belonging to him. It dismissed the suit.

The Divisional Court assumed that the father had bought the land as a provision for the plaintiff, and held that the causing of his name to be entered in the sale-deed, and in the Revenue Registers was an effective delivery of possession to him.

Neither Court had in mind the long line of decisions referred to at pages 531 and 627 of Amir Ali and Woodroffe's Evidence Act as to the presumption to be made in India when a person purchases property and takes a conveyance in the name of a relation. As far back as 1854 it was decided by the Privy Council that the presumption made in English law that the purchase in such a case was for the benefit and advancement of the person to whom the conveyance is made, does not apply in India, and that the presumption in India is that the purchase is *benami*, and that the burden lies on the person to whom the conveyance has been made of proving that he is entitled to, and beneficially interested in, the property.

There is nothing in the present case to outweigh the presumption, or to satisfy the burden. As far as it appears, the father had at the time no other property on which to live, but even if he had, there is nothing to show that the property was ever used solely for the benefit of the plaintiff. The mother admits that the rents of the land were mixed with their other money, and after the father's death she certainly treated the property as her own.

I would reverse the decree of the Divisional Court and restore that of the District Court dismissing the suit. I would order the next friend Ma Hme to pay the Court-fees in the Divisional Court and the costs of the defendants in all the Courts.

Decree reversed.

(s. c. 3 Bur. L. T. 66.)

LOWER BURMA CHIEF COURT.

CRIMINAL REVISION CASE No. 230 B OF 1909.

August 30, 1909.

Present:—Mr. Justice Lowis.

EMPEROR—APPLICANT

versus

TUN ZUN AND OTHERS—RESPONDENTS.

Burma Gambling Act (*I of* 1899), *s.* 4—*Game of skill.*

In the games of *thonbonpe* or dominoes, as played in Burma, the element of chance is so subordinated to the element of skill that the game must be looked upon as a game of the kind contemplated by section 4 of the Burma Gambling Act.

REFERENCE.

The following reference was made by the District Magistrate, Prome, in Criminal Revision No. 253 of 1909, on the 23rd August 1909.

On the 11th May 1909, a warrant under the Burma Gambling Act was issued by the Sub-Divisional Magistrate, Prome, at the instance of the Police, for the search of the house of Maung Tun Zan in Prome town." The house was raided the same day, and a number of men were found playing *thonbonpe* or Burmese dominoes. All the men present were arrested and sent up for trial under the Burma Gambling Act. One was pardoned and called as a witness. The house-owner was convicted under section 12, and fined Rs. 50. The other men were convicted under section 11, and fined Rs. 25 each. An application has been made for revision of the above order. It is argued that *thonbonpe*, or Burmese dominoes, is a game of skill, and is covered by section 4 of the Act. There is indeed an element of chance, but it is no greater than at billiards or skittles. A really good *thonbonpe* player cannot be beaten by an inferior player, any more than a champion billiard player can be beaten by an amateur, however, much the luck may be against the former. *Thonbonpe* can be played for stakes and is often so played. It is also

often played for love. The game is a popular one, and dominoes are to be found in probably ten per cent. of the houses in any town. If their seizure be held to justify the presumption under section 7 of the Act, that the house is a common gaming house, the consequences will be far reaching.

Dice (or rather a die) and counters are usual adjuncts of Burmese dominoes. There are 24 dominoes in a set and these, after being shuffled together, are dealt, or divided out, face downwards, into three files of eight each—one for each player. The die is only used to divide which pile each player shall have. Counters are used to record the games won, and may or may not have a money value, according to whether the game is played for stakes or for simple amusement.

The Sub-Divisional Magistrate has held that the game is not the one of pure skill, because the value of the dominoes that fall to each player is a matter of chance. A player, he says, may have such a good hand dealt to him that he is declared winner without playing out the game. It is admitted that this is so, but the contingency is highly improbable, and, as a matter of fact, is so rare as hardly to affect the contention that the game is one of skill.

I cannot find any ruling on the subject, and I venture to submit the case for orders.

* * * *

Order.—In the circumstances described by the District Magistrate, Prome, I concur with him in his view that the element of chance in the game of *thonbonpe* or dominoes, as played in Burma, is so subordinated to the element of skill that the game must be looked upon as a game of the kind contemplated by section 4 of the Gambling Act. The convictions and sentences passed by the Sub-divisional Magistrate, Prome, are set aside and the fines will be refunded.

Conviction set aside.

(s. c. 3 Bur. L. T. 67.)

LOWER BURMA CHIEF COURT.

CRIMINAL REVISION NO. 326B OF 1909.

December 17, 1909.

Present:—Mr. Justice Parlett.

MAUNG TUN THA *alias* WONG KIN—APPLICANT

versus

MA PU—RESPONDENT.

Buddhist Law—Marriage—Custom—Chinese Buddhist—Validity of marriage with Burmese Buddhist—Necessary facts to be proved.

Where it is sought to establish a marriage between a Chinese Buddhist and a Burmese Buddhist woman, it must be shown that the practices the husband followed differ from those followed by all Chinese Buddhists and are the peculiar characteristics of Burmese Buddhists.

No presumption as to his being a Burmese Buddhist can be drawn from the fact that he bears a Burmese name. For it is a matter of common knowledge and experience that Chinamen, long resident or born in this country, adopt Burmese names.

In such a case the customary law applicable to Chinese Buddhists must be followed.

Fone Lan v. *Ma Gyee*, 2 L. B. R. 95, followed.

Appeal against the order of the First Additional Magistrate of Rangoon, dated the 15th November 1909, passed in Criminal Miscellaneous No. 350 of 1909.

Mr. *L. Ah Yain*, for the Applicant.

Mr. *Sealy*, for the Respondent.

Judgment.—The record discloses the following facts:—

Respondent, a Burmese Buddhist woman, claimed maintenance for herself from applicant who is half Chinese and a Buddhist. He denied that she was his wife. The Magistrate held that he was to all intents and purposes a Burmese Buddhist and that the marriage was a valid one as between two Burmese Buddhists, and granted the respondent maintenance. Applicant now asks for revision on the grounds that, though a Buddhist, he is not a Burmese but a Chinese Buddhist and that the marriage is not valid unless it complies with the requirements of the law governing Chinese marriages and, further, that even if he had been a Burmese Buddhist there would not have been a valid marriage between them according to Burmese Buddhist law.

The grounds on which the Magistrate considered applicant a Burmese Buddhist are that he is commonly known by a Burmese name; that he worships at *pagodas*, pays reverence to Buddhist monks and keeps fast days at Buddhist monasteries; and that he built a Buddhist monastery and dedicated it according to the ritual observed by Burmese Buddhists in such cases. It is a matter of common knowledge and experience that Chinamen long resident or born in this country adopt a Burmese name. As regards the other points, they indicate that he is a Buddhist, as he admits he is, but there is nothing to show that the practices he followed differ from those followed by all Chinese Buddhists, whether in Burma or

elsewhere, much less that they are the peculiar characteristics of Burmese Buddhists. The Magistrate's finding on the point is, moreover, in direct defiance of the sworn testimony of respondent and her witnesses, her mother and brother-in-law. The last named says applicant is a Chinaman, the other two say he is a Chinese half caste, and there is not the smallest doubt that he is.

I find that he is a Chinese Buddhist. In *Fone Lan* v. *Ma Gyee* (1), it was held that Buddhist law in section 13 of the Burma Laws Act must be read as meaning the law applicable to the Buddhist parties in the case, and that in a case like the present the customary law applicable to Chinese Buddhists must be followed. As in that case with respect to succession, so in this case with respect to marriage, there is nothing in the evidence to show that the customary marriage law applicable to a Chinese Buddhist is in any way connected with the Buddhist faith, and the case of *Pai Beng Teng* v. *Ko Maung* (2), seems to indicate that it is not.

It is quite clear that none of the preliminaries referred to in that case as essential to a Chinese marriage were observed in this instance, unless one considers applicant's message to the girl's mother sent by her brother-in-law as being negotiations between the families on either side, which I do not.

Nor do I consider that what was done would have constituted a valid marriage even between two Burmese Buddhists. Applicant was a well-to-do mill-owner of 53 years of age with a wife living. He sent a message to respondent's parents, who are very poor folk, that he wanted their daughter of 15 and would treat her well. They jumped at the offer. He hired and furnished a house to which her parents and brother-in-law removed with her. Applicant then visited the house alone in the morning, and again alone the same night, and they were married, according to her brother-in law, at his first visit, according to her at his second one. Both of them distinctly contradict her mother who tries to make out she invited some ten people, some of whom were named but none called. It is quite clear that there was no sort of form or ceremony gone through, nor were there any independent witnesses present. Reliance, however, is placed on the fact that they co-habited for some four and a half years and that, as laid in *W. R. Vanoogopal* v. *R. Krishnasawmy Mudaliar* (3); the presumption of marriage arising from co-habitation with habit and repute can only be rebutted by clear and satisfactory evidence. I may remark that there is not a particle of evidence offered of repute as among her neighbours and the people of the quarter where they lived, and therefore, there is nothing to rebut. But it was clearly laid down by the Privy Council in *Ma Wun Di* v. *Ma Kin* (4), approving the words of the Chief Judge of this Court that the presumption of marriage does not arise in the case of a woman who enters into a union with a man with her eyes open to the fact that he has already a legally married wife, but that, on the contrary, the presumption in case is that she is a mistress and not a wife.

I hold that respondent totally failed to show that she was the wife of applicant and as such entitled to maintenance. I, therefore, set aside the Magistrate's order granting her maintenance.

Order set aside.

(1) 2 L. B. R. 95.
(2) 2 L. B. R. 261.
(3) 3 L. B. L. 25.
(4) 4 L. B. R. 175; 3 M. L. T. 93; 10 Bom. L. R. 41; 18M. L. J. 3; 12 C.W.N. 220; 7 C.L.J. 112; 35 C. 232; 5 A. L. J. 63; 14 Bur. L. R. 3.

(s. c. 3 Bur. L. T. 74.)

LOWER BURMA CHIEF COURT.

CRIMINAL REVISION CASE No. 362B OF 1909.

January 21, 1910.

Present:—Mr. Justice Parlett.

MA E MYA AND OTHERS—ACCUSED—APPLICANTS

versus

MAUNG PO THAUNG AND ANOTHER—COMPLAINANTS—RESPONDENTS.

Criminal Procedure Code (Act V of 1898), s. 145—Dispute between tenants of joint owners—Jurisdiction of Magistrate to proceed under s. 145.

Certain land was jointly leased to tenants by two joint owners and the former continued in possession for several years under the lease. One of the joint owners sued for partition of his share and obtained a decree but he did not obtain possession of his share under the decree and while the old tenants were in possession as before, some new tenants forcibly entered on the land asserting that they were the tenants of only one of the joint owners. The Magistrate, acting under section 145, Criminal Procedure Code, put the old tenants in possession

MA E MYA *v.* MAUNG PO THAUNG.

Held, that the Magistrate did not act without jurisdiction, and that though there is no doubt that the Court must give effect to a decree of a Civil Court for partition, yet in this instance the dispute not being between the parties to the decree but between two rival sets of tenants, the Magistrate was right in putting the old tenants into possession of the land.

Appeal against the order of the 2nd Additional Magistrate of Kyauktan, passed on the 17th November 1909, declaring the respondents to be entitled to possession of the land, in Criminal Miscellaneous Case No. 10 of 1909.

Mr. *Villa*, for the Applicants.

Mr. *Higinbotham*, for the Respondents.

Judgment.—It is argued that the proceedings though purporting to come under Chapter XII, Criminal Procedure Code, do not in reality do so.,

First it is urged that the 1st Class Additional Magistrate of Kyauktan has no local jurisdiction, but no definition of any local area under section 12 (1) of the Code has been proved and, therefore, clause (2) applies to give him jurisdiction.

Next is it urged that the Magistrate's order of 16th September does not show that he was satisfied that a dispute existed which was likely to cause a breach of the peace, nor does it state the grounds of his being so satisfied. It is true that the Magistrate wrote that it appeared that there was reasonable ground for believing that a breach of the peace was likely to occur, instead of using the actual words of the Code. But he gives as a ground of his belief that the joint owners of the land have disagreed and have each set up rival tenants on the land, and he refers to the statements contained in the petition of Po Thaung and Tha Swa which initiated the proceedings. The order actually served upon the other party expressly sets out that it has come to the Magistrate's knowledge that a breach of the peace will occur owing to the forcible entry by petitioners and respondents upon the land in dispute, which is fully described.

It appears to me that the proceedings as a whole show that section 145 (1) was substantially complied with.

Next it is urged that section 145 cannot be applied to a dispute between two parties having joint rights to the land in dispute and being in joint possession, each claiming exclusive possession, as it is not a dispute between two opposing parties having adverse rights to exclusive possession. This was the ruling in *Makhan Lal Roy* v. *Barada Kanta Roy* (1). I was also referred to *Dhani Ram* v. *Bhola Nath* (2) and other cases, none of which, however, appear to be quite similar to the present case.

The facts as found by the Magistrate and appearing from the proceedings are as follows:—

The land has been treated as the joint property of three persons, one of whom is dead, and the other two are Maung So, and the first respondent, Ma E Mya. Petitioners alleged, and the Magistrate has found, that the land has been leased to them by Maung So and Ma E Mya for several years past, up to and including the current agricultural year. In June and July 1909, the second, third, fourth and fifth respondents forcibly entered upon the lands asserting that they were tenants of Ma E Mya alone.

Petitioners have been unsuccessfully prosecuted both for criminal trespass and for theft of crops.

It appears that Maung So has sued Ma E Mya and others for partition of the land, and on 21st July 1908, obtained a decree, declaring that he was entitled to one-third share of the land. It is urged that in face of this decree the Magistrate had no jurisdiction under section 145, Code of Criminal Procedure, to put petitioners in possession of the whole of the land. No doubt in proceedings under section 145 between parties to the decree, the Court is bound to give effect to the decree and maintain in possession the party put in possession under the decree [*Kunja Behari Das* v. *Khetra Pal Singh* (3)]. But in the present case the dispute arose and the breach of the peace was likely to occur, not between the parties to the decree but between third persons who claimed to be tenants of some of the parties. Moreover, it is not contended that any one has been put in possession of the land or any part of it under the decree. On the contrary, the Magistrate has found that petitioners were put in as tenants by both Maung So and Ma E Mya after the decree was passed. He further found that the second,

(1) 11 C. W. N. 512; 5 Cr. L. J. 296.
(2) 23 P. R. 1902 Cr.; 135 P. L. R. 1902.
(3) 29 C. 208; 6 C. W. N. 38.

third, fourth and fifth respondents forcibly and wrongfully dispossessed petitioners within two months next before the date of his order under section 145 (1), and, therefore, he treated them under section 145 (4) as if in possession at that date. They were not parties to the decree, and petitioners were not in possession nor were respondents put in possession, under the decree.

In my opinion in a dispute between them the Magistrate has jurisdiction to act under Chapter XII of the Code.

This being so, his proceedings are not subject to revision and this application is dismissed.

Application dismissed.

(s. c. 3 B. L. T. 75.)

LOWER BURMA CHIEF COURT.

CRIMINAL REVISION No. 683A OF 1909.

January 24, 1910.

Present:—Mr. Justice Hartnoll.

EMPEROR—APPLICANT

versus

CHIT MAUNG—RESPONDENT.

Revision—Interference by Chief Court—Sessions Judge passing heavier sentence than the verdict of the Jury.

The Chief Court will not interfere in revision in a case where the Sessions Judge, passes on the accused a heavier sentence than he would have passed had he agreed with the verdict of the Jury.

Review of the order of the Sessions Judge, Tenasserim, passed in Session Trials No. 47 of 1909, dated the 4th October 1909.

Order.—Maung Chit Maung was charged with murder of his wife, and was tried before the Sessions Judge of the Tenasserim Division and a jury. His defence was practically to the effect that he killed her as he had just seen her in the act of committing adultery with another man. In charging the jury, the Sessions Judge stated that if the accused acted while deprived of self-control by grave and sudden provocation, that fact was sufficient to reduce the offence from murder to culpable homicide not amounting to murder and that the question whether there was such grave and sudden provocation was really the only question for determination. He then went on to sum up the facts and concluded by saying that if the jury thought there was a reasonable possibility that the accused's story might be true, they should give him the benefit of the doubt and find him guilty of culpable homicide not amounting to murder.

The jury then found unanimously that the accused was guilty of culpable homicide not amounting to murder. On this the Sessions Judge wrote an order of considerable length and found that in his opinion there was no truth in the allegation of the accused that he had seen his wife in the act of committing adultery. He went on to say: "My own opinion is that he should have been found guilty of murder. But I do not think it necessary to refuse to accept the verdict. I am satisfied that the accused at any rate believed in good faith that his wife had been guilty of adultery and for that reason I deal with him as leniently as appears to me to be justifiable." He then sentenced him to ten years' transportation. This, in my opinion, was a heavy sentence if the defence of Maung Chit Maung was correct—that is, if he killed her just after seeing her in the act of committing adultery, and from a perusal of the order of the Sessions Judge I think it not at all unlikely that, if he had agreed with the finding of the jury, he would have passed a much less severe sentence. It seems very probable that the reason why so heavy a sentence was passed was because he did not agree with the verdict of the jury. If my surmise is correct, I am of opinion that the Sessions Judge has acted erroneously. He should either have passed a sentence commensurate with the verdict or have submitted the case to this Court under the provisions of section 307 of the Code of Criminal Procedure if he was clearly of opinion that it was necessary for the ends of justice that a heavier sentence than was warranted by the verdict should be passed on Maung Chit Maung.

The proceedings will be returned to the Sessions Judge for report as to whether, if he had agreed with the verdict of the jury, he would not have passed a much less severe sentence, and as to whether, if he had considered that the law had left him no option but to pass a sentence commensurate with the verdict, or to refer the case to this Court, he would not have been clearly of the opinion that it was necessary for the ends of justice to have submitted the case to this Court, and whether in such case he would not in fact have so submitted it

under the provisions of section 307 of the Code.

Judgment.—The learned Sessions Judge has reported that if he had agreed with the verdict of the jury he would have passed a sentence much, less severe than the one he actually did pass, and further, that if he had considered that the law only allowed him the option of passing a sentence commensurate with the verdict or of submitting the case for orders under section 307 of the Criminal Procedure Code, he would have submitted it under that section.

The question remains whether this Court can, or should, interfere in revision. The proceedings of the Sessions Judge practically amount to an acquittal on the charge of murder, and in cases other than cases tried by a jury this Court in dealing with acquittals can exercise the powers conferred by section 423 (1) (*a*) of the Code; but in cases tried by a jury the provisions of section 423 (2) apply.

One way of dealing with the case would be to set aside the Sessions Judge's order convicting Maung Chit Maung of culpable homicide not amounting to murder and directing him to submit the case under section 307; but after careful consideration I am unable to see that this Court has power to make such an order. Such an order would not seem to come under section 423 (1) (*d*).

No action can, therefore, be taken in revision in my opinion and so the proceedings in revision are closed.

Order set aside.

(s. c. 3 Bur. L. T. 77.)

LOWER BURMA CHIEF COURT.

SECOND CIVIL APPEAL No. 9 OF 1909.

August 28, 1909.

Present:—Mr. Justice Parlett.

Banoo MAHOMED HOOSEIN—PLAINTIFF—APPELLANT

versus

MANSOOKLAL DAWLAT CHAND—DEFENDANT—RESPONDENT.

Injunction—Right to let the water run off from land on a higher level into that on a lower level.

The owner of higher land is entitled to let the water run off into the lower land by whatever means nature intended that it should and his right is infringed by any means which prevent the water so doing whether it be the damming of stream or the holding up of the promiscuous spill.

Subramania Ayyar v. *Ramchandra Rau*, 1 M. 335, followed.

Khoorshed Hossein v. *Teknarayan Singh*, 2 C. L. R. 141; *Abdul Hakim* v. *Gonesh Dutt*, 12 C. 323; *Powmal* v. *Ramasami Chetty*, 11 M. 16, referred to.

Appeal against the decree of the District Court of Hanthawaddy, dated the 26th October 1908, passed in Civil Appeal No. 126 of 1908, reversing the judgment and decree of the Township Court of Insein, and dismissing the appellant's (plaintiff's) suit filed in Civil Regular No. 557 of 1908.

Mr. *Giles*, for the Appellant.

Mr. *Dantra*, for the Respondent.

Judgment.—Plaintiff sued defendant to restrain him from interfering with the natural flow of surplus rain water from off his land.

Plaintiff's land slopes from north to south and is generally on a higher level than defendant's which adjoins it on the south, and, therefore, the water from plaintiff's land tends naturally to drain off into defendant's land. The latter has now prevented this by maintaining a small *bund* along his northern boundary.

The facts are sufficiently set out in the judgments of the Township and District Courts. It appears that formerly both pieces of land were under paddy cultivation, when it was to the interest of the occupier of the higher land to retain as much of the surface water as he could, and it would similarly be beneficial to the occupier of the lower land to receive any surplus water that drained down from above. Both parties have now given up paddy cultivation and planted out their lands with fruit and other trees to which water logging of the soil is detrimental. The plaintiff accordingly no longer wishes to retain, nor the defendant to receive, the surplus rain water.

The District Court held that plaintiff was not entitled to the relief sought inasmuch as his land being formerly so constructed as to retain a larger quantity of water for paddy cultivation, and he having so altered the conformation of his land as to secure a speedy out flow of surplus rain water, defendant is entitled to so alter his land as to prevent the water from above from flowing over it.

The exact converse of the present case was dealt with in *Khoorshed Hossein* v. *Teknarain*

Singh (1) where it was held that where A has the right to discharge surplus rainfall from his land on to B's land, no length of time will give B the right to compel A to send water on to him, provided A does not interfere with water flowing in a natural and defined channel. Similarly, I take it, no length of time will give B the right to restrain A from sending the water on to him, provided it be not discharged in a concentrated stream from an artificial channel.

English decisions have been quoted to show that the owner of land can use the rain water falling upon it if he wishes or may let it flow away as nature intended. Water is merely casual and the owner is entitled to get rid of it for the purpose of the better cultivation of his land. Though the owner may use some or all of the water, he does not forfeit his right to let it run away if he wishes to do so.

The learned District Judge distinguishes the present case from several reported Indian cases, because in them a permanent stream or water-way had been blocked up, whereas here there was no recognized channel, but the water merely spilled over and found its way down casually as it could.

In my opinion, however, this difference is immaterial; the owner of higher land is entitled to let the water run off into the lower land by whatever means nature intended that it should and his right is infringed by any means which prevent the water so doing, whether it be the damming of a stream or the holding up of the promiscuous spill.

In *Subramaniya Ayyer* v. *Ram Chandra Rau* (2), the following passage occurs:—"The claim appears to be a claim to restrain a disturbance of a right of property . . . of a kind which . . goes by the name of right, *ex jure* nature. It is found that the accustomed course of things was for water from plaintiff's land to drain into a stream which flowed on without obstruction. Defendants obstructed the flow of stream and thus forced the water back and obstructed the drainage of plaintiff's land. Such an act is an interference with the right of property which plaintiffs have to the accustomed flow of the stream, and is actionable . . because injury to rights imports damage."

This was approved in *Abdul Hakim* v. *Gonesh Dutt* (3) where it was held that the right of the owner of high land to drain off the surplus surface water through the adjacent low lands is incident to the ownership of land in this country.

In *Powmal* v. *Ramasami Chetti* (4) it was held that natural water courses are like ways of necessity and the right to have a stream running its natural direction is *jure naturæ*. It should be ascertained in the first place where, by the laws of nature the water would flow, it is the natural right of every owner of land to collect or dispose of all water on the surface which does not pass in a defined channel.

In the present instance it is clear from the evidence that by the laws of nature the surplus surface water from plaintiff's land can only flow away over defendant's land, for the adjoining land to the north, east and west is higher than plaintiff's land. Plaintiff has indeed erected *bunds* along these three sides of his land, the effect of which is to keep off his land water which would otherwise drain on to it, and across it on to defendant's land. His action in doing so has, therefore, tended to lighten and not increase, the natural burden lying upon defendant as the owner of the lower land. It is true that the earth for these *bunds*, was excavated from his own land which has, therefore, been given an uneven surface by the creation of hollows, but this in no way increases the amount of rain water falling on it nor does it in any way add to the natural burden of defendant's land.

I reverse the decree of the District Court and, instead, the plaintiff is granted an injunction restraining defendant from doing any act which will interfere with the natural flow of surplus surface water from off plaintiff's land.

Defendant will pay plaintiff's costs in all Courts.

Decree reversed.

(1) 2 C. L. R. 141.
(2) 1 M. 335.
(3) 12 C. 323.
(4) 11 M. 16.

K. B. BANURJI *v.* PORT COMMISSIONERS.

(s. c. 3 Bur. L. T. 78.)

LOWER BURMA CHIEF COURT.

CIVIL REGULAR No. 38 OF 1909.

May 2, 1910.

Present:—Mr. Justice Robinson.

K. B. BANURJI—PLAINTIFF

versus

THE PORT COMMISSIONERS—

DEFENDANTS.

Malicious prosecution, suit for—Essentials—Malice—Burden of proof.

The plaintiff must show, *first*, that he was prosecuted; *secondly*, that the prosecution determined in his favour, *thirdly*, that it was without reasonable and probable cause and *fourthly*, that it was malicious.

Malice is not to be considered in the sense of spite or hatred against an individual but of *malus animus* and as denoting that the party is actuated by improper and indirect motives:—*Mitchell* v. *Jenkins*, 5 B. & Ad. 588 at p. 595; 2 N. and M. 301; 3 L. J. K. B. 35, relied upon.

Bhim Sen v. *Sitaram*, 24 A. 363; A. W. N. (1902) 62, followed.

It is necessary to prove malice in addition to want of reasonable and probable cause and the onus of proving both essentials lies on the plaintiff.

Mr. *N. M. Cowasjee*, for the Plaintiff.

Mr. *Coltman*, for the Respondents.

Judgment.—Plaintiff sues the defendants for Rs. 50,000 for malicious prosecution.

The Local Government acquired the Botataung Land Company's land for the Port Trust. On this land were a large number of tenants, who has built houses. Their interests in the land were to be acquired and notices issued to them. Thereupon they had a meeting and deputed four men to engage a lawyer to appear for all. Plaintiff was engaged. It is said that each tenant was to contribute the amount he paid as ground rent for one month towards the payment of a lawyer's fees. Plaintiff obtained powers-of-attorney from each tenant and all paid Re. 1 for stamps. Government finally decided not to acquire the tenants' interests and it was decided that they should be paid the expenses they had incurred. The main expense was the lawyer's fee, and to enable the Collector to make a separate award in each case, plaintiff undertook to put in a list showing what each man was to be paid and did so. Awards were made accordingly and the Port Commissioners issued cheques for these amounts, payable to the tenants. These were given to plaintiff who got most endorsed and cashed them. Eleven persons, however, did not endorse. Plaintiff finally returned those cheques to the defendants and asked that one consolidated cheque be issued in his own name for the total amount as the payees had not turned up to endorse them. The Port Commissioners replied that they could not do so without further information. Plaintiff then obtained a sort of certificate from Mr. Stevens, an officer on special duty to assist Collector in these cases and forwarded it to the plaintiffs. The day after Mr. Stevens gave this certificate certain tenants came and said they had not been paid. He told them they must file petitions and they did so a few days later. The petitions alleged they had not been paid the amount awarded. Mr. Stevens recorded a short statement at the bottom of the petition that the petitioner had paid so much and had not authorized plaintiff to demand. Mr. Stevens mentioned the matter to Mr. Buchanan, the Chairman of the Port Commissioners, and was then written (Exhibit 15) to know if he would still hold the certificate he had given plaintiff to be good. He replied (Exhibit 16) enclosing Exhibit 17. This letter was an official letter from the Collector to defendants asking them to cancel certain of the cheques previously issued and to issue fresh cheques for what the claimants asserted were the correct amounts. In Exhibit 16 Mr. Stevens asked that the other cheques should be kept till they heard further information.

These are very briefly the facts which led to the action taken which action resulted in the complaint filed by the defendants and the prosecution for which plaintiff now seeks damages. I shall have later to treat the earlier stages in greater detail.

After the Port Commissioners had issued fresh cheques as requested, they asked the Collector to make further enquiries. Many cheques had been cashed, and if they also had been issued for larger amounts than were correct, it is obvious that enquiry was necessary. It is not denied that they were fully justified in asking for further enquiries.

Then Mr. Stevens went to the land acquired to see the tenants. He met Mr. Boog who was in charge of the land for defendants and who collected the ground rents from the tenants.

Mr. Boog assisted him in getting the tenants and in interpreting the statements of some of them. He kept the defendants informed of what he was learning and

informed the Collector also. The Special Collector for the acquisition cases had left and the Collector was the Collector of Rangoon. Mr. Stevens was then instructed to go and take the men whose statements he had recorded to Mr. Young, the Government Advocate, who had been the defendants' counsel in the land acquisition cases. Mr. Young recorded certain statements, Mr. Boog helping in interpretation here also. Exhibit 18 is the record made by Mr. Young. Then Mr. Young gave an opinion to defendants. It is contained in the last few paragraphs of Exhibit 22. He said: "I think that we ought to succeed almost certainly, if the witnesses adhere to their statements." Mr. Stevens states that the witnesses had made the same statements to Mr. Young that they had made to him.

Mr. Young had submitted a draft complaint of an offence under section 420, Indian Penal Code. Mr. Buchanan refused to file this at once but sent the papers to Mr. Giles, he says, "in order to be sure there was a good *prima facie* case." Mr. Giles gave his opinion and said that, in his mind, there was no room to doubt that the offence of cheating was committed and that the evidence, oral and documentary, should be sufficient to establish the charge. He suggested that the statements of as large a number of the claimants as possible should be recorded to pin them down to a statement and in particular those of two more of the men who were present when the fee was settled. He points out that the offence is a cognizable one and that if information is laid the police would have to investigate. Mr. Buchanan then asked Mr. Stevens to take the two men specially mentioned to Mr. Young that their statements might be recorded, but they were away from Rangoon. The Port Commissioners, then, in meeting, considered the case and decided that the papers should be sent to the Commissioner of Police, (see Exhibit 25,) and Mr. Buchanan there states that the question of prosecution must be left to the discretion of the Commissioner of Police. Exhibit 26 is the letter with which the papers were sent, amended as Mr. Buchanan in Exhibit 25 had ordered. Then the Commissioner of Police wrote that a *prima facie* case had been made out and requesting that a formal complaint be sent. This was then done and the prosecution instituted.

In suits such as this one the plaintiff must show, *first*, that he was prosecuted; *secondly*, that the prosecution determined in his favour; *thirdly*, that it was without reasonable and probable cause and, *fourthly*, that it was malicious. The first two essentials are admitted and have been proved.

The action of the defendants has been attacked principally on the ground that it was without reasonable and probable cause, and the presence of the essential of malice is based partly on this absence of good cause and partly on inferences to be drawn from other facts. What amounts to want of reasonable and probable cause must and can only be decided upon the facts and circumstances of each particular case. I will, however, state now what is necessary to constitute such malice as would be required to be established before the plaintiff can succeed. "It is not to be considered in the sense of spite or hatred against an individual but of *malus animus* and as denoting that the party is actuated by improper and indirect motives." Per Parke, B., in *Mitchell* v. *Jenkins* (1). This has been followed in *Bhim Sen* v. *Sita Ram* (2) and is settled law. In *Abrath* v. *N. E. Railway Company* (3), Cave, J., in summing up, put it to the jury that they must decide whether they (defendants) "were actuated by malice, that is to say, were they actuated by some motive other than a desire to bring a man whom they believed to have offended against the criminal law to justice." This is the only proper motive. It is not necessary to show that they were anxious to injure the plaintiff personally, though that, if proved, would be evidence of malice. If they had a private end to serve and were acting otherwise than to vindicate the law their motive would be improper. It is also necessary to prove malice in addition to want of reasonable and probable cause, and the onus of proving both essentials lies on the plaintiff.

For plaintiff it is urged that want of proper care was shown in the manner of the enquiry held, in their not asking a man of

(1) 5 B. & Ad. 588 at p. 595; 2 N. and M. 301; 3 L. J. K. B. 35.

(2) 24 A. 363: A. W. N. (1902) 62.

(3) 11 Q. B. D. 440: 55 L. J. Q. B. 457; 50 J. P. 659; 11 App. Cas. 247; 55 L. T. 63.

plaintiff's position and respectability for an explanation before launching a prosecution since that explanation would have satisfied them that there was no offence. It is urged that the opinions given were such that they had reason to hesitate and enquire further. Also, that the opinions were not justified on the materials put before counsel and that defendants cannot shield themselves behind counsel's opinion but must themselves decide. Malice, it was argued, was to be inferred from the want of probable cause. That they prosecuted under section 420 instead of the more appropriate section 210, Indian Penal Code, and this because sanction was required for the latter and before it was granted plaintiff would have had an opportunity of explaining, which they feared, would result in the case being stopped. It is further said that Abdulla one of the four men who fixed the fee was made a co-accused to shut his mouth. The whole enquiry was confidential and the Collector should have been asked to make it.

It will be seen that malice and want of probable cause are practically based on the same allegations and one is inferred from the other.

It is important to consider what happened when plaintiff was told by the Collector that a separate award would have to be made in each case. Plaintiff had stated his fee was Rs. 1,500, and, according to Mr. Stevens, undertook to submit a list showing how the fee was to be apportioned amongst all his clients. He produced that list and Mr. Stevens deposes that he and the Special Collector understood that the Rs. 1,500 was the total of the various sums that each client had agreed to pay. The point was important and I questioned Mr. Stevens to make quite sure. He stated in reply—"Mr. Banurji did not suggest to the Collector that the Rs. 1,500 was a lump sum that could only be divided up amongst the tenants on some basis of his own. He gave us to understood that he wanted time to get a list from the tenants to show how the Rs. 1,500 should be apportioned, that is, how much each had subscribed. I regard these two phrases in this case as synonymous." Plaintiff states he told the Collector that he had been engaged by the elders to appear for all the tenants for a lump sum of Rs. 1,500. I find it hard to believe that this could have been so. There is no reason whatever to doubt Mr. Stevens' evidence, and if plaintiff's statement is accurate it is impossible that Mr. Stevens should have acted as he did. It is obvious that he at once suspected plaintiff had stated, his fee was larger than it was, and if plaintiff had stated, as he says he did, he must have seen that it was possible that each tenant's share of the fee might not be the same as plaintiff's apportionment. One would have thought that the matter would have been so clearly stated that there could have been no ground for misunderstanding. The statements made when the petitions were presented led Mr. Stevens to at once report the matter not merely to get fresh cheques issued but that notice might be taken of plaintiff's action. Enquiries were made and the information gathered showed that the general body of the tenants had agreed to subscribe an amount equal to one month's rent towards the lawyer's fee and also that plaintiff had been told this.

Then plaintiff's letter to the Port Commissioners contained a deliberate misstatement. It may not have been made with any evil intent but the fact must have weighed with those who considered the question of a prosecution.

I am unable to hold that the statements made to Mr. Young were such that no prosecution could have been properly determined on. There are, it is true, some small points in plaintiff's favour and two of the men who fixed the fee were not examined then. But all agree that one month's rent was to be the subscription towards the fee. Plaintiff would not at first agree to Rs. 1,000 but wanted more, and all, that the statements referred to in argument go to show is that the elders said they would try and get him more if he got them compensation or land elsewhere. That evidence clearly negatived the fact that Rs. 1,500 had been agreed to definitely as the fee.

Mr. Young's opinion was given subject to the proviso that the witnesses adhered to their statements. I am unable to see anything in this. Mr. Giles' opinion is attacked as biassed because of certain statements in it. But no case whatever has been made out to show that his opinion was not honestly given or that he did not believe a good case existed. There is also no reason whatever to

hold that defendants did not believe the same and I can find no ground for holding that these opinions should have caused them to pause. Mr. Giles advised that certain other statements be taken, and the defendants having considered the case at a meeting sent the papers to the Commissioner of Police. The police made a complete enquiry, examining between 30 to 40 persons, and then informed defendants that there was good *prima facie* case and then only was the complaint filed. That complaint did not refer to Abdulla at all, and as he was made a co-accused by the Police and not by defendants the argument based on this is worthless.

The main contention was that plaintiff was never given an opportunity of explaining. Considering that he had made a distinct statement to the Collector, the wording of this letter to defendants and Mr. Stevens' knowledge of the facts, there was no essential need to do so. Even if an explanation had been asked for and given, as it is said it would have been, I quite fail to understand why it should of necessity have made any difference to the defendants' action. Even if the investigations were conducted so that plaintiff should know nothing about them, I cannot infer from this either want of due care or malice.

No case whatever has been made out to show malice. It is not suggested even that defendants had any motive either of benefiting themselves or injuring plaintiff. If they believed that the Collector had been induced to award more than was correct against them, and the result of a successful prosecution would mean the recovery of certain money, the amount is small. It is, no doubt, true that they must weigh all the evidence they had and that they can't pick and choose, but very little indeed has been mentioned to support the argument that there was before them evidence which, had it been reasonably considered, would have caused them not to proceed.

I do not wish for a moment to suggest that Mr. Banurji was in any way guilty of the offence. He has been discharged, and that on defendants' counsel's statement that he did not desire to produce further evidence in view of the evidence previously given. He has produced a large number of witnesses, men of high position and integrity, who depose that they believe him and have always regarded him as a man worthy of respect and esteem. But I am unable to hold that he has made out either want of reasonable or probable cause of malice. The onus lay on him and he has not in any way discharged it. The suit is, therefore, dismissed with costs.

Suit dismissed.

(s. c. 3 Bur. L. T. 82.)

LOWER BURMA CHIEF COURT.

CRIMINAL REVISION No. 164B OF 1909.

August 12, 1909.

Present:—Sir Charles Fox, KT., Chief Judge, and Mr. Justice Parlett.

EMPEROR—APPLICANT

versus

PA—RESPONDENT.

Opium Act (I of 1878), s. 10—Presumption—Onus.

Accused was tried for illegal possession of opium found on him on the 18th May 1909. He accounted for it by saying that he had purchased it from a licensed vendor. This fact was accepted by the prosecution, but they alleged that the date of his purchase was such that this explanation was not satisfactory: *Held*, that it lay upon the prosecution to prove that date, and only then, upon the accused failing to satisfactorily account for the large quantity of opium still in his possession on the date of his arrest, could any presumption be drawn against him under section 10 of the Opium Act.

King-Emperor v. *Paw Yan*, 4 L. B. R. 314; 9 Cr. L. J. 16, considered.

Reference made by the District Magistrate Henzada, in his order in Criminal Revision No. 265 of 1909, dated the 3rd July 1909, with the recommendation that the conviction and sentence be set aside.

The *Assistant Government Advocate*, for the Applicant.

Judgment.

Parlett, J.—A Chinaman named Pa, was on the 18th May found in possession of $2\frac{7}{8}$ *tolas* of raw opium, which he said he bought from the licensed vendor at Henzada. As in the Register kept by the licensed vendor under Rule 68 of the Rules under the Opium Act, the latest entry regarding the accused was one referring to a purchase by him of 3 *tolas* on the 12th May, it was inferred from the lapse of time that the opium found in his possession on the 18th could not be part of that which he bought on the 12th, and he was, therefore, prosecuted for its illegal possession.

Before the Magistrate the accused admitted that the opium was found in his possession, that he bought it at the Henzada Opium Shop, and that his daily consumption of opium

was ½ to 11/16 *tolas*. The Magistrate held that, as at this rate of consumption, accused could not have had so much of the opium purchased on the 12th left on the 18th as was then found in his possession, the opium found on him could not have been that which he so purchased, and he, therefore, convicted him.

The District Magistrate has referred the case with a recommendation that the conviction be set aside on the ground that the prosecution failed to prove that the opium was not bought from a licensed vendor.

The learned Assistant Government Advocate has argued in support of the conviction that the Magistrate was justified in drawing the presumption which he did, and that under section 10 of the Opium Act the onus lay upon the accused to account satisfactorily for the opium found in his possession and that he has failed to do so.

Reference has been made to the case of *King-Emperor* v. *Paw Yau* (1), in which a conviction based on somewhat similar facts was set aside, and it has been argued that that ruling is incorrect. The facts there were somewhat different from those of the present case.

A non-Burman who had purchased 3 *tolas* of opium on 4th June was found in possession of the full quantity on 9th June, and he explained that in the interval he had borrowed opium from his friends for use, and had saved his own. The Magistrate, however, presumed that he must have consumed ½ *tola* a day and convicted him of illegal possession of the opium found on him. On reference to this Court it was held that the proved facts did not justify the inference drawn from them.

In the present instance the accused admits that his usual consumption is ½ *tola* or over a day, and therefore, the inference against him is, in that respect, stronger than it was in the former case.

On the other hand there is no strict proof that he did not purchase, or could not have purchased any opium from the Henzada shop after the 12th May.

It was stated that that was the date of the last entry of his name in the register, but the register does not appear to have been produced in Court, nor was it shown that secondary evidence of its contents was admissible. Accused was never asked on what date he purchased the opium found on him, nor was he asked to explain what opium, if any, he had been consuming since that date.

Until the date of his last purchase was proved or admitted, he could not properly be asked what his usual daily consumption was, as there was nothing appearing in the evidence on the point.

But even assuming that he last purchased opium from the shop on 12th May, and that his usual daily consumption is ½ *tola* or over, I do not consider the Magistrate was justified in drawing the presumption which he did, without giving the accused an opportunity for farther explanation. Several possible explanations may be conceived. He may have abstained wholly or practically from opium since 12th May. It is no doubt unlikely that a regular consumer, with a large quantity in his possession, should do so; but that abstention is not physically impossible is proved by the fact that opium is withheld from consumers who are sentenced to imprisonment. He may have had some already in his possession when he purchased on 12th or since then his friends may have given or sold him some. Under such circumstances he may have committed some offence, but neither its time, place nor nature can be defined; nor is the opium produced with respect to which any such offence may have been committed, so that no presumption under section 10 can be drawn regarding it.

What he was tried for was the illegal possession of the opium found on him on 18th May. He accounted for that by saying he had purchased it from a licensed vendor: this fact was accepted by the prosecution, but they alleged that the date of his purchase was such that this explanation was not satisfactory. It lay upon them to prove that date, and only then, upon accused failing to satisfactorily account for the large quantity of opium still in his possession on the date of his arrest, could any presumption be drawn against him under section 10 of the Opium Act.

I would set aside the conviction and sentence and acquit Pa and direct that the fine be refunded to him.

FOX, C. J.—I concur.

Conviction set aside.

(1) 4 L. B. R. 314; 9 Cr. L. J. 16.

MAUNG LU GYI *v.* MAUNG NYUN BU.

(s. c. 3 Bur. L. T. 83.)

LOWER BURMA CHIEF COURT.

SECOND CIVIL APPEAL NO. 38 OF 1909.

August 16, 1909.

Present:—Mr. Justice Lowis.

MAUNG LU GYI—PLAINTIFF—APPELLANT

versus

MAUNG NYUN BU AND ANOTHER—DEFENDANTS—RESPONDENTS.

Execution—Civil Procedure Code (Act XIV of 1882), s. 263—Occupation by judgment-debtor after execution—Fresh cause of action.

A defendant, who remains in actual occupation notwithstanding execution, must be regarded as a trespasser who commits a fresh act of dispossession and thus gives a fresh cause of action.

Hassan Raja Chanday v. *Kailas Chandra Singh*, 8 C. W. N. 49, followed.

Appeal against the decree of the District Court of Henzada, dated the 28th November 1908, passed in Civil Appeal No. 93 of 1908, reversing the decree of the Township Court of Henzada, and dismissing the plaintiff's (appellant's) suit filed in Civil Suit No. 659 of 1907.

Mr. *Chari*, for the Appellant.

Mr. *S. C. Dutta*, for the Respondents.

Judgment.—In 1902 appellant sued respondent for possession of some land and got a decree, which he proceeded to execute in 1903. Both respondent and his wife were on the spot notified by the bailiff of the Court that they must turn out of the land. They, or one of them, promised to vacate but they did not do so and have not yet done so. Nothing happened further till 1906, when respondent initiated fresh execution proceedings. The Township Court (that of Henzada) held that the fresh application for execution was time-barred under article 169 of the second Schedule of the old Limitation Act and dismissed it. On appeal the District Judge of Henzada pointed out that by virtue of section 230 of the old Civil Procedure Code the application was not time-barred but dismissed the appeal and confirmed the Township Court's order on the ground that the decree had been executed in 1903 and could not be executed again. A suit was then brought for ejectment and for recovery of mesne profits. Issues were framed in the Township Court whether the suit was *res judicata* and whether it was bad for misjoinder of causes of action. The Township Court held that it was *res judicata* and left the misjoinder issue in consequence undecided. The Township Court's decision was upheld on appeal by the District Court, which held that the suit was not only *res judicata* but also bad for misjoinder. The District Court's order in appeal was dated the 12th September 1907. In 1908 there was an application for review to the District Court and on the 30th March of that year, the District Court, having come to the conclusion that, after all, the suit was neither *res judicata* nor bad for misjoinder, remanded the case to the Township Court with a view to deciding the questions (*a*) whether symbolical possession had been given in 1903 and (*b*) whether appellant was entitled to damages. The Township Court found on both issues in appellant's favour (that is to say, it found that appellant had been given symbolical possession in 1903 and that he was entitled to damages) and gave him a decree. There was an appeal from this to the District Court, which found that under section 263 of the Code of Civil Procedure there was no such thing as symbolical possession, that no symbolical possession had, in fact, been given to appellant and that the case was *res judicata*. It is against this decision that appellant has now come up to this Court.

The first question that has to be asked is "what is symbolical possession." I have been referred to various rulings that have more or less a bearing on the facts in issue. In all of them there are references to a possession that is short of and in essence different from actual possession. In some of the rulings it is alluded to as "symbolical," in some as "formal" possession. I take it that there is no real difference between the two. Assuming that this is so, I cannot find myself in agreement with the District Judge in thinking that there can be no such thing as "formal," as opposed to "actual," possession under section 263 of the old Code of Civil Procedure. The decree, the execution of which in 1903 has been held to have been operated as a bar to subsequent proceedings, purported to have been executed under section 263. The bailiff went to the land and read out the order of attachment first to respondent's wife and then to respondent himself and explained to them that they would have to turn out. If respondent's wife had refused to vacate the property, the bailiff would presumably have taken action in accordance with the closing words of section 263 and would have removed her. There

was no refusal, however, on the woman's part. She said she would quit. Respondent himself made no such promise apparently. What he said does not appear, but he seems to have raised no active objection. The bailiff reports that he actually ejected respondent, but it seems clear that this ejectment has nothing more than an insistance on the fact that respondent would have to turn out. It is clear that this did not give appellant actual possession of the land, but, the terms of the law having been complied with, it seems certain that at any rate "formal" possession of the land was given. Assuming that formal possession of the land was really given, how do matters stand as regards *res judicata*? It is urged that respondent's refusal to carry out their promise to quit or to acquiesce in their formal ejectment, as the case may be, gave a fresh cause of action and that the principle of *res judicata* does not apply. Several authorities have been quoted in support of this contention, the most apposite of which is that of *Hassan Raja Chanday* v. *Kailas Chandra Singh* (1), where it is held that a defendant "who remains in actual occupation notwithstanding execution must be regarded as a trespasser who commits a fresh act of dispossession and thus gives a fresh cause of action." I think it can be said that there was full execution in this case, even though the possession given was formal and not actual, and the principle enunciated above must be held applicable to the present case.

I must, therefore, hold that the suit is not barred by *res judicata*. The judgment and decree of the lower appellate Court are set aside and those of the Court of first instance restored. Appellant will get his costs in all Courts.

Appeal allowed.

(1) 8 C. W. N. 49.

(s. c. (1910) 1 U. B. R. 10.)

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 248 OF 1908.

August 13, 1909.

Present:—Mr. McColl, J. C.

NGA TUN BAW AND ANOTHER—APPELLANTS

versus

MI KYE AND ANOTHER—RESPONDENTS.

Mortgage—Redemption suit—Valuation—Jurisdiction—Subject-matter of suit.

In a suit for redemption the subject-matter of the suit is the property which the plaintiff seeks to recover. Therefore, the value of the suit is the market-value of the land at the time the suit is filed.

Mr. *Tha Gywe*, for the Appellants.

Mr. *C. G. S. Pillay*, for the Respondents.

Judgment.—The respondents sued the appellants for redemption of certain land for Rs. 339-8-10 in the Township Court. The appellants contended that as the value of the land was between Rs. 1,000 and Rs. 1,500, the Township Court had no jurisdiction. They also contended that the amount due on the mortgage was over Rs. 1,200.

The Township Court gave respondents a decree enabling them to redeem for Rs. 404-2-0. On appeal the District Judge increased the amount to Rs. 474-2-0. Both Courts appear to have confounded the value of a suit for purposes of jurisdiction with that put upon it for fiscal purposes. At any rate, neither Court quoted any authority for holding these values to be the same, though as a matter of fact as regards redemption suits there is such authority.

In this appeal the question of jurisdiction has been raised again, and it is contended that the value of the suit for the purpose of jurisdiction is the value of the land sought to be redeemed, calculated according to section 7(V), Court Fees Act. On the other hand, for the respondents it is contended that the value for the purposes of jurisdiction is the amount for which redemption is sought. In support of this contention Mr. Pillay had quoted several rulings, and he says that the practice in Upper Burma has for the last 20 years been as stated.

After examining various decisions of the High Courts, I am of opinion that neither contention is correct, and that the decision of the Chief Court of Lower Burma in *Maung Kyaw Dun* v. *Maung Kyaw and U Myat San* (1), namely, that the value of the suit is the market value of the land at the time the suit is filed, is correct.

The question depends upon the meaning of the phrase "subject-matter of the suit" used in section 3, Upper Burma Civil Courts Regulation.

The Suits Valuation Act gives a little assistance. A redemption suit, when the land is in the possession of the mortgagee, as in this case, falls under section 7 (1X),

(1) 1 L. B. R. 96.

Court Fees Act. Such a suit is not referred to in section 3 of the Suits Valuation Act which gives the Local Government power to make rules for determining the value of land for purposes of jurisdiction in certain suits, nor is it referred to in section 4. Section 8 runs:—

"Where in suits other than those referred to in the Court Fees Act, 1870, section 7, paragraphs V, VI and IX and paragraph X, clause (*d*), Court-fees are payable *ad valorem* under the Court Fees Act, 1870, the value as determinable for the computation of Court-fees and the value for purposes of jurisdiction shall be the same." Redemption suits are thus expressly excluded. Consequently the ruling of the Full Bench of the Madras High Court (dissented from by two of the Judges) in *Mana Vikrama, Zamorin Maharaja Bahadur of Calicut* v. *Suiya Narayana Bhatta* (2) that in redemption suits the subject-matter of the suit is the amount expressed to be secured by the instrument of mortgage has been overriden by the legislature.

In *Kubair Singh* v. *Atma Ram* (3), it was held that in a redemption suit the subject-matter of the suit was not the market-value of the land but the amount for which redemption was sought. This ruling does not conflict with section 8, Suits Valuation Act. The matter, however, was not discussed and no reasons were given for the ruling.

This ruling was followed in *Amanat Begam* v. *Bhajan Lal* (4), but again no reasons were given beyond the fact that there was a long current of rulings in favour of that interpretation of the phrase "subject-matter of the suit."

The case was heard by five Judges, and one of them, Mr. Justice Mahmood, dissented and gave what, in my opinion, were very powerful arguments for holding against the view taken. I shall quote some of his remarks later.

In *Rupchand Khemchand* v. *Balvant Narayan* (5), it was held that the subject-matter was the amount due on the mortgage or the amount claimed on it by the mortgagee. This was the view taken by the two Judges who dissented from the Madras Full Bench ruling. If this view be correct, it follows that the mortgagee would have the absolute right to determine in what Court the suit should be brought, and could thus harass the mortgagor with impunity, as stamp fees would still be calculated according to the amount secured and not according to the amount claimed.

The most weighty objection to the proposition that the valuation should be calculated according to the amount for which redemption is sought and not according to the market-value of the property is, in my opinion, that the title to a valuable property mortgaged for a petty amount might then be decided in a Court of low jurisdiction. This objection is of the greatest weight in Upper Burma, where land has enormously increased in value, and where suit for the redemption of ancient mortgages which secured petty sums, in which an absolute title to the land is set up by the alleged mortgagee, are very common.

This objection was referred to in *Rupchand Khemchand* v. *Balvant Narayan* (5), but it was stated that though the title to valuable property might be in issue in a suit before a Court of low jurisdiction, the Court that heard the appeal would be determined by the value of the property. This, however, would not be the case in Upper Burma. Under section 12 (3), Upper Burma Civil Courts Regulation, an appeal from a decree of a Township Court lies to the District Court, and consequently if a person sued for redemption of property worth a lakh of rupees alleging a mortgage for, say, Rs. 400, the defendant denying the mortgage *in toto* and setting up an absolute title, and the suit were cognizable by a Township Court, the appeal would lie to the District Court, and if the District Court agreed with the Township Court on the facts and there were no point of law involved, there would be no further appeal. It is obvious that such a state of things would be utterly contrary to the spirit of the Upper Burma Civil Courts Regulation.

In *Ramchandra Baba Sathe* v. *Janardan Apaji* (6), the High Court of Bombay whilst professing to follow the above-mentioned decision, apparently dissented from the view that the criterion was the amount remaining due on the mortgage, and held that it

(2) 5 M. 284.
(3) 5 A. 332.
(4) 8 A. 438.
(5) 11 B. 591.
(6) 14 B. 19.

was "the amount of the mortgage the rights connected with which are the subject of contention in the mortgage suit." If by this is meant the amount originally secured by the mortgage, it seems to me that the decision, which was given after the Suits Valuation Act came into force, conflicts with that Act, because, if it was intended that in redemption suits the value should be calculated for purposes of jurisdiction in the same way as for fiscal purposes, paragraph IX of section 7 of the Court Fees Act would have been omitted from section 8 of the former Act. If it does not mean that, and does not mean the amount remaining due on the mortgage, but the total amount of the loans taken on the security of the property without allowing for payments made towards extinguishment of the mortgage, the decision does not follow previous rulings but lays down a different criterion to that arrived at in any other ruling.

It seems to me that there is much force in the following observations made by Mr. Justice Mahmood in *Amanat Begam* v. *Bhajan Lal* (4) already referred to:—"Again, the allegation of the plaintiff as to the extent of the limitation upon his ownership, would seem to be equally inconclusive as to the pecuniary extent and value of the dispute, for, whilst, on the one hand, he may be met by the plea that the mortgage charge is far higher than that stated by him, on the other hand, I think that the learned Pandit for the respondents put the matter very forcibly, when he said that there may be cases in which the plaintiff offers to pay nothing at all, because the whole amount of the mortgage money has been paid either from the usufruct or otherwise. I have called this last argument forcible, because, if the extent of the money which the plaintiff mortgagor offers to pay is to regulate the value of the subject-matter in dispute, in the case contemplated there would be no standard for any calculation of the value . . . . And, of course, apart from the question of the mortgage money, a redemption suit may be met by the plea that either on account of foreclosure or prescription, the right of redemption no longer exists, and it is obvious that in such a dispute the whole *corpus* of the property would be at stake whilst the question of jurisdiction lies at the threshold, and must be disposed of before the real merits of the litigation are entered upon . . . . . while in cases of taxation everything is to receive a strict construction in favour of the subject, in questions of jurisdiction the presumption is in favour of giving jurisdiction to the highest Court."

It seems to me that in a suit for redemption the subject-matter of the suit is the property which the plaintiff seeks to recover. It obviously is so when the defendant denies the mortgage and sets up a title of his own and as the plaintiff cannot always anticipate what defence will be set up before he files his plaint, it seems to me that the subject-matter should be held to be the property in every case. I prefer to follow the decision in *Maung Kyaw Dun* v. *Maung Kyaw* (1) rather than the rulings of the Indian High Courts, and in doing so I adopt Mr. Justice Mahmood's reasoning.

The appellants alleged in their written statement that the land was worth between Rs. 1,000 and 1,500. The only evidence as to the value of the land is that of the witness, Maung Pyu, who states that it is worth Rs. 600. It must be taken, therefore, that the land is worth more than Rs. 500, and that the Township Judge had not jurisdiction to try the suit.

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(s. c. (1910) 1 U. B. R. 14.)

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 132 OF 1909.

May 23, 1910.

Present:—Mr. Shaw, J. C.

NGA NYAN GYI—APPLICANT

versus

NGA KYAW NYA—RESPONDENT.

Mortgage—Lease by mortgagee—Effect of redemption on such lease—Mortgagee's lessee obstructing mortgagor after redemption—Compensation—Civil Procedure Code (Act V of 1908), s. 115—Court not considering duly the law or facts—Illegality or material irregularity—Revision.

On the general principle that no one can transfer a larger estate than he himself has, a mortgagee cannot make a lease which will bind the mortgagor on redemption, that is, a lease by a usufructuary mortgagee is determined by redemption, and the mortgagor can oust the mortgagee's lessee at any time of the year without giving him any notice; and if the lessee obstructs the mortgagor and does not give him immediate possession on redemption, the mortgagor is entitled to compensation or damages.

There is illegality or material irregularity where a

Court does not duly consider and apply the right law or overlooks or fails to consider the facts.

Mr. *S. Murkerjee*, for the Applicant.

Mr. *C. G. S. Pillay*, for the Respondent.

Judgment.—Land called *natyin* belonging to plaintiff-applicant was under mortgage and sub-mortgage. The sub-mortgagee let to Tun Baw, who sub-let to defendant-respondent, Kyaw Nya. Kyaw Nya again sub-let to Nga Si. All the leases were for the one year 1268 B.E., and were made in or about the month of *Wazo* of that year. In *Tawthalin* plaintiff applicant redeemed. The land was *mayin* which would be cropped in *Tabodwe*. The sub-mortgagee on receipt of the mortgage-money told the tenant and sub-tenants to give plaintiff-applicant possession. Plaintiff-applicant put down a stock of paddy plants on the land with a view to planting them, but defendant-respondent by his protests prevented him from using them.

Plaintiff-applicant, therefore, sued for damages, which he estimated at Rs. 100 being the entire value of a year's outturn in paddy.

Plaintiff-applicant first sued Nga Si unsuccessfully, and Nga Si, as he says, also sued plaintiff-applicant unsuccessfully for damages for the loss he sustained through plaintiff-applicant preventing him from cultivating the land. Owing to the dispute nobody cultivated the land in the year in question.

The sub-mortgagees, Tun Baw and Kyaw Nya, had all got their rent in advance and refused to give back any of it.

These were the facts proved or admitted. Both the lower Courts decided against plaintiff-applicant. The lower appellate Court held that plaintiff-applicant redeemed too late in the year, that the lessee and sub-lessee were entitled to notice as pointed out in *San Pyi* v. *Nga Tun* (1), and that plaintiff-applicant in preparing to cultivate before he had ascertained whether the lessee and sub-lessee were willing to give up possession, did not act in a business-like manner, and was, therefore, entitled to no compensation.

It may be noted that defendant-respondent merely denied having received intimation of the redemption. It is contended for plaintiff-applicant that the lower appellate Court was wrong, that the sub-mortgagee could not give a better title than he had himself that plaintiff-applicant was under no obligation to wait till after the cultivating season, and that if the lessee was damnified his remedy was against his lessor. To bring the case within section 115, Civil Procedure Code, it is contended that the Additional Judge of the lower appellate Court did not apply his mind to the fact that plaintiff-applicant was not a party to the tenancies.

The governing principles are those of equity, justice, and good conscience, but to assist in deciding on these principles the rules contained in the Transfer of Property Act as interpreted by decision of the High Courts, and works like that of Dr. Ghosh on the Law of Mortgage, may be referred to. The learned Advocates have not cited any authorities, and I have not been able to find in the books anything about leases by usufructuary mortgagees such as we have in Upper Burma.

The general rule is that a lessor cannot transfer a larger estate than he has himself. Hence a life-tenant cannot give a perpetual lease.

If the lessor's interest is terminable on his death, or is dependent upon any other contingency, the lessee's interest cannot enure beyond that period.

But though in such a case the lease is determined, the lessor is not thereby personally exonerated from such liability as he may have incurred by virtue of his covenants. He may then be still liable to pay damages for breach of his covenant. (Gour's Law of Transfer in British India, Volume 3, page 1226.)

In other words, the lessee has to give up the property, and claim damages from the lessor.

Ghosh says generally (without excepting any particular description of mortgage), "It should be noticed that a mortgagee in this country cannot alter the terms of a subsisting tenancy, or make any new lease which would be binding upon the mortgagor on redemption." (Ghosh's Law of Mortgage, 3rd Edition, page 374.)

The argument put forward on behalf of the plaintiff-applicant assumes that these rules apply to a lease by a usufructuary mortgagee.

The learned Additional Judge of the District Court apparently assumed on the contrary that the lease by the usufructuary mortgagee and the sub-leases in the present

(1) U. B. R. (1897-1901), II p. 414.

case held good against the mortgagor on redemption, unless notice was given, just as though they had been made by the owner. *San Pyi's case* (1) had to do with a lease by the owner or his agent (if "owner" is a term that can be used of an occupant of State land), and, therefore, properly speaking, it had no bearing on the present case.

The Additional Judge gave no reason for applying that decision, and cited no other authority for his finding.

The usufructuary mortgagee of Upper Burma, as we know, takes the profits towards interest, and has no accounts to render. The contract is that he "restores the land on payment of the (principal) mortgage-money."

A mortgage of this kind kept alive by further advances, often lasts much longer than 60 years and the mortgaged property is handed down by inheritance in the family of the mortgagee. The mortgagee, therefore, enjoys all the advantages of an owner, except that he must allow redemption if the mortgagor pays the mortgage-money within limitation. While he has the land he deals with it in practically the same way as he would deal with land of his own, and he very frequently leases it to tenants. These circumstances seem to put the Upper Burma usufructuary mortgagee in an exceptionally favourable position. But I cannot find any authority for holding that he is able to make a lease which will bind the mortgagor on redemption. In spite of the advantages enjoyed by the mortgagee, the mortgagor's right to redeem remains unimpaired. I think it must, therefore, be held that a lease by a usufructuary mortgagee is determined by redemption.

The question then arises whether it is equitable that the mortgagor should be permitted to oust the lessee at any time of year without letting him get his crop and without having given notice. It may be that the lower appellate Court proceeded on this ground. Here the position occupied by the lessee must be taken to be no better and no worse than that of the mortgagee. My experience in this Court affords some indication of a custom—at least in parts—by which land is redeemed only at certain seasons of the year, so as not to deprive the mortgagee or his tenant of the crop. But as far as I know, there is no generally admitted custom of the kind, and there was no proof of such a custom in the present case no such custom was even alleged. Apart from custom it would seem that the mortgagee or his tenant has no just ground of complaint. The contingency of redemption is one that he must reckon with and may provide against. Here the crop was not yet planted at the date of redemption; the time for planting had not yet come. Hence the lessee had nothing to lose by giving immediate possession: he could get a refund of his rent from the lessor. It is true the lessor would lose his rent, but then the mortgagor had redeemed, which was a perfectly good reason why the lessor should not get rent for the coming season. Therefore, nobody need really have been a penny the worse.

But anyhow I think the plaintiff-appellant was entitled to immediate possession and, therefore, to compensation.

Did the lower appellate Court's finding to the contrary involve any illegality or material irregularity? I think it must be held that the rules being what I have stated, and there being no authority for the view taken by the Additional Judge, the lower appellate Court did not duly consider the law, or else that as the learned Advocate has contended, the lower appellate Court in overlooking the fact that the plaintiff-applicant was not a party to the tenancies did not duly consider the facts. This being so there can be no doubt that there was illegality or material irregularity—see *Shwe Thin* v. *Nga Nyun* (2).

It remains to decide what compensation plaintiff-applicant is entitled to.

No doubt, as the Additional Judge of the District Court said, plaintiff-applicant was in great measure to blame for the loss of his plants. But if he had not put any plants on the land he would still have been entitled to compensation for being prevented from cultivating the land.

To give him the value of a full crop, however, would be going too far in any circumstances. The crop might have been wholly or partly destroyed by drought or floods, before the time of harvest. I set aside the decree of the lower appellate Court and grant plaintiff-applicant a decree for Rs. 30 against defendant-respondent Kyaw Nya. Costs in proportion.

Decree set aside.

(2) U. B. R. (1904-06) II Civ. Pro. 26.

J. M.—— *v.* EMPEROR.

(s. c. (1910) 1 U. B. R. 17.)

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 175 OF 1910.

April 6, 1910.

Present:—Mr. Shaw, J. C.

J. M.——ACCUSED.

versus

EMPEROR

Penal Code (Act XLV of 1860), ss. 85, 86—Drunkenness—Intention.

Where an act done is not an offence unless done with a particular intention, it is permissible to consider voluntary drunkenness in determining whether the accused had that intention and in doing so regard must be had to the distinction between cases in which intention is presumed in law and those in which it is to be found as a fact and is not to be assumed.

Judgment.—Applicant, a Eurasian aged 29, has been convicted in this case of three robberies committed on the same occasion on adjoining houses and sentenced to one month's rigorous imprisonment and a fine of Rs. 20 or in default two weeks' rigorous imprisonment for each offence.

In another case he has been convicted of two other similar robberies committed on two other adjoining houses on the same occasion and he has been sentenced to similar punishment for them, making the total imprisonment five months and the total fine Rs. 100 or in default ten weeks' further rigorous imprisonment.

* * * *

The circumstances were of an exceptional character. It was New Year's Eve, and applicant was one of a party of merry-makers at the Railway institute at Kanbalu. Applicant's gun was used to fire salutes in honour of the New Year.

At 2 A. M., when the last of the company dispersed, applicant was very drunk, and the billiard-marker, Abbas, was sent with him to see him safely home.

Applicant, however, on the way broke into the houses of five shop-keepers in succession and demanded money (Rs. 5) with threats. He had his gun in his hand and he enforced his demands by exhibiting it. In each case he got a small sum of money (Rs. 2) and in one some cigarettes in addition, and having got these things he made his way home.

Abbas accompanied and assisted him all through. There was no evidence that he was drunk. I agree with the Committing Magistrate that it was very improbable he would have been drinking with his master. It is unnecessary to interfere with the sentences passed on him.

The shop-keepers went promptly to the police station and laid information, and the accused were arrested on the afternoon following.

Applicant denies all knowledge of the robberies, his defence drunkenness merely. He denies having received the money, etc., extorted from the shop-keepers.

Abbas admittedly received the loot in the first instance. He says that he gave it to applicant when they got to the latter's house, and the Sessions Judge has accepted this statement as a fact. There is no admissible evidence to support it. The statement of the Police Officer as to an admission made to him by applicant was, of course, directly in contravention of section 25, Evidence Act, and cannot be regarded.

There is no *prima facie* reason why Abbas's statement about the money should be credited rather than applicant's. On the contrary the probability is in favour of applicant.

The learned Sessions Judge recognized that the robberies were not crimes of the ordinary kind, which was certainly right. He overlooked, however, the provisions of section 397, Indian Penal Code. If the offence was robbery, section 397, undoubtedly, applied, and in that case the sentences passed were illegal.

Applicant has accordingly been called upon to show cause why the sentences should not be enhanced. The first point for determination is whether the offence amounted to robbery. Unfortunately I have not had the assistance of legal argument, and the question is one of considerable difficulty.

The Committing Magistrate and the Sessions Judge alike assumed that applicant's drunkenness did not affect the question of his guilt. The law is contained in sections 85 and 86, Indian Penal Code. The Rulings on the point are extraordinarily few. In *Queen-Empress* v. *Dasser Bhooyan* (1), it was assumed that knowledge and intention stood on the same footing, and it was held that the fact of drunkenness should be eliminated so far as knowledge or intention was concerned.

The same assumption was made in *Nga*

(1) 8 W. R. Cr. R. 71.

San v. *King-Emperor* (2). The late Chief Judge of the Chief Court there said: "Intoxication does not affect the presumption as to intention or relieve him of responsibility" and "although intoxication cannot be considered as affecting the intention of the accused (section 86, Indian Penal Code)."

Neither of these decisions, however, quotes the language of section 86 or explains why it is to be taken as treating intention and knowledge in the same way.

That section runs as follows:—"When an act done is not an offence unless done with a particular knowledge or intent, a person who does the act in a state of intoxication shall be liable to be dealt with as if he had the same knowledge as he would have had if he had not been intoxicated, unless the thing which intoxicated him was administered to him without his knowledge or against his will."

The remarkable fact about it is that it does not say that the accused shall be liable to be dealt with as if he had the *same intention* as he would have had if he had not been intoxicated.

It appears to me that this omission cannot be assumed to be accidental. Several reasons might be given for this opinion. One is that according to English law the fact of intoxication, where the intention of the person committing the crime is an element of the crime itself, may be taken into consideration in determining whether he formed the intention necessary to constitute the crime. This is said to have been laid down in a series of decisions beginning with *Reg.* v. *Doherty* (3)—[*See* notes to section 86, Indian Penal Code, in Kinealy's Indian Penal Code(4th Edition, 1909), and Ratanlal's Law of Crimes (5th Edition, 1909)].

Mayne says: "There seems no reason to suppose that the framers of the Code proposed to introduce a different rule from that of the English law"—(Criminal Law of India, 3rd Edition, paragraph 201).

Kinealy says: "The same rule" (as the Rule of English law) "prevails in India where it has been laid down that intoxication is a material element in determining the intention, but that to plead it successfully as a bar to punishment it must be of such a nature as to exclude the idea of deliberation or design." Unfortunately the four cases which he cites as authority for this proposition are not published in any volumes of Reports available to me.

In *Rim Sahoy Bhur* (4), Mr. Justice Glover said: "Voluntary drunkenness does not palliate any offence, but it is generally taken into account as throwing light on the question of intention." That was a case of a drunken quarrel where the accused hit the deceased with *lathis* and so ruptured his spleen. It was held that there was no intention to kill. Presumably what was meant by this was that there was no intention to cause death or injury sufficient in the ordinary course of nature to cause death. The accused were found guilty of culpable homicide not amounting to murder. Apparently they were presumed under section 86 to have known that they were likely to cause death.

The only other case I have been able to find is also the only Burma case besides *Nga San* v. *King-Emperor* (2) above referred to, where the question under consideration is dealt with. This is *Abdul Karim* v. *Queen-Empress* (5). The Judicial Commissioner of Lower Burma, Mr. Hosking, there said: "The Legislature appears to have intended to make a distinction between the presumption as to knowledge and the presumption as to intention, and though ordinarily intention is to be inferred from knowledge, I do not think it is to be inferred where the knowledge is merely a legal fiction," that is, as I understand, where by reason of intoxication the accused actually does not know but under section 86 is presumed to know. The distinction here drawn between knowledge and intention is in accordance with the view I have expressed above. The limitation on inference is not to be found elsewhere.

Mayne's remarks on intention are in point here. He says: "Intention is sometimes a presumption of law" (as where the accused kills a man by striking him on the head with a loaded club and he is presumed to have intended to cause death as he is presumed to have intended the natural or necessary consequence of his act even if he is drunk), "sometimes it is a mere fact to be proved like any other fact (*e.g.*, where, in

(2) 2 L. B. R. 204; 1 Cr. L. J. 473.
(3) 16 Cox. C. C. 306.
(4) W. R. Jan.-July (1864) Cr. R. 24.
(5) (1872) S. J. L. B. 650.

determining the quality of an offence evidence is necessary of a specific existing state of mind which must be found as a fact and cannot be assumed, as when grave and sudden provocation has been received but the accused is shown to have acted from a preconceived malicious resolve to kill, or under the excitement of drunken passion rather than under fixed and settled malice: or where a man is found in the house of another at night and it is shown "that he was drunk and, therefore, did not enter with the intention of committing robbery)"—*see* Mayne's Criminal Law, 3rd Edition, paragraph 201.

On consideration of the foregoing authorities I am of opinion that where an act done is not an offence unless done with a particular intention, it is permissible to consider voluntary drunkenness in determining whether the accused had that intention. In doing this I think that regard must be paid to the distinguishing circumstances illustrated by Mayne.

These points are of vital importance in the present case. Here is a man who according to the evidence is of good character and is not even in the habit of getting drunk. On a festive occasion he gets very drunk and then on his way home breaks into five petty shops in succession, and demands small sums of money with threats enforced by the exhibition of a gun which he happens to have with him. On the face of it his offence was robbery of the kind in which extortion is involved (section 390, Indian Penal Code). Now a man is said to commit extortion who "intentionally puts any person in fear of any injury . . . . and thereby dishonestly induces him to deliver . . . . . any property" (section 383).

And a man does a thing "dishonestly" when he does it "with the intention of causing wrongful gain and wrongful loss" (section 24)—wrongful gain being "gain by unlawful means of property to which the person gaining it is not legally entitled," and wrongful loss "loss by unlawful means of property to which the person losing it is legally entitled" (section 23).

Must we or can we hold on the evidence that applicant acted "dishonestly," within this definition?

As we have seen, there was no admissible evidence to show that applicant ever got the money. He denied all knowledge of what became of it.

In my opinion applicant must be taken to have acted under the unreflecting influence of intoxication, and not with the intention of causing wrongful gain or wrongful loss.

As regards the element "dishonestly," the case appears to be one where the particular intention must be proved and cannot be presumed.

I hold, therefore, that the necessary intention was wanting and that applicant did not commit robbery.

But he did commit house-breaking by night with intent to commit criminal intimidation, and with criminal intimidation sections 457, clause 1, and 506, Indian Penal Code.

Here the intention was, I think, clearly of the other kind and must be presumed.

I alter the three convictions here in question to convictions under section 457, clause 1, Indian Penal Code, and I reduce the three sentences to one month's rigorous imprisonment for each offence, the sentences to run concurrently.

Sentence reduced.

(s. c. (1910) 1 U. B. R. 22.)

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 305 OF 1909.

May 11, 1910.

Present:—Mr. Shaw, J. C.

MI ME—APPELLANT

versus

NGA ON GAING AND ANOTHER—RESPONDENTS

Contract Act (IX of 1872), s. 56—Impossibility—Landlord and tenant—Failure of crops owing to failure of rain—Rent, liability of tenant for—Transfer of Property Act (IV of 1882), s. 108 (c).

The general rule laid down in the second paragraph of section 56 of the Contract Act is not intended to do away with the distinction observed in the English Law between the subjective and objective impossibility.

The covenant in a lease was that the tenant would pay rent whether he got a crop or not:

Held, that, apart from the said covenant, the contract to pay rent did not become void if owing to a failure of rain the tenant did not get any crop.

Mr. *J. C. Chatterjee*, for the Appellant.

Mr. *C. G. S. Pillay*, for the 1st Respondent.

Judgment.—I see no reason to doubt the correctness of the order setting aside the abatement. I therefore confirm it.

MI ME *v.* NGA ON GAING.

Plaintiff-appellant sued to recover 425 baskets of paddy or the value Rs. 340 as rent of her land for the year 1270 B.E.

The first paragraph of the plaint alleged that the land was leased by "the attached document." This was the lease, Exhibit ...

The defendants-respondents in their written statement admitted having worked plaintiff-appellant's land for a rent of 425 baskets of paddy "as alleged in paragraph 1 of the plaint". .....

Their defence was that as the early rain failed they "returned" (*i.e.*, asked plaintiff-appellant to take back) the land—this in *Wagaung*— when plaintiff-appellant made a further or supplementary agreement .... that they were not to pay rent if owing to failure of rain they got no crop and would have to buy paddy to pay the rent.

The pleadings do not show that plaintiff-appellant disputed the failure of rain and defendants-respondents' failure to get a crop, but the Township Court put this in issue.

Although the Township Court did not consider it necessary to come to a finding on the point, I think the evidence showed clearly enough, as the lower appellate Court said, that there was a general failure of rain at the right time, and that defendants-respondents were unable to work the land or get a crop accordingly. It was not the plaintiff-appellant's case that the defendants-respondents got or might have got a crop. I do not think it is open to her to say so now. What she alleged was that defendants-respondents were liable for the rent whether they got a crop or not. The lease expressly provided that rent should be payable whether defendants-respondents got a crop or not. This stipulation appears as an interpolation, and it is contended now on defendants-respondents' behalf that the defendants-respondents never expressly admitted the correctness of the document, and that on the face of it, it disclosed a material alteration and as such was invalid. But I am of opinion that these objections cannot be entertained at this stage, in face of the admission above mentioned in the written statement (*see* O. VIII, r. 5) and the nature of the defence set up. Plaintiff-appellant admitted that defendants-respondents wished to give up the land in *Tawthalin* or *Thadingyut*, but she said that she refused to take it back, and called two witnesses to prove this. As the Township Court observed, there was no apparent contradiction on this point, as defendants-respondents admitted that when they returned the land in *Thadingyut* plaintiff-appellant refused to take it back.

Defendants-respondents called two witnesses to prove that they first offered to return the land in *Wagaung*, and that plaintiff-appellant then told them to keep it, and made a (supplementary) promise that they need not pay rent if they got no crop and, would have to buy paddy to pay it. The plaintiff-appellant denied all this.

There can be no doubt that the Township Court was right in finding that defendants-respondents failed to prove this supplementary agreement of *Wagaung* which they alleged. The only witnesses they had to it were defendant-respondent, Po Tin, and his brother-in-law, Po Naing, whose statements are not convincing, and without corroboration cannot be held sufficient. The Additional Judge of the District Court apparently concurred with the Township Court on this point, though his remarks are not very precise, and hardly indicate as correct an appreciation of the evidence as the Township Court had.

The Township Court in this state of facts found for the plaintiff-appellant. But the lower appellate Court upset that decision in a very summary manner. The learned Additional Judge assumed that section 56, Contract Act, stood in the plaintiff-appellant's way. He said,—"The contract to work the land and pay rent was contingent on the rainfall being favourable. It was not, and, therefore, it became impossible to work the land. The contract is void".

The Additional Judge in these remarks gave no heed to the express stipulation interpolated in the lease as already mentioned; he also assumed that the rent was to be paid out of the produce of the land, and that it became impossible for defendants-respondents to pay if they did not get a crop: which was a very large assumption to make even if there had been no stipulation for the payment of rent whether defendants-respondents got a crop or not.

Having regard to the language of the lease I am of opinion that all that it stipulated for was the delivery of so much paddy as rent.

Section 56 of the Contract Act is not free from difficulty as the commentaries sufficiently show. It is supposed to have been intended

for a broad simplification of the English law on the subject (*see* Pollock's Indian Contract Act, 2nd Edition, notes to section 56). But it is admitted to have introduced a very important variation (Pollock *ibid*, also Cunningham and Shepherd's Contract Act, 10th Edition, notes to section 56). According to English law, a contract to do an act which becomes impossible *in law* after the contract is made, becomes void when the act becomes impossible, but a contract to do an act which becomes impossible *in fact* does not become void unless, according to the true intention of the parties, the agreement was conditional on its performance being or continuing possible in fact (Pollock's Principles of Contract, 7th Edition, pages 398—437). The Contract Act makes no distinction of this kind. In the second paragraph of section 56, so far as contracts to do an act which becomes impossible in fact are concerned, it lays down as a general rule what was the English law only in certain exceptional cases (*see* Pollock's Contract Act, *in loc cit.* Also his Principles already cited, page 437).

Cunningham and Shepherd say of the second paragraph, "further it is to be observed that the term used is no longer 'impossible in itself' but 'simply impossible,' and hence it may be inferred that "the contract becomes void when the act stipulated for becomes impracticable in the ordinary sense of the word, provided that the inability is not due to the promisor's act or default". . . But they go on to add, "It cannot, however, be intended that a contract should become void on the ground of impossibility merely because the promised act becomes more difficult or burdensome than was expected, or because the consent of some third person on whom the performance of the act depends cannot be obtained". And I think we must add, it cannot be intended that a contract to pay Rs. 10,000 by a person who becomes a pauper should become void. If it were, every debtor unable to pay would be at liberty to avoid his contract under this section on the plea that it had become impossible to perform it. In fact the distinction observed in the English law between subjective and objective impossibility must be taken to subsist. Pollock explains it as follows in a quotation from Savigny (Obl, I., 384). Pollock on Contracts, 7th Edition, page 403.

"Impossibility may consist either in the nature of the action in itself, or in the particular circumstances of the promisor. It is only the first or objective kind of impossibility that is recognized as such by the law. The second or subjective kind cannot be relied on by the promisor for any purpose, and does not release him from the ordinary consequences of a wilful non-performance of his contract. On this last point the most obvious example is that of the debtor who owes a sum certain, but has neither money nor credit. There is plenty of money in the world, and it is a matter wholly personal to the debtor if he cannot get the money he has bound himself to pay".

My opinion, therefore, is that, apart from the interpolated stipulation before referred to the contract in question was not void under section 56, Contract Act.

It may be noted that in English law, for the reason just explained, *viz.*, that the impossibility is personal and relative, a tenant is not released from his obligation to pay rent by the accidental destruction of the premises demised. By the Civil law, on the contrary, it is an incident of the contract to pay rent that it is suspended by inevitable accident destroying or making useless the thing demised (Pollock's Principles, page 410), and the Transfer of Property Act in section 108 (*e*) appears to have adopted the latter rule to a certain extent. It is there provided that "if by fire, tempest, flood or violence of an army, or of a mob or other irresistible force, any material part of the property be wholly destroyed or rendered substantially and permanently unfit for the purposes for which it was let, the lease shall at the option of the lessee be void."

But it is to be observed that neither the Civil law nor the Transfer of Property Act provides that the contract to pay rent is to be void if owing to a failure of rain the tenant does not get a crop.

The failure of rain is, I think, a contingency which the parties could have foreseen and provided for by a special condition in the Contract; and one of the ordinary risks which they must be understood to have had before them and to have taken upon them in making such a contract, like contrary winds in a charter-party. It thus differs from what is called an "Act of God," which Pollock defines as "an event which, as between the parties and for the purpose of the matter

in hand, cannot be definitely foreseen or controlled." (Pollock's Principles, pages 414-415.)

As in the case of the demised premises being burnt by fire, the question is which, in the absence of a special agreement, is the better distribution of the hardship. It is hard for a tenant to pay rent for land out of which he has failed to extract a crop. It is hard for a landlord to lose the rent of land which he has let (Pollock's Principles, page 413). I have gone into these questions because of the doubt thrown on the interpolated stipulation, and because of the contention put forward on defendants-respondents' behalf that it is inequitable to make defendants-respondents pay rent when they did not get a crop.

In truth, it is no more inequitable that defendants-respondents should pay the rent, than that plaintiff-appellant should lose the rent, and as far as my study of the question enables me to say, the law would have laid the loss upon the defendants-respondents in the circumstances of the present case—apart from their special covenant to pay whether they got a crop or not.

But that covenant, for the reasons before explained, must be taken to have formed part of the contract.

It has been suggested that such a covenant is unconscionable and should not be enforced.

I have already said enough to show that, in my opinion, it is not unconscionable, and I know of no provision of law by which the Courts could refuse to enforce it. No question of undue influence arose here: the parties stood on equal terms when they entered into the contract.

The decree of the lower appellate Court is set aside and that of the Township Court is restored with all costs.

Appeal allowed.

(s. c. (1910) 1 U. B. R. 26.)

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 128 OF 1909.

May 25, 1910.

Present:—Mr. Shaw, J. C.

MI HLA MIN—APPLICANT

versus

MI KET, LEGAL REPRESENTATIVE OF MI HMYIN DECEASED AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 151; O. XXXIII, Rr. 5 and 7—Pauper suit—Objection on the ground that the pauper plaintiff has co-heirs who want an adjudication as defendants without paying Court-fee.

An application for permission to sue as a pauper was opposed on the ground that the applicant had co-heirs, who were not paupers, and that he was induced by the said co-heirs so that they might obtain the decision of the Court, as defendants and without paying any Court-fee, regarding their rights and shares in the suit property. It was not denied that the applicant was a pauper:

Held, that the above contention was untenable and that the applicant was entitled to be given the permission sought for.

Rule 7 of Order XXXIII of the Civil Procedure Code requires the Court to proceed solely on the grounds specified in rule 5, and section 151 of the Code has no application.

Mr. *S. Mukerjee*, for the Applicant.

Mr. *H. M. Lutter*, for the Respondents.

Judgment.—This application was originally presented as an appeal under Order XLIII, Rule 1 (*w*). But as such an appeal lay only on the grounds specified in Order XLVII, Rule 7, and as none of those grounds existed in the present case, I allowed it to be amended into an application in revision.

Applicant applied for permission to sue as a pauper to recover her share of the inheritance of Nga O, a cousin, deceased. There is nothing on the lower Court's record outside the judgment to show that any opposition was offered. From the judgment, however, it appears that some of the respondents objected that applicant had co-heirs who were not paupers and that there was "some reason to suspect that they have induced her to bring this suit, in order that they may obtain the decision of the Court regarding what property the estate consists of and what shares the several heirs are entitled to" (without paying Court-fees).

The learned Judge (Mr. Moore) thought that the Court might not be limited in

passing orders under Order XXXIII, Rule 7, to the grounds specified in rule 5, but was of opinion that the suspicion of collusion was too vague to act upon, and, therefore, granted the permission asked for.

Respondents, Mi Hmyin (the widow) and Nga Nyo, Po Tok, Yusuf and Nga Hmut (the business agents of the deceased as they are described in the plaint), then applied for a review on the grounds (1) that the Court was not bound to be satisfied of collusion; (2) that the fact that there were co-heirs who were not pauper was a sufficient ground for the Court to refuse permission, and (3) that the Court had overlooked section 151, Civil Procedure Code.

It is explained by the learned Advocate for respondents that the first two grounds did not rest upon section 151. The underlying contention is that Order XXXIII, Rule 7, does not require the Court to proceed solely on the grounds specified in Rule 5.

As to this, Rule 7 is practically identical with section 409 of the old Code, and the plain construction of the phraseology employed seems to me to show that what the Legislature contemplated was a decision for or against the application on the grounds stated in Rule 5. If it had been intended to authorize the Court to proceed on other grounds, I think that this should and would have been stated in the rule.

Mr. Moore's successor (Captain Roberts), who disposed of the application for Review, applied section 151. After hearing the learned Advocates and referring to such authorities as have been cited on one side or the other, I am of opinion that section 151 was not applicable.

The view which I take is that there could be no abuse of the process of the Court, when the applicant had a *bona fide* claim of inheritance on her own account, and was not entitled to require financial assistance from her co-heirs towards the payment of the Court-fees. If she was a pauper, and it was not denied that she was, she was entitled to the benefit of Order XXXIII. The fact that she had co-heirs, who were men of means, was immaterial. They were under no obligation to pay her Court-fees. Nor were they under any obligation to sue for their shares of inheritance when they could come in as defendants. The whole argument on which the respondents' case rests appears to me to be fallacious. I can see no reasonable possibility of Government losing the Court-fees: the first order would be for the payment of the Court-fees out of the estate; and the same order would probably be made if the suit were instituted in the ordinary way on payment of Court-fees. But this consideration is immaterial so far as the question under discussion is concerned, except that it tends to prove the improbability of the alleged collusion.

The point is that even if the parties contemplated the Government losing the Court-fees they were within their rights in acting as they did.

I think that the lower Court in applying section 151 did not duly consider the law, and, therefore, committed an illegality or material irregularity within section 115, Civil Procedure Code.

I set aside the order granting the review and dismissing the applicant's application for permission to sue as a pauper. Respondents will pay applicant's costs in all the proceedings on that application up to and including the present proceedings in this Court; 2 gold *mohurs*.

Order set aside.

(s. c. (1910) 1 U. B. R. 28.)

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 193 OF 1909.

May 16, 1910.

Present:—Mr. Shaw J. C.

MI MYA—APPLICANT

versus

MI GYI—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 2, O. XXXIII, Rr. 5 and 7—Order rejecting or refusing application for permission to sue as a pauper—Decree—Appeal.

An order rejecting or refusing an application for permission to sue as a pauper is not a decree and, therefore, is not appealable as such.

While rules 5 *(d)* and 7 (2) of Order XXXIII, Civil Procedure Code, do not only justify but require a Court to see whether the applicant's allegations disclose a cause of action, they do not contemplate the decision of such disputed questions as can be determined only when the suit is heard.

Mr. *S. P. Sarvadhikari*, for the Applicant.

Mr. *San Wa*, for the Respondent.

MI MYA *v.* MI GYI.

Judgment.—Applicant applied for leave to sue as a pauper to recover—

(1) Property left by her aunt, Mi Shin, who died in 1271 B. E.

(2) Property left by her grand-father, Nga Hme, who died in 1212.

As to the latter, her allegations were that Nga Hme's estate was kept undivided and the profits shared among his heirs, and that she as an heir enjoyed her share of profits down to Mi Shin's death.

She claimed to be sole surviving heir to both Nga Hme and Mi Shin; defendant-respondent, Mi Gyi, another niece of Mi Shin's having been an out-of-time grand-child of Nga Hme's, and having been adopted into another family, and, therefore, not entitled to inherit from Mi Shin.

The Judge of the District Court in a very summary order, without citing any authority, declared that applicant was barred by article 123, Schedule I, Limitation Act, as regards Nga Hme's estate, and that under no circumstances could she be held to be an heir to Mi Shin. He did not explain on what grounds he came to either conclusion.

Without determining the question of applicant's pauperism he proceeded to *dismiss the plaint* as not showing a cause of action.

The first point for determination is whether an appeal lies from that order.

On the face of it, it was not such an order as the Civil Procedure Code authorized the Judge to make.

He might, without sending notice to the other side, have *rejected* the *application* under Order XXXIII, Rule 5, if he thought that applicant's allegations did not show a cause of action.

He did not, however, do that, but sent notice. What he had to do, then, if he did not *grant the application* was to *refuse* it under rule 7.

A plaint is *rejected* if it does not disclose a cause of action (Order VII, Rule 11).

And an order rejecting a plaint is a decree which is subject to appeal (section 2).

An order rejecting (Rule 5) or refusing (Rule 7) an application for permission to sue as a pauper does not involve the rejection or dismissal of the plaint, as the applicant may proceed with the plaint if he can procure the necessary Court-fee Stamps (Rule 15).

On a consideration of the language of section 2 defining "decree," I am of opinion that such an order is not a decree. It is not an adjudication in a suit. The Allahabad High Court in *The Secretary of State for India in Council* v. *Jillo* (1) decided on this ground in the same sense under the Code of 1882, and the definition of "decree" in the New Code does not substantially differ from the old one in this respect.

As no provision is made for an appeal under Order XLIII, it follows that no appeal lies from an order rejecting or refusing an application for permission to sue as a pauper.

The incorrect phraseology employed by the District Judge might, of course, be relied upon as a ground for admitting an appeal. But I think it must be assumed that what the Judge intended was to pass an order under Order XXXIII, Rule 7, and that he expressed himself incorrectly owing to carelessness or inadvertence.

It seems obvious that the Judge's phraseology would not prevent the applicant from proceeding with the suit in a regular manner, if she chose to do so under Rule 15.

My conclusion, therefore, is that the Judge's order is not open to appeal.

But it is manifestly open to revision, and I am clearly of opinion that it calls for interference in revision.

Clause (*d*) of Rule 5 and clause (2) of Rule 7, of course, justify and indeed require the Court to see whether the applicant's allegations disclose a cause of action. But it cannot be supposed that they contemplate the decision of disputed questions of law, such as whether article 123, Schedule I, Limitation Act, applies to the case and bars the applicant's claim, and whether under Buddhist Law a niece by the half-blood is wholly debarred from inheriting in presence of a niece by the whole-blood, even when the latter has been adopted into another family.* Such questions as these are matters for determination, when the suit is heard.

On the face of the plaint, it cannot be said that the applicant's allegations disclose no cause of action.

I am of opinion that the District Court did not duly consider the law, and was guilty of illegality or material irregularity in

(1) 21 A. 133.

* It is stated that this is the view which the District Judge took in the present case.

refusing applicant's application on the grounds stated.

I set aside the District Court's order and direct that the Court proceed to dispose of the application according to law.

Respondent will pay applicant's costs in the present application—2 gold *mohurs*.

Order set aside.

(s. c. (1910) 1 U. B. R. 30.)

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 204 OF 1909.

March 9, 1910.

Present:—Mr. Shaw. J. C.

NGA CHIT NYO—APPELLANT

versus

MI MYO TU—RESPONDENT.

Buddhist Law—Divorce, suit for—Partition—Plaint, amendment of—Civil Procedure Code (Act V of 1908), O. VI, R. 17.

A suit for bare divorce without and as distinct from partition of property does not lie under Buddhist Law.

Where a suit for divorce was instituted without praying for partition, the Judicial Commissioner allowed the plaint to be amended by adding a prayer for partition.

Mr. *Tha Gywe*, for the Appellant.

Mr. *San Wa*, for the Respondent.

Judgment.—Plaintiff-respondent sued for divorce on the ground of ill-treatment without praying for partition. Defendant-appellant in his written statement objected to the omission. The Courts below took no notice of this objection. But, no doubt, they were bound by the decision of this Court in *Nga Pye* v. *Mi Me* (1), which has not yet been overruled, to the effect that a suit may be brought for divorce without a prayer for partition. They agreed in finding plaintiff-respondent entitled to a divorce as by mutual consent. Defendant-appellant now comes up in 2nd appeal. The first point raised is that a suit for bare divorce does not lie under Buddhist Law. The decision in *Tha So* v. *Mi Min Gaung* (2) the complement to *Nga Pye* v. *Mi Me* (1) was recently dissented from by a Bench of the Chief Court, Lower Burma, in *Mi Lon Ma Gale* v. *Nga Pe* (3). The Chief Judge there agreed with the view taken in *Nga Pye* v. *Mi Me* (1) that *Mi Gyan* v. *Su Wa* (4) did not decide that a suit for bare divorce would not lie, but, differing from Mr. (now Sir Harvey) Adamson in *Tha So* v. *Mi Min Gaung* (2), held that the claim for divorce and the claim for partition arise out of the same cause of action, and consequently where there had been a suit for bare divorce, that a second suit for partition was barred by section 43, Civil Procedure Code, 1882 (Order II, Rule 2). All these cases, except the recent Lower Burma one, were summarized and discussed in *Mi Kin Lat* v. *Ba So* (5), but it was not necessary there to decide whether a suit for bare divorce is maintainable.

The learned Advocates have not been able to advance any new facts or arguments to assist me in coming to a decision. But in view of the Lower Burma case it appears advisable to re-consider the question.

First as regards *Mi Gyan* v. *Su Wa* (4), I have read and re-read Mr. Burgess's judgment again, with all the care and attention I can bestow, and I find myself unable to concur in the interpretation of it given in *Nga Pye* v. *Mi Me* (1).

In setting out the principles of the Buddhist Marriage Law it says:—"Another striking feature, again, is the parternship and community of property created by this equality. When the parties wed, the spouses virtually, if not literally, say to each other, 'with all my worldly goods I thee endow,' and this joint ownership is jealously guarded both by written law and by popular sentiment. Consequently, when husband and wife part there must be a separation, not only of heart and hand, but of goods as well, and "unless there is such separation there can be no divorce," etc. It proceeds:—"The conclusion to be drawn from these premises is, of course, that the appellant in suing for a bare divorce has mistaken her remedy. Her learned Advocate has indeed admitted that there is but one cause of action for divorce and partition of property and that appellant's proper course was to sue for both together. The appellant seems to be placed in this dilemma. Either the decree of the Court of first instance is bad because it is incomplete and imperfect, inasmuch "as it does not deal with the property with-

(1) U. B. R. 1902-03, II Budd. Law Div. 6.
(2) U. B. R. 1902-03, II Budd. Law Div. 12.
(3) 5 L. B. R. 114; 4 Ind. Cas. 306.
(4) U. B. R. 1897-1901, II Budd. Law. Div. 28.
(5) U. B. R. 1904-06, II Budd. Law Div. 3.

out doing which there can be no divorce in Buddhist Law," or if the decree stands, it amounts to a decree of divorce leaving all the property to the husband, to whom the wife has abandoned it. . . . . The appellant by suing separately for a share of the estate has shown, however, that this is not the position taken by her" (*i.e.*, that she has not abandoned the property). "This separation of suits was contrary to section 42 of the Civil Procedure Code . . . . . and in obedience to this rule the plaint in the present action" (*Sc.* the first suit for a bare divorce "ought to have been returned for amendment under clause (iv) (6) of section 53, Civil Procedure Code, if it were not rejected under the first part of the section as not disclosing a cause of action. "But if I am right in the analysis which I have made above of the principles of Buddhist Marriage Law, there was no cause of action for divorce without and as distinct from division of property, and the plaint should either have been rejected for that reason, or, the suit failing by reason of such formal defect, the plaintiff should under section 373, Civil Procedure Code, have been permitted to withdraw with liberty to bring a fresh suit *for the subject-matter of the suit.* The effect of the order now to be passed will be as if this had been done originally."

Therefore, the suit was dismissed "upon the grounds now set forth" (*Sc.* as not disclosing a cause of action), and the effect was evidently to leave the second suit (for partition) to stand as a suit for divorce and partition.

In face of the quotations just given, it is not intelligible to me how Mr. Adamson came to the conclusion "that there is nothing in *Mi Gyan* v. *Su Wa* (4) from which it can be inferred that a suit for bare divorce does not lie," and that what was decided was that the first suit barred the second.

It appears to me to be incontestable that there was a clear decision that a suit for bare divorce would not lie; and the head-note was perfectly correct. The second suit (for partition) was not under appeal, and the question whether it was barred was not before the Court. Moreover, the first suit having been dismissed, as we have seen, because it disclosed no cause of action, the second suit could not be barred.

The Chief Judge of the Chief Court in *Mi Lon Ma* v. *Nga Pe* (3) agreed in the conclusion come to in *Mi Kin Lat* v. *Ba So* (5), that the quotation there given from *Mi Gyin* v. *Su Wa* (4) contained a correct statement of the Buddhist Law, but he went on to say, "I do not think it follows from it that, as stated in the head-note to *Mi Gyin* v. *Su Wa* (4), a suit for bare divorce without partition of property will not lie, or that there is no cause of action for divorce without and as distinct from division of property." There is nothing in the judgment to explain how the learned Judge arrived at this conclusion. But in reproducing the quotation he only gave a small part of it, and omitted what, in my opinion, was the most important part. Is it possible that he overlooked the passages quoted above which I have emphasized? His reference to the head note is consistent with this hypothesis.

The judgment contains no original analysis of the Buddhist Law, and cites no texts to show that divorce can be effected without partition.

I venture to think that the examination of the authorities made in *Mi Kin Lat* v. *Ba So* (5) fully supported Mr. Burgess's opinion that divorce and partition are inseparable. The first thing which I undertook to prove in *Mi Kin Lat's case* (5) was that partition does not arise only after divorce, but accompanies it and is inseparable from it, and the conclusion come to was that "the *Dhammathats* treat the division of property as part of the law of divorce and even deal with divorce in some cases by rules about the division of property."

Section 441 of the 2nd Volume of the Kinwun Mingyi's Digest contains the texts from ten *Dhammatkais* which expressly deal with the question whether a divorce is complete without partition of property. Nine distinctly declare in effect that a divorce is not complete till the property has been divided. The tenth is *apparently* in conflict with the rest. This is the extract from the Manugye. In *Nga I'ye* v. *Mi Me* (1), Mr. Adamson relied on this passage as his authority for dissenting from "Mr. Burgess's dictum in *Mi Gyan* v. *Su Wa* (4), that there can be no divorce in Buddhist Law without partition of property." He quoted from the translation given in Note 2 of Mr. Jardine's

notes (*see* at page 25). Richardson's translation and that in the English version of the Digest differ somewhat from this and from each other. All fail, as it seems to me, to give the full meaning and effect of the original; they overlook the little word(**) "only," and thus lose the point of the passage. The following is my rendering:— "After husband and wife have divorced, if the property, animate and inanimate, has not been divided only let the property be divided, according to the original decision, if it is liable to partition.

Let it not be said that the husband cannot re-marry on the ground that the property and debts have not been divided yet, let him be at liberty to re-marry, and let the wife also be at liberty to re-marry."

The meaning, I think, is clear: the author of the Manugye does not approve of re-marriage being hindered on such a ground, and he says "*only* let the property be divided," *i. e.*, the only thing to do is to divide, the property. Divide the property and be done with it: why let it remain undivided and so raise an unnecessary obstacle to re-marriage?

I can find no support for the decision in *Nga Pye's case* (1) here. It would be remarkable if the Manugye stood alone against nine other *Dhammathats*, the language of which admits of no misconstruction. But as I understand it, there is no real contradiction. That this interpretation is correct is, I think, proved by the Manugye passage given in section 442. On the other hand, I have gone through the Digest once more, and I am unable to find any texts which justify the conclusion that divorce can be effected without-partition.

I hold, therefore, as it is necessary to come to a new decision, that a suit for bare divorce without and as distinct from partition of property will not lie under Buddhist Law. This overrules *Nga Pye* v. *Mi Me*(1), on this point supersedes *Tha So Mi* v. *Min Gaung* (2), and partly dissents from *Mi Lon Ma* v. *Nga Pe* (3).

In view of this finding, the question whether Order II, Rule 2 bars or does not bar a second suit for partition after a first suit has been brought for bare divorce, cannot arise and it is unnecessary to decide, whether, as Sir C. Fox held in the Lower Burma case last cited, the cause of action in a subsequent suit for partition is the same as that in the first suit for bare divorce, or whether, as Mr. Adamson held in *Tha So* v. *Mi Min Gaung* (2), it is different. Order II, rule 2, does not bar the subsequent suit where the previous suit disclosed no cause of action (*see* Hukm Chand's Civil Procedure Code, 1882, note to section 43). But it may be noted that Mr. Adamson based his arguments for a separate cause of action on the ground that the question of partition only arises after divorce. And as we have just seen the view taken of the Buddhist Law in *Mi Gyan* v. *Su Wa* (4), confirmed in *Mi Kin Lat* v. *Ba So* (5), and now re-affirmed involves the negation of that proposition. It remains to determine what course should be taken in the present case.

The position is not the same as that in *Mi Lon Ma's case* (3), which had to do with the subsequent suit, or as that in *Mi Gyan's case* (4). Here no subsequent suit has been brought, and the new Code of Civil Procedure has introduced a wider rule for the amendment of a plaint.

Order VI. rule 17, authorizes the Court to allow amendment at any stage of the proceedings, and directs that all such amendments shall be made as may be necessary for the purpose of determining the real question in controversy between the parties.

I allow the plaintiff-respondent to amend the plaint by adding a prayer for partition and appending schedules of the property for this purpose.

(s. c. (1910) 1 U. B. R. 34.)

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION CASE No. 216 OF 1910.

June 9, 1910.

Present:—Mr. Shaw, J. C.

NGA PO SAW—APPLICANT

versus

MI THET—RESPONDENT.

Criminal Procedure Code (*Act V of* 1898), *s.* 488—*Decree obtained against wife for restitution of conjugal rights—Wife still refusing to go to her husband—Maintenance—Children, maintenance of, by father.*

Where the husband had obtained a decree for restitution of conjugal rights and while the decree was in full force the wife applied for maintenance:

Held, that her application should be dismissed.

Obiter dicta.—A grievance against an elder wife is not a sufficient cause in Upper Burma for a wife to refuse to live with her husband.

U KUTHALA *v.* U SUNDA.

A father is not at liberty to refuse to maintain his children on the ground that they are not living with him.

Mr. *S. Mukerjee*, for the Appellant.

Judgment.—In his written statement the present applicant pleaded that he had sued for and obtained a decree for restitution of conjugal rights, and that the respondent still refused to live with him.

The Sub-Divisional Magistrate overlooked this altogether. The point was a very important one. In *In re Bulakidas* (1), it was held by the Bombay High Court, following previous decisions of the Allahabad and Calcutta High Courts, that an order of a Civil Court for restitution of conjugal rights supersedes any previous order for maintenance if the wife should persist in refusing to live with her husband, and that a Magistrate ought to cancel his order, or rather to treat it as determined, if the wife, failing to comply with the decree for restitution, refuses to live with her husband.

The position in the present case was only different in this, that the respondent applied for maintenance *after* the decree for restitution had been passed against her.

The Civil suit was Civil Regular No. 111 of 1908, of the Township Court, Yenangyaung, which was decided on the 29th July 1908.

The respondent first applied for maintenance on the 22nd September 1908, and the Township Magistrate, who happened to be the same officer who as Judge of the Township Court had tried the Civil Suit, naturally did not overlook the decree for restitution, and dismissed the application for maintenance on the ground that the present applicant had obtained a decree for restitution which was in full force, and had also obtained an order in execution directing the respondent to live with her husband. This was on the 2nd October 1908.

On the principle followed in *Bulakidas's case* (1), I am of opinion that the Township Magistrate was right.

The present proceedings were instituted on the 7th October 1909, when the respondent made a fresh application for maintenance to the Sub-Divisional Magistrate. She alleged the same ill-treatment on which the Township Court had found against her, and she now alleged for the first time as a grievance that the applicant had re-united with his former wife.

That was a point which she had never touched upon before. If she had raised it, no doubt, the Township Court would have investigated the circumstances. It was not a new occurrence since the decree for restitution. The respondent plainly stated in her application to the Sub-Divisional Magistrate that the applicant had been living with his former wife since *Nayon* 1268 (30th May—27th June 1908), *i. e.*, precisely the time when the Civil Suit was going on. The grievance against an elder wife has never been held sufficient cause in Upper Burma for a wife to refuse to live with her husband,—see *Nga Waing* v. *Mi Chit* (2). The present is certainly not a case where it would be proper to re-open that question. The Sub-Divisional Magistrate of course was bound by the decisions of this Court. As far as the respondent herself is concerned, therefore, I am of opinion that the Sub-Divisional Magistrate was in error in granting her maintenance.

The case of the children is different. According to the Ruling of this Court in *Mi Nyein Me* v. *Nga Kyaw* (3), affirmed and extended in *Mi Gauk* v. *Po Hmi* (4), and again affirmed recently in *Mi Saw* v. *S*—(5), a father is not at liberty to refuse to maintain his children on the ground that they are not living with him. If he does not wish to provide them with separate maintenance, it is his business to apply to the proper authority and get the custody of them.

The Magistrate's order is modified: so far as the maintenance of the respondent is concerned it is set aside.

Order modified.

(1) 22 P. 484.

(2) U. B. R. 1904-06; 1 Cr. Pro. 10.
(3) U. B. R. 1902-03 1 Cr. Pro. 7.
(4) U. B. R. 1904-06 1 Cr. Pro. 33.
(5) U. B. R. 1910, Vol. I, p. 1; 7 Ind. Cas. 460.

(s. c. (1910) 1 U. B. R. 35.)

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 95 OF 1909.

April 25, 1910.

Present:—Mr. McColl, J. C.

U KUTHALA—

versus

U SANDA—

Civil Procedure Code (Act V of 1908), s. 9—Jurisdiction of Civil Courts—Dispute as to possession of a

monastery—Power of the head of hierarchy to oust a monk—Buddhist Law—Ecclesiastical authority.

There is a custom in Upper Burma, which has the force of law, that the monk recognised by the state as the head of the hierarchy has jurisdiction to decide certain disputes between other monks as to the possession of a monastery.

Where a *Taik* is *Thingika* property, every monk who lives in the *Taik* must submit to the *Thathanabaing's* authority and the latter has jurisdiction to oust from the *Taik* a monk professing to be a schismatic and denying to be a follower of the *Thathanabaing*, even if the monk has been living in the *Taik* for twenty years or more. But if the *Taik* property is dedicated to a particular sect, which does not recognise the *Thathanabaing* as head of the hierarchy, the latter has no jurisdiction to decide disputes relating to the possession of the property and, therefore, cannot oust any person from such property.

It is not the province of the Civil Courts to decide whether a decision or order of the *Thathanabaing* or any other ecclesiastical authority is strictly in accordance with the *Vinaya* or not, nor can they consider whether such decision or order is in conformity with the general principles of equity, justice, and good conscience. Therefore, a Civil Court will not set aside an order passed *ex parte* by such authority against a person who had notice of the proceedings against him but still did not care to appear and contest the proceedings on the ground of want of jurisdiction or on the merits of the case.

Obiter dictum.-- The question whether certain property is *Thingika* or *Pokgalika* is one for the Civil Courts and not for the ecclesiastical authorities to decide.

Judgment.—The parties are Buddhist monks. The plaintiff-respondent brought a suit for a declaration that he was entitled to reject the defendant-appellant and four others from the group of monasteries in Mandalay known as the *Bongyaw Taik*, and for an order to eject them. He based his claim on three grounds, namely, (1) that he was the successor of the *Bongyaw Sayadaw* who owned the *Taik*, (2) that he was *Taikkyat*, or Superintendent of the *Taik*, duly appointed by the *Thathanabaing*, and (3) that he had obtained an order from the *Thathanabaing* for the ejectment of the appellant and his co-defendants.

He set out in his plaint various reasons why it was desirable that these monks should be ejected, but the learned District Judge declined to go into the merits.

In the course of the trial of the suit the plaintiff-respondent abandoned the first ground, and admitted that the monasteries were *Thingika* property and that, therefore, no individual monk could own them.

Before filing the suit the plaintiff-respondent laid a complaint before the *Thathanabaing*, who referred the matter to the Taungbyin *Gainggyok* within whose jurisdiction the *Taik* in question is said to be situated. The latter sent a notice to the defendant-appellant to appear and defend himself, but he refused to do so. The *Gainggyok* then passed an *ex parte* order that the defendant-appellant should leave the *Taik*. This order was in due course confirmed by the *Thathanabaing*.

These facts are admitted, but the defendant-appellant denied that the *Thathanabaing* had authority to appoint plaintiff-respondent or any other monk *Taikkyat*, and denied that he was subject to the *Thathanabaing's* authority on the ground that he belonged to a sect which recognized the authority of certain twelve *Sayadaws* only. He also denied the facts set out in the plaint as grounds for ejecting him. The learned District Judge following the rulings of this Court declined to go into the merits and found that the *Taik* in question was within the jurisdiction of the Taungbyin *Gainggyok*, that the *Thathanabaing* had acted within the scope of his authority, and that he and the *Gainggyok* had done nothing contrary to law, and gave the plaintiff-respondent a decree, which is badly worded but is to the effect that the defendant-appellant must leave the *Taik* and pay the costs of the suit, and dismissed the suit as against the other defendants, because the *Gainggyok's* order did not direct them to leave the *Taik*.

The defendant-appellant has appealed against this decree on eight grounds, which will be considered *seriatim*.

The first ground is that the learned District Judge erred in holding that the *Thathanabaing* had jurisdiction to oust the defendant-appellant, who had lived in the *Taik* for twenty years, in spite of the fact that he belonged to a sect which did not recognize his authority.

This is the main ground of appeal as it was the main defence.

The length of time that the defendant-appellant has lived in the *Taik* is clearly immaterial. The question is whether the defendant-appellant is subject to the authority of the *Thathanabaing*.

The present *Thathanabaing* was elected as head of the hierarchy, not unanimously but by a majority of the monks of Mandalay, if not of Upper Burma. He was granted a *sanad* in which is set out the extent to which the Local Government recognize his

authority. It has been held in numerous cases by this Court that the possession of a monastery is a matter within the jurisdiction of the Ecclesiastical authorities, and it is not seriously contended that the *Thathanabaing* has no jurisdiction to order one of his own followers to leave a monastery. But it is argued that the granting of the *sanad* had not legislative effect, and that it did not and cannot oust the jurisdiction of the Civil Courts which is clearly laid down in section 9 of the present Civil Procedure Code (section 11 of the Code of 1882), and that as the defendant-appellant is not a follower of the *Thathanabaing* but a Schismatic, he is in no way bound by the latter's orders, and that the District Court was bound to adjudicate upon the merits of the case.

The matter is not free from difficulty. In the year immediately following the annexation, the authority of the *Thathanabaing*, who had been appointed by the late King of Upper Burma, was not questioned, and it was held by this Court that so long as his orders were within the scope of his authority and were not contrary to law, Civil Courts could not go into the question, whether they were proper or not, but were bound to give effect to them. Then after his death, during the time there was no *Thathanabaing* recognised by Government, it was held that monks were bound to obey their immediate Ecclesiastical superiors, and that the Civil Courts were bound to give effect to their orders on the same condition. None of these rulings explain the grounds on which the ordinary jurisdiction of the Civil Courts to decide suits between monks in accordance with equity, justice, and good conscience was held to be ousted. If the matter be considered a question of religious usage or institution, the Buddhist law would be applicable under section 4, Civil Courts Regulation. But no text of Buddhist law has been quoted, as an authority for the rulings. The constitution of the Buddhist hierarchy in Burma, however, is very ancient, and what I think the rulings lay down is, that there is a custom in Upper Burma, which has the force of law, that the monk recognized by the State as the head of the hierarchy should have jurisdiction to decide certain disputes between other monks, and the giving of the *sanad* to the present *Thathanabaing* was a recognition by the British Government of this custom. This is borne out by the opening words of the *sanad*: "Whereas by ancient custom Ecclesiastical affairs in Upper Burma are superintended by a *Thathanabaing*."

So far there is no difficulty, but the important question arises whether no variation of this custom is ever to be allowed. It is not the policy of Government to interfere in matters of religion, and it would be utterly contrary to every British tradition to lay down that there should be but one Buddhist sect in Burma, and that every Burman who wished to embrace a religious life should accept the dogmas laid down by the *Thathanbaing*. It is expressly stated in the *sanad* that the recognition of the *Thathanabaing* by the State does not extend to matters of dogma, but it seems obvious that if the *Thathanabaing* had power to direct a monk to leave a monastery, and to enforce his order through a Civil Court without the merits being gone into, that the life of a Schismatic might be made intolerable, the way would be laid open to persecution, and the effect would be the same as if the Government openly recognized the *Thathanabaing's* authority on matters of dogma.

The solution of the difficulty lies, I think, in the consideration of the matter from the point of view of property. In *U Thi Ha* v. *U Thudattana* (1), the latest ruling on the point, which was also a suit for possession of a monastery in which the defendant raised the defence that he was not subject to the authority of the *Thathanabaing* it was held that the fact that the defendant professed to be a Schismatic and to refuse recognition to the *Thathanabaing* was apparently immaterial, but this remark was rather of the nature of an *obiter dictum*, as the defendant had voluntarily submitted to a decision of the dispute by the *Sayadaws* to whom the matter had been referred by the *Thathanabaing*.

If property were dedicated to a particular sect which did not recognize the *Thathanabaing*, then I think it is clear that the latter would have no jurisdiction to decide disputes relating to its possession. But in the present case it is admitted that the *Taik* is *Thinaika* property, *i.e.*, that it belongs to the whole body of monks. The sect to which the defendant-appellant belongs is

(1) U. B. R. 1907-08, II, B. L. Ecc. 5.

of recent origin. The *Taik* in question was dedicated to the priesthood before this sect came into existence. There can be no doubt, therefore, that according to ancient custom the *Thathanabaing* had authority to decide disputes relating to it.

This view of the matter does not get rid of all difficulties. It implies for instance, that the question whether property is *Thingika* or *Pokgalika* is one for the Civil Courts and not for the Ecclesiastical authorities to decide, but it is not necessary to go further into this point in this case because it is admitted that the *Taik* in question is *Thingika* property, and, therefore, every monk who lives in it must submit to the *Thathanabaing's* authority

The second ground of appeal is that the District Court erred in holding that an order passed *ex parte* was binding under the Ecclesiastical law. It is urged that had the defendant-appellant appeared before the *Gaingyok* in order to contest the case on the merits, it would have been held that he had submitted to the authority of the *Thathanabaing*, and that the decision had the effect of an award. I do not think that this necessarily follows. The defendant-appellant might have appeared under protest, and have expressly declined to waive the objection that the *Thathanabaing* and *Gainggyok* had no jurisdiction. A defendant may object to the jurisdiction of a Civil Court, but if he declines to appear to contest the case on the merits he does so at his peril, and if on appeal the question of jurisdiction is decided against him, he will not be allowed to re-open the case on the merits. Moreover, the matter is one of procedure. It is not the province of the Civil Courts to decide whether an order of the *Thathanabaing* or any other Ecclesiastical authority is strictly in accordance with the *Vinaya* or not.

The next ground of appeal has already been dealt with.

The fourth ground of appeal is that the District Court erred in holding that the *Thathanabaing* could appoint a *Taikat* to a *Kyaungdaik* where there was one already. This has reference to the second ground on which the plaintiff-respondent's claim was leased but it was not on this ground that the learned District Judge based his decree. He expressly held that it was not shown that a *Taikkyat* alone had authority to evict a monk from his monastery, He based his decree purely on the *Thathanabaing's* order and the decision of the *Gainggyok*. The question whether the *Thathanabaing* had power to appoint the plaintiff-respondent *Taikkyat* of the *Taik* in suit or not is, therefore, immaterial.

The next ground of appeal is that the learned District Judge erred in not considering whether the *Gainggyok's* decision was in conformity with the general principles of equity, justice, and good conscience. But there is a series of rulings of this Court to the effect that the Civil Courts cannot go into questions of this sort. If they were competent to do so, the decisions of the Ecclesiastical authorities would be of less effect than an award of arbitrators. I am of opinion that the learned District Judge was right in refusing to go into the merits.

The next ground of appeal is that it was not proved that the *Bongyaw Kyaungdaik* was within the jurisdiction of the *Gainggyok* of Taungbyin, or that the *Thathanabaing* acted within the scope of his authority in passing the order that he did. This ground has not been strongly pressed, and it is only necessary to say that there is evidence that the *Taik* is within the jurisdiction of the Taungbyin *Gainggyok*, and that it has been held several times by this Court that disputes as to the possession of a monastery are within the scope of the *Thathanabaing's* authority.

The seventh ground of appeal is that the plaintiff-respondent having brought the suit on certain allegations of fact on which he asked the Court to adjudicate, the learned District Judge erred in holding that he could not enter into those facts.

This is practically the same as the fifth ground, but I may add that the plaintiff-respondent did not ask the Court to adjudicate upon the facts set forth in the plaint as reasons why it was desirable that the defendant-appellant should have the monastery. The 17th paragraph of the plaint runs as follows:—That the plaintiff, either as successor-in-interest to the *Kyaungdaik* as aforesaid or as *Taikkyat*, having control of the *Kyaungdaik* by the authority of the *Thathanabaing*, or by reason of the decision of the *Gainggyok* of Taungbyin which was confirmed by the *Thathanabaing*, or on all these grounds together, is entitled to evict the defendants from the *Kyaungdaik* in question.

KAPILDEO SINGH *v.* RAMRIKHA SINGH.

The last ground of appeal is that, even supposing that the Ecclesiastical authorities had the right to decide in the matter the proper officers to whom the plaintiff-respondent should have appealed were the *Taikok* and *Taikkyat* of the *Taik*, namely, U Aseinna and U Tilawka, who had been acting as such for over twenty years.

There is nothing in this ground of appeal. U Aseinna and U Tilawka were two of the monks whom the plaintiff-respondent wished to evict, and obviously the dispute could not be decided by them, and the proper person to whom to refer the dispute for enquiry was the Ecclesiastic to whom all the parties were subordinate.

I am thus of opinion that the decision of the District Court is correct and I dismiss the appeal with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.

CIVIL REVISION NO. 64 OF 1910.

November 8, 1910.

Present:—Sir George Knox, KT., Judge, and Mr. Justice Karamat Husain.

BHAIA KAPILDEO SINGH—PLAINTIFF—APPELLANT

versus

BHAIA RAMRIKHA SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Right to sue in forma pauperis—*Rule—Exemption—Burden of proof—Mortgage—Redemption—Equity of redemption, a property—Mortgage of Equity of redemption.*

There is no existing right to sue in *forma pauperis*. It is an exemption, from the ordinary rule, which the plaintiff claims from the Court and the burden of proving the exemption lies upon him.

The equity of redemption is in many cases property of far greater value than the mortgage which the person instituting the suit for redemption may be seeking to redeem. So if a plaintiff in a redemption suit raises money by mortgaging his equity of redemption, it would not in effect be mortgaging his claim.

Vedanta Devisika Charyulu v. *Perindevamma*, 3 M. 249, referred to.

Revision against the decree of the Subordinate Judge of Ghazipur, dated the 28th of August, 1909.

Mr. *Sarat Chandra Chowdhry* for Dr. *Satish Chandra Benerji*, for the Appellant.

Mr. *M. L. Agarwala* (with him Mr. *Govind Prasad*), for the Respondents.

Judgment.—This application is for revision of an order passed by the Subordinate Judge of Ghazipur. The Subordinate Judge had before him an application on the part of the petitioner seeking to be permitted to sue in *forma pauperis*. The Subordinate Judge, as we find from the record, fixed a day for receiving whatever evidence the applicant might adduce in proof of his pauperism. He examined the applicant and it was not shown to us that any evidence tendered by the petitioner was rejected by the Court unheard. After examining the petitioner, the Court wrote as follows:—"The applicant has on his own showing the equity of redemption and there is nothing to show that he cannot obtain money on its security. I believe he is not a pauper and dismiss the application with costs."

The suit which the petitioner desired to institute was a suit asking for redemption of the whole of a certain property set out in the schedule attached to the plaint. On behalf of the petitioner, we are referred to the case of *Vedanta Devisika Charyulu* v. *Perindevamma* (1), and we were asked to hold that a person praying for the relief which the plaintiff sought should not be refused permission to sue in *forma pauperis* and to be left to raise funds by mortgaging his claims. It has, however, been pointed out to us by the other side, and we accept the contention that the petitioner in trying to raise money upon the equity of redemption would not in effect be mortgaging his claim. The equity of redemption in many cases is property of far greater value than the mortgage which the person instituting the suit may be seeking to redeem. If any obscurity remains in the present case, it is the fault of the plaintiff that he did not remove that obscurity. There is no right existing to sue in *forma pauperis*. It is an exemption from the ordinary rule which he claims from the Court and the burden of proving the exemption lies upon the person who claims the exemption. We are not satisfied that the Court was in error when it held that the petitioner had not proved his pauperism. As he had not proved his pauperism, the Court was within its jurisdiction in refusing permission. We dismiss the application with costs which will include in this Court fees on the higher scale.

Application dismissed.

(1) 3 M. 249.

ALLAHABAD HIGH COURT.

PRIVY COUNCIL APPEAL CASE NO. 22 OF 1910.

November 12, 1910.

Present:—Sir John Stanley, KT., Chief Justice, and Mr. Justice Banerji.

Lala KUNJ BEHARI LAL—DECREE-HOLDER—PETITIONER

versus

THE COLLECTOR OF SHAHJEHANPUR AS MANAGER OF COURT OF WARDS OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 109 (c), O. XLV, R. 3—Privy Council appeal—Case fit for appeal.

In 1902 a decree recieved a certain interpretation by the Court. In a subsequent proceeding the High Court decided that the interpretation given in 1902 operated as *res judicata*. Against this order of the High Court the decree-holder applied for leave to appeal to the Privy Council:

Held, that it was not a fit case for appeal to His Majesty in Council.

Application for permission to appeal to the Privy Council.

The Hon'ble Mr. *Sundar Lal*, for the Applicant.

Mr. *Ryves*, for the Respondent.

Judgment.—This is an application for leave to appeal to His Majesty in Council from a judgment of this Court passed in execution proceedings. The value of the subject-matter of the appeal to this Court and of the proposed appeal to His Majesty in Council is below Rs. 10,000. We are asked to certify the case as a fit one for appeal to His Majesty. In our judgment the case is not a fit one for appeal to His Majesty inasmuch as it does not raise any question of law of general importance. The decree-holder, who seeks to appeal to His Majesty, obtained a decree which was interpreted by the Court executing the decree in 1902. The learned Judges of this Court held that under that interpretation the decree could not be executed against the property which had passed to the legal representatives of the deceased judgment-debtor by right of survivorship and that in consequence of that interpretation the matter had become *res judicata*. That was the only ground upon which the appeal was decided. The only question involved in the case is whether the question now raised is *res judicata* by reason of the order passed by the Court executing the decree in 1902. That is not a question of general importance. We cannot, therefore, certify that the case is a fit one for appeal to His Majesty in Council. We accordingly reject the application with costs.

Application rejected.

PUNJAB CHIEF COURT.

MISCELLANEOUS CIVIL APPEAL NO. 1084 OF 1909.

November 8, 1910.

Present:—Sir Arthur Reid, KT., Chief Judge.

MANSA SON OF MALAWA—PLAINTIFF—PETITIONER

versus

NATHUMAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Provincial Insolvency Act (III of 1907), s. 46—Order made by District Court—Appeal—Divisional Court in the Punjab deemed to be the District Court—Punjab Government Notification No. 889, dated 18th November 1908.

By virtue of the Punjab Government Notification No. 889, dated 18th November 1908, for the purposes of section 46 of the Provincial Insolvency Act, the Divisional Court in the Punjab is deemed to be the District Court. Therefore, an order made in the exercise of insolvency jurisdiction by an ordinary District Court is appealable to the Divisional Judge.

The above notification mistakenly refers only to sub-section (1) of section 46 but it is intended to refer to and cover the whole section.

Appeal from the order of Lala Sansar Chand, District Judge of the Gurdaspur District, dated 26th July 1910.

Facts.—The appellant applied to the District Judge, Gurdaspur, for his being declared an insolvent. His creditors opposed the application and the District Judge found on evidence that the applicant (appellant) was solvent and able to pay his creditors. Therefore, he dismissed the application. The appellant appealed to the Chief Court.

Lala *Ganga Ram* for *Lala Pardoman Das*, for the Petitioner.

Chaudhri *Rambhaj Datta*, for the Respondents.

Order.—A preliminary objection that the appeal lies to the Divisional Court, not to this Court, must be allowed. Section 46 (1) of the Insolvency Act (III of 1907) gives an appeal to the District Court from any order made in the exercise of Insolvency Jurisdiction by a Court Subordinate to a District Court, and Punjab Home Department Judicial Notification No. 889 of the 18th November 1908, declares that the Divisional Court should be deemed to be a Dis-

trict Court for the purposes of section 46 (1) of the Provincial Insolvency Act (III of 1907). Section 46 (1) is probably a mistake for section 46, as complications of a serious nature may arise from the limitation to section 46 (1) of the Notification.

Be this as it may, the appellant felt himself aggrieved by an order made in the exercise of insolvency jurisdiction by a Court Subordinate to the Divisional Court and the appeal lies under the notification to the Divisional Court. The objection is allowed and the memorandum of appeal is returned for presentation in the Divisional Court. Parties will bear their own costs of this Court, the contents of the notification being calculated to create misconception.

To this extent the appeal is dismissed.

Appeal partially dismissed.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 736 OF 1910.

October 21, 1910.

Present:—Sir Arthur Reid, KT., Chief Judge, and Mr. Justice Kensington.

KHIRA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

RALLA *alias* RULIA AND OTHERS—DEFENDANTS—RESPONDENTS.

Punjab Pre-emption Act (II of 1905), ss. 12, cls. (a) and (b) Secondly, 14 cls. (a) and (b)—Rival pre-emptors—One of several equal pre-emptors can improve his position before suit—Two sales by the same vendor—One of several heirs becoming co-sharer by pre-empting one sale—Preferential right of such heir against other co-heirs in regard to the second sale.

A vendor sold some land on 17th July 1907. He also sold some other land to another vendee, on 17th August 1907. S, one of the vendor's heirs, sued to pre-empt the first sale on 16th June 1908 and obtained a consent decree on the 23rd *idem*. On 25th *idem*, S sued to pre-empt the second sale. On 2nd July 1908, the other heirs of the vendor, who as co-heirs stood on an equal footing with S, instituted suits to pre-empt both sales as heirs of the vendor:

Held, that the case fell under section 12 (*b*) *secondly* rather than under section 12 (*a*), and again under clause (*a*) rather than clause (*b*) of section 14, and that S, having got a decree in respect of the first sale, had become a co-sharer and as such he took precedence of the other co-heirs:

Held, further, on the analogy of *Dhanna Singh* v. *Gurbakhsh Singh*, 91 P. R. 1909; 148 P.L.R. 1909; 161 P. W. R. 1909; 4 Ind. Cas. 337, (F. B.), that a pre-emptor, like a vendee, can improve his position by the date on which he sues for pre-emption.

Further appeal from the order of H. A. Rose, Esquire, Divisional Judge, Ambala Division, dated the 1st of April 1909, confirming that of the District Judge, Ludhiana, dated the 20th of November, 1908, decreeing the claim.

Facts appear sufficiently from the following Judgment of the lower appellate Court.

The leading facts of this litigation are very simple and are these :—

Rulia sold certain land (*A*) by a deed of 17th July 1907 for Rs. 500.

He also sold land (*B*) to Sultani on 17th August 1907 for Rs. 1,622.

Sahib Ditta pre-empted the land (*A*). He filed a suit on June 16th, 1908, and obtained a decree on the 23rd *idem*.

On June 25th he filed a suit to pre-empt (*B*).

On July 2nd, Nihal &c., (appellants-plaintiffs), filed suits to pre-empt *A* and *B*. The case regarding *A* is still pending. This relates to *B*.

Sahib Ditta has obtained a decree for B also.

It is admitted and is clear that initially Sahib Ditta and the appellants-plaintiffs stood on an equal footing as co-heirs. But by his decree of June 23rd 1908, Sahib Ditta became a co sharer, and thereby acquired after the sales a better position than his co-heirs, plaintiffs-appellants. Now it is argued that the decree of 23rd June 1908 was collusive but it was not so. Sahib Ditta had admittedly a right of pre-emption and he sued to enforce it. The defendants were not bound to contest or to make a show of contesting his claim. Eventually Sahib Ditta must have obtained a decree and defendants were not called upon to fight out a hopeless cause or delay the decree, so they justifiably confessed judgment and on 23rd June 1908, Sahib Ditta became a co-sharer.

It is, however, argued that he was not a co-sharer at the time of the sale and only became so subsequently, though before appellants-plaintiffs' suit was filed. Now section 12(*b*) of the Pre-emption Act is, no doubt, ambiguous but it can only mean "co-sharers at the time of the suit" not "at the time of the sale." If it meant the latter, a co-sharer at the time of the sale could sell his share after it and yet pre-empt as a co-sharer. We have to look to the facts as they stand at the time this suit was instituted by appellants-plaintiffs. By the 2nd of July 1908,

Sahib Ditta had by undue and excessive diligence succeeded in putting himself in a better position than his other co-heirs and he must reap his reward. It is unnecessary to enlarge on the complications and hardships which might ensue if a single backward pre-emptor could come in on the last day and defeat all the less dilatory pre-emptors by raising a claim inconsistent with those already claimed by or decreed to them.

I accordingly concur in the District Judge's finding and affirm his decree. This appeal fails and is dismissed with costs.

A further appeal was preferred to the Chief Court on the following grounds:

1. That the lower Courts have misunderstood and misconstrued the provisions of section 12 of the Punjab Pre-emption Act.

2. That the learned District Judge has mis-applied the doctrine of superior and excessive diligence.

3. That the lower appellate Court was not justified in treating Sahib Ditta respondent as a co-sharer on the strength of the consent decree of 23rd June 1908, especially when a suit for pre-emption of the land, which was the subject of that decree, had been filed, within time, by the present plaintiffs and was pending in the Court of Munsif, Ludhiana.

4. That the decree of 23rd June 1908 was clearly a collusive decree and cannot be said to affect the rights of parties to the prejudice of the present plaintiffs who were not parties in that suit.

5. That in no case was Sahib Ditta respondent entitled to a decree for more than 1/27th portion of the land sold.

Bhagat *Ishwar Das*, for Bakhshi *Tek Chand*, for the Appellant.

Lala *Lajpat Rai*, for the Respondents.

Judgment.—This is an appeal by rival pre emptors against the man Sahib Ditta who has been given a preferential decree for certain land on payment of the full price specified in the sale-deed

The lower Courts have concurred in holding that Sahib Ditta's right is superior on the ground that during the intervening period between the dates of sale in dispute and institution of the present suit, Sahib Ditta had succeeded in establishing his position as a co-sharer by obtaining as pre-emptor a consent decree of 23rd June 1908 in respect of a portion of the holding, covered by a companion sale of the same date (17th July 1907), as that with which we are here concerned.

We can dispose at once of the 5th and 6th grounds of appeal. There may have been somewhat sharp practice on Sahib Ditta's part in respect of his previous suit and decree of 23rd June 1908. But we can find no indication of anything justifying use of the word collusion, and unfortunately the law of pre-emption in the Punjab often resolves itself into a contest of witnesses. No one can be blamed; still less disqualified, merely because he has availed himself of an opportunity afforded by the technicalities of the Act.

Ground No. 6 begs the whole question. No doubt, if the vendor's heirs can claim pre-emption he as one of them would be restricted to his fractional share. The lower Courts have, however, decided that in his capacity of co-sharer he takes precedence of the heirs.

For the rest we are not aware of any ruling directly in point in support of the appellants' contention. And if we turn to the Pre-emption Act we think that the case falls under section 12 (*b*) *secondly*, rather than under section 12 (*a*), and again under clause (*a*) rather than clause (*b*) of section 14.

Further although the points concerned were not quite the same, there is a good deal in the cases of *Mahtab-ud-din* v. *Karm Ilahi* (1), and *Hukim Singh* v. *Indar* (2), to support the contention of Sahib Ditta. The conclusion arrived at by the Full Bench in *Dhanna Singh* v. *Gurbakhsh Singh* (3), is much in point. The dispute was there between a pre-emptor and the vendee and it was held that the date of institution of suit was the latest by which a vendee could improve his position after a sale. We are, it is true, not now concerned with vendee who has been paid in full, but with rival pre-emptors, but as at present advised we think that the same sort of reasoning will apply.

We do not treat the present case as one of superior diligence as commonly understood and are not pressed by the ruling in *Gokal* and *Jowahir* v. *Bhola* (4). Our conclusion is that the lower Courts have decided the case correctly.

(1) 73 P. R. 1898.
(2) 46 P. R. 1902; 49 P. L. R. 1902.
(3) 91 P. R. 1909; 148 P. L. R. 1909; 161 P. W. R. 1909; 4 Ind. Cas. 337.
(4) 29 P. R. 1892.

The appeal is dismissed with costs to the respondent Sahib Ditta.

Appeal dismissed.

(s. c. 8 M. L. T. 341.)

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1903 OF 1908.

April 21, 1910.

Present:—Sir Ralph Benson, Judge, and Mr. Justice Krishnaswami Aiyar.

NELAYATHAKSHI AMMAL—PLAINTIFF—APPELLANT

versus

THE *Taluq* BOARD, MAYAVERAM THROUGH ITS PRESIDENT—DEFENDANT—RESPONDENT.

Madras Regulation (VII of 1817), ss. 2, 7, 8 & 13—Madras Act (V of 1884), s. 51—Property dedicated to charity—Board of Revenue, assuming management—Subsequent handing over of the management to the Taluq *Board—Powers and duties of the* Taluq *Board.*

Plaintiff's husband by his Will created certain charities and appointed trustees of which plaintiff was one. The testator provided in the Will that the trustees "shall maintain correct accounts accessible to all the persons."

In consequence of alleged mismanagement, the Board of Revenue intervened. Subsequently, the Board of Revenue made over the management and superintendence to the *Taluq* Board. The plaintiff claimed to inspect the accounts of the charity:

Held, that where there is no averment of mismanagement by the *Taluq* Board, there is no right of inspection in any member of the public.

Held, also, that the direction in the Will does not impose the obligation to maintain accounts and allow inspection upon a statutory body entering on the management under statutory powers.

Held, further, that though the Board of Revenue had only the powers of superintendence and not the right of actual management, under Regulation VII of 1817, the *Taluq* Board had both the powers.

Held, likewise, that the *Taluq* Board had not, therefore, the power of appointing trustees for the management of an institution taken over by it under section 51 of Madras Act V of 1884.

Second appeal against the decree of the District Court of Tanjore, in Appeal Suit No. 729 of 1907, presented against the decree of the Court of the District Munsif of Mayaveram, in Original Suit No. 33 of 1906.

Judgment.—The plaintiff claims to inspect the accounts of a charity and has made the *Taluq* Board of Mayaveram, defendants. By the Will of the plaintiff's deceased husband, certain charities were created and trustees appointed. The plaintiff was one of them. In consequence of alleged mismanagement the Board of Revenue intervened. It must be assumed for the purposes of this case that the management and superintendence of the endowment were made over to the *Taluq* Board under section 51 of the Madras Act V of 1884. The possession of the endowment property passed to the *Taluq* Board in due course. The plaintiff has ceased to be a trustee of the endowment and claims the right to inspect under a special clause in the Will which runs as follows:—"I have appointed certain persons (named) as trustees. The said persons shall properly conduct the said charities according to their present scale and maintain correct accounts therefor in bound books accessible to all the persons." The power is given by the instrument to the trustees appointed for the nomination of their successors after their death. If the trustees made default in management and resign office the Government is given the power of appointing other trustees in their stead. There is no mention of the duty of maintaining correct accounts accessible to all in the case of the successors to be appointed by the trustees named or by the Government. It may, however, be assumed that it was the testator's intention that such a duty should be attached to the successors as well. But it is another question altogether whether the obligation to maintain accounts accessible to all attacks to the *Taluq* Board which takes the place of the trustees appointed by the testator under special statutory authority in the absence of a special direction in the statute itself. We do not suggest that the *Taluq* Board as managers of a charity are not bound to maintain accounts like all managers of charitable institutions. But, as conceded by the learned Advocate-General there would be no duty in such a case to allow inspection to any member of the public when there is no averment of mismanagement. The question merely is whether, in the absence of a charge of mismanagement, the direction contained in the Will as to the maintenance of accounts accessible to the public will *ipso facto* impose the obligation upon the statutory body which enters upon management under statutory powers. We think we must answer this in the negative. The duty to keep and give inspection of accounts is part of the function of manage-

ment. When it is transferred by a special law to a statutory body, we must look to that law, and not to the instrument of trust for the duties of the manager. There being no provision in the Act requiring him to give the inspection sought for and no general right of inspection on a charge of mismanagement being now in question, we must negative the plaintiff's claim. This is sufficient to dispose of the second appeal. But the question has been argued at some length as to whether the action is maintainable against the *Taluq* Board, when it has transferred the management to another person, as in this case it is alleged to have done. This raises the further question whether the *Taluq* Board which has taken over the management under section 51 of the Local Boards' Act, can appoint an independent trustee so as to divest itself of its duty of management. It has been held that, under Regulation VII of 1817. The Board of Revenue has merely the powers of superintendence and not the right of actual management. The case, *Venkatesa Naydu* v. *Shrivan Shatagopa Shri Shatagopa Swami* (1), if it does not actually decide it, suggests this view in more than one place as the proper view to take with regard to the powers of the Board of Revenue. In *Ponduranga* v. *Nagappa* (2), Muthusami Ayyar and Parker, JJ., point out that the powers of the Board of Revenue were primarily powers of supervision and control and that the committee constituted under Act XX of 1863, which was given the same powers as the Board of Revenue had under Regulation VII of 1817, was not entitled to sue for possession. In *The Chairman, Municipal Council, Rajamundry* v. *Susurla Venkateswarlu* alias *Venkatakrishna Brahma Sastrulu* (3) it has been held that powers and duties of management did not attach to the Board of Revenue under Regulation VII of 1817 and that they had no right to maintain a suit upon a bond executed in favour of a charitable foundation. But where under section 51, an institution is transferred by the Board of Revenue to the control of a *Taluq* Board, both powers of superintendence and of management are made over. To adopt the words of Miller and Munro, JJ., to the facts of this case, the contention that the *Taluq* Board has merely stepped into the shoes of the Board of Revenue, and has no greater powers does not seem to be correct. What was made over to the *Taluq* Board under section 51 of the Local Boards' Act was not only the superintendence of the charity but also the actual management. Is it competent to the *Taluq* Board to divest itself of the management given to it by virtue of section 51 of the Local Boards' Act? Mr. Seshagiri Iyer contends that it is competent to the *Taluq* Board to do so and he relies on the clause in section 51 of Act V of 1884 which runs as follows: —"Thereupon all powers and duties which attach to the Board of Revenue in respect thereof shall attach to such Local Board as if such Board had been specifically named in the said Regulation." Is it said that the power to appoint trustees is among the powers of the Board of Revenue under the Regulation and that, therefore, the *Taluq* Board has a like power. It is again contended that the provision that, all powers of the Board of Revenue shall attach as if the Local Board had been named in the Regulation effects the substitution of the Local Board for the Board of Revenue wherever the latter term is employed in the Regulation. The question does not appear to us to be free from difficulty but we are inclined to hold that the contention is not right. In the first place, unlike the Board of Revenue which has no management, the *Taluq* Board is given powers of management which must be deemed to be inconsistent, in the absence of specific authority, with a right to delegate the management. In the second place, the power of appointing trustees vesting in the Board of Revenue under section 13 of the Regulation and the pre-requisite of such appointment being the receipt of a report from local agents, designated or appointed under the Regulation, it is difficult to argue that the *Taluq* Board has the same power of appointment when no local agents can be said to be contemplated as working under the *Taluq* Board and making reports to it. Reading sections 7 and 8 of the Regulation together, it seems fairly clear that the local agents are public officers. We cannot suppose that section 51, which continues to the *Taluq* Board the powers and duties of the Board of Revenue has the effect of continuing to maintain local agents who are public officers

(1) 7 M. H. C. R. 77.
(2) 12 M. 366.
(3) 31 M. 111; 3 M. L. T. 241.

under the authority of the *Taluq* Board. The powers and duties which are continued are probably those that are referred to in sections 2, 3 and 5 of the Regulation and not necessarily powers of superintendence over local agents: section 51 does not continue any duties of local agents towards *Taluq* Boards. The substitution of the *Taluq* Board for the Board of Revenue is limited to the powers and duties which attach to the Board of Revenue. We are inclined to hold that the *Taluq* Board does not possess the power of appointing trustees which the Board of Revenue had in virtue of the provision contained in section 13 of the Regulation. It was suggested that section 3 of the Regulation might be so construed as including the power to appoint trustees. We doubt whether it is admissible to include such an important power as that of appointing trustees under the general words of taking "such measures as may be necessary to ensure that all endowments are duly appropriated to the purpose for which they were destined." If section 3 included such power of appointment it might, no doubt, be contended that the same power passed to the *Taluq* Board. But in the face of the specific provision contained in section 13 of the Regulation, we are disinclined to hold that the same power is to be swept into the somewhat general language of section 3 of the Regulation. In this view it follows that the *Taluq* Board has not the power to appoint independent trustees for the management of institutions taken over by it under section 51 of the Local Boards' Act. Having regard, however, to the opinion already expressed as to the plaintiff's right to claim inspection, we must dismiss the second appeal but in the circumstances without costs.

Appeal dismissed.

(s. c. 8 M. L. T. 344.)

MADRAS HIGH COURT.

ORIGINAL SIDE CIVIL APPEAL NO. 15 OF 1908.

September 15, 1909.

Present:—Sir Ralph Benson, Offg. Chief Justice, and Mr. Justice Sankaran Nair.

GANTHAPODIKARA SHEIK MIRAN SAIB—DEFENDANT—APPELLANT

versus

THE COMMERCIAL BANK OF INDIA, LTD. AND OTHERS—TRANSFEREE PLAINTIFF—DEFENDANTS—RESPONDENTS.

Suit among partner in favour of one—Decreed same of the partners for a certain sum against one of the debtors of the firm—No opportunity given to the debtor to contest the correctness of the amount.

In a suit between the partners, when a certain sum is mentioned in the decree, as being due from a person who is not a partner, the latter has the right of showing that the said sum or any portion thereof is not actually due from him, unless he had been previously given an opportunity to show the same and failed.

Appeal from the judgment and order of the Honourable Mr. Justice Boddam, dated the 3rd day of December, 1907, in the exercise of the Ordinary Original Civil Jurisdiction of the High Court, in Civil Suit No. 160 of 1895.

Judgment.—It is contended before us that though it is stated in the decree that a sum of Rs. 12,620-15-1 is payable by the appellant, this was done without affording an opportunity to him to show that such amount was not due by him as the case, so far as the debts due were concerned, was really tried only between the plaintiff and such of the defendants as were found to be really partners and this appellant was not a partner. The appellant's contention appears to be well-founded. It was not necessary by the order to determine the amounts due by the various debtors. It might have been left to the Receiver to take the necessary steps to recover the debt. But as the order determines the debts due by about ten debtors and only one of them, the appellant, has appealed, we think it would be more convenient to decide what debt, if any, is payable by this appellant also. We will, therefore, call for a finding on the question, "what debt, if any, is due by the appellant to the partners or what amount is due to him by the partners." Fresh evidence including oral evidence will be received. Seven days will be allowed for filing objections.

Case remanded.

GHULAM GHOUSE *v.* SHUNMUGAM PILLAI.

(s. c. 8 M. L. T. 345.)

MADRAS HIGH COURT.

CIVIL REVISION PETITIONS NOS. 739 TO 745 OF 1907.

February 1, 1910.

Present:—Sir Arnold White, KT., Chief Justice.

Hazareth Kibulai Syed GHULAM GHOUSE SHA SAHIB KADIRI—PLAINTIFF—PETITIONER

versus

SHUNMUGAM PILLAI AND OTHERS—DEFENDANTS—RESPONDENTS.

Madras Rent Recovery Act (VIII of 1865), s. 14—Limitation Act (XV of 1877), Sch. II, art. 110—When arrears become due—Starting point of limitation.

A landlord, who was the plaintiff in all the suits, sued his tenants in the Revenue Court in 1902 for the enforcement of *pattahs* under section 9 of the Rent Recovery Act and obtained a judgment on the 24th May 1904. Previous to that, the tenants sued the landlord in the Civil Courts for a declaration that the landlord was not entitled to vary the terms of the previous *pattahs*, and obtained, during the pendency of the Revenue suit, a judgment in appeal in the High Court on 7th August 1902, which judgment contained the reservation: "A general declaration will not, of course, prevent either party from claiming a modification of the *pattah*, should circumstances arise."

Held, that under the circumstances, the starting point for limitation was the judgment of the Revenue Court.

Arunachellam Chettiar v. *Kadir Rowthen*, 29 M. 556; 1 M. L. T. 315; 16 M. L. J. 486, distinguished.

Rangayya Appa Rao v *Bobba Sreeramulu*, 27 M. 143; 31 A. 17; 14 M.L.J. 1; 6 Bom. L. R. 241; 8 C.W.N. 162, referred to and followed.

Petitions under section 25 of Act IX of 1887, praying the High Court to revise the decrees and judgments of the Court of the District Munsif of Valangiman, dated 6th day of September 1907, in Small Cause Suits Nos. 620 to 626 of 1907, respectively.

Judgment.—These are suits for rent and the Munsif, sitting as a Small Cause Judge, has decided that the suits are barred by limitation. The question I have to consider is: Was he right in law in so holding?

The tenants say that the suits are barred because the arrears became due within the meaning of article 110 of the second Schedule to the Limitation Act on the date of a judgment which was delivered on a first appeal by this Court, the date of the judgment being the 7th August 1902. The landlord says that the arrears did not become due within the meaning of that article until a later date, *viz.*, the 24th May 1904, that being the date of a judgment by the Sub-Collector in certain proceedings before the Revenue Court under the Rent Recovery Act. The judgment of the High Court to which I have referred is a judgment in a suit in which the tenants sued the landlord for a declaration that the landlord was not entitled to vary the terms of previous *pattahs*—the *pattahs* in that suit relating to the same lands as the lands for which rent is now sought to be recovered in the present suits. The judgment by the Revenue Court was a judgment in a suit by the landlord in the Revenue Court which was instituted in 1902 and in which, as I have said, judgment was given by the Sub-Collector on the 24th May 1904.

The Munsif in deciding that the suits were time-barred has relied upon the decision of this Court in *Arunachellam Chettiar* v. *Kadir Rowthen* (1), in which the learned Judges distinguished the case before them on the facts from the decision of the Privy Council in *Rangayya Appa Rao* v. *Bobba Sriramulu* (2). If the present case is on all fours with the case decided in *Arunachellam Chettiar* v. *Kadir Rowthen* (1), sitting as a single Judge, I should, of course, follow it. But it seems to me that the present case is not on all fours with the *Arunachellam Chettiar* v. *Kadir Rowthen* (1). That is a case in which the circumstances are somewhat special and in which it was shown that by custom the rents were payable in kind, not at the end of the *fasli* which I understand to be the ordinary rule but at the time of the harvest. And it was there held that the rent was ascertained as soon as the harvest was reaped. The question I have to determine is not whether rent was ascertained at the end of the *fasli* or at some date before the end of the *fasli*, but whether the rent was ascertained at the date of the judgment of the High Court in the tenants' declaratory suits, or whether it was ascertained at the date of the judgment of the Sub-Collector in the Revenue proceedings brought by the landlord. Consequently it seems to me, I am not bound by the decision in *Arunachallam Chettiar* v. *Kadir Rowthen* (1).

Then I go back to the decision of the Privy Council in *Rangayya Appa Rao* v. *Bobba Sriramulu* (2). It must be borne in

(1) 29 M. 556; 1 M. L. T. 315; 16 M. L. J. 486.

(2) 27 M. 143; 31 A. 17; 14 M. L. J. 1; 6 Bom. L. R. 241; 8 C. W. 162.

mind that in the present cases, the Revenue proceedings were pending at the date of the judgment in the High Court in the suits by the tenants. I am not at all satisfied that the judgment in the declaratory suit by the tenants did determine once and for all the rate of rent which was payable in respect of these lands. The declaration given is in somewhat guarded terms. At the end there is this provision "A general declaration will not, of course, prevent either party from claiming a modification of the *puttah* should circumstances arise." But even supposing that this judgment did determine the rate of rent, it does not seem to me, necessarily, to follow from that, that in the state of things which existed here, where, at the date of the judgment of the High Court, proceedings properly brought by the landlord were pending in the Revenue Court, the date of the judgment of the High Court must be the date from which the statute of limitation begins to run as against the landlord.

In the *Rangayya Appa Rao* v. *Bobba Sriramulu* (2) their Lordships after examining the provisions of the Rent Recovery Act say: "Under this procedure it seems clear that as long as proceedings are pending before the Collector and on appeal from him before the Civil Courts, the rate of rent is in suspense, for no one can say what it will prove to be, and that, therefore, no arrear of rent can be said to have become due within the meaning of the Limitation Act." I think I must apply that proposition to the facts here. Of course, it is argued that the rate of rent is not in suspense, because it has been held that it is a certain amount in the High Court proceedings. I say I am not satisfied as to that. My attention has been drawn on behalf of the tenants to another passage: "In their Lordships' opinion this whole series of sections applies to ascertained rents, not to rents at rates which have yet to be determined." That passage in the judgment occurs after the examination of the provisions of the Rent Recovery Act. And I think when their Lordships speak about 'ascertained rents' they mean rents which have been ascertained by means of the procedure provided by the Rent Recovery Act.

Now it is beyond question that a landlord cannot get his rent until he has tendered a *pattah* which the tenant has accepted or with regard to which the Courts have held that he is bound to accept it. And I think it is anomalous that limitation should begin to run against him at a date anterior to the date when he can enforce his claim for rent.

I think the Munsif was wrong in his view of the law.

In C. R. P. Nos. 739, 740 and 743 the decrees of the Munsif will be set aside and the cases will go back to be dealt with according to law. Costs will abide the event.

C. R. P. No. 744 is dismissed with costs.

In C. R. P. Nos. 741, 742 and 745 there will be a decree for rent with costs throughout.

(s. c. 8 M. L. T. 347.)

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 563 OF 1908.

April 21, 1910.

Present:—Sir Arnold White, KT., Chief Justice, and Mr. Justice Munro.

CHINNATHAYAMMAL—PLAINTIFF—APPELLANT

versus

CHIKKANNA CHETTY—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act XIV of 1882), ss. 25 and 582—Powers of appellate Court to transfer appeals.

The District Court has no jurisdiction to transfer an appeal to the Subordinate Judge's Court after the District Court has heard it in part.

Kumarasami Reddiar v. *Subbaraya Reddiar*, 23 M. 314, followed.

Second appeal against the decree of the Subordinate Judge's Court of Salem, in Appeal Suit No. 177 of 1905, presented against the decree of the Court of the District Munsif of Krishnagiri, in Original Suit No. 252 of 1904.

Judgment.—The only ground of appeal with which we need deal is the ground of jurisdiction, *viz.*, that the District Judge having heard the appeal in part and remanded issues for trial, he could not transfer the appeal to the Subordinate Judge.

The Advocate-General suggested that in this case the order of transfer was made by the High Court and not by the District Judge. Apparently, however, no order of transfer was made by the High Court. We must

take it then that the order was made by the District Court. That being so, the case is governed by the decision in *Kumarasami Reddiar* v. *Subbaraya Reddiar* (1). We agree with this decision. We think it is more convenient to deal with the present case on the general principles on which *Kumarasami Reddiar* v. *Subbaraya Reddiar* (1) was decided than—as the Advocate-General has invited us to do—to take into consideration the fact that in this particular case the individual District Judge, who heard the appeal in part and remanded the case for findings, was not the District Judge when the appeal was heard.

We must set aside the decree of the Subordinate Judge and remand the appeal to the District Judge to be dealt with according to law.

Costs will abide the event.

Case remanded.

(1) 23 M. 314.

(s. c. 8 M. L. T. 347.)

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 62 OF 1910.

CRIMINAL REVISION PETITION No. 52 OF 1910.

August 1, 1910.

Present:—Mr. Justice Sankaran Nair.

In re MUTHU PILLAI AND OTHERS—PETITIONERS.

Criminal Procedure Code (Act V of 1898), s. 110, cl. (f) and s. 117—Security for good behaviour.

The accused were required by an order, passed by the Sub-Divisional Magistrate of Sattur, to show cause why they should not be made to execute bonds for good behaviour under section 110 (*f*) of Criminal Procedure Code. There was no evidence against the accused except this that they were habitual offenders by repute; that some of the accused committed an assault for which they were tried and acquitted, and that another assault was committed by them which is disbelieved:

Held, that evidence of general repute is not admissible under section 110, clause (*f*), though it may be admissible under section 110 clause (*f*) coupled with some other sub-clause, under which it may be admissible.

Held, also, that exceptions, such as in section 117, Criminal Procedure Code, to the general rules of evidence, must only be applied to the cases to which they are confined by the Legislature.

Emperor v. *Bidhyapathi*, 25 A. 273; A. W. N. (1903) 36, approved.

Kalai Haldar v. *Emperor*, 29 C. 779, *Wahid Ali Khan* v. *Emperor*, 11 C. W. N. 789; 6 Cr. L. J. 1, referred to.

Parasulla v. *King Emperor*, 13 C. W. N. 244; 4 Ind. Cas. 10; 10 Cr. L. J. 460, distinguished.

Petition, under sections 435 and 439 of the Criminal Procedure Code, praying the High Court to revise the order, dated 2nd October 1909 of the Sub-Divisional Magistrate, Sattur in Miscellaneous Case No. 7 of 1909.

Order.—The Sub-Divisional Magistrate of Sattur passed an order requiring the petitioners, six in number, to show cause why they should not be made to execute bonds for good behaviour as he had information that each of them "is so desperate and dangerous as to render his being at large without security hazardous to the community", see section 110 clause (*f*) of the Code of Criminal Procedure.

After taking evidence he has passed his final order directing them to give security. This is a petition against that order. The main contention is that there is no legal evidence on which the order can be sustained.

All the prosecution witnesses except the first two and the fourth give evidence of the accused being habitual offenders by repute. The first two speak to an assault by some of the accused for which they were tried and acquitted. The fourth witness speaks to another assault, but the Magistrate thinks and I agree with him that he cannot be believed without corroboration which is not forthcoming.

The only remaining evidence is of general repute and is hearsay and such evidence is only admissible under section 117 to prove that a person is a habitual offender, under section 110, but not to prove a charge under section 110 clause (*f*) of being a desparate and dangerous character. See *Emperor* v *Bidhyapathi* (1), where the question is discussed with reference to section 107; see also *Kalai Haldar* v. *Emperor* (2). The ruling in *Kalai Haldar* v. *Emperor* (2) has not been in any way shaken but is followed in *Wahid Ali Khan* v. *Emperor* (3).

It is argued by the Public Prosecutor that though evidence of general repute is not admissible to prove a charge under section 110 clause (*f*) it is admissible to prove that a person is a habitual offender under section 117 and the fact so proved is evidence which the Magistrate may consider

(1) 25 A. 273; A. W. N. (1903) 35.
(2) 29 C. 779.
(3) 11 C. W. N. 789; 6 Cr. L. J. 1.

to prove a charge under clause (*f*) and he relies upon *Parasulla* v. *The King-Emperor* (4), where a person was charged both under clauses (*a*) and (*f*).

Whether where a person is tried jointly for charges under clause (*f*) and under any other clause a finding that he is an habitual offender under the other clause may be taken into consideration when deciding the charge under clause (*f*) it is unnecessary to consider, and probably it will not be of any practical use to consider that question, as in that case an order could be passed without reference to clause (*f*). But I am clearly of opinion where a person is solely charged under clause (*f*) evidence of general repute is not admissible, as a provision of law which is an exception to the general rules of evidence must be only applied to the cases to which it is confined by the legislature. Excluding such evidence, there is none to support the order appealed against and it is accordingly set aside.

Order set aside.

(4) 13 C. W. N. 244; 4 Ind. Cas. 10; 10 Cr. L. J. 460.

(s. c. 33 P. W. R. 1910 Cr.)

PUNJAB CHIEF COURT.

CRIMINAL REVISION No. 291 OF 1910.

Present:—Sir Arthur Reid, KT., Chief Judge.

BULANDA—CONVICT—PETITIONER

versus

EMPEROR—PROSECUTOR—RESPONDENT.

Penal Code (*Act XLV of* 1860), *s.* 498—*Voidable marriage*—Sunnies.

A woman is not the wife of a man within the meaning of section 498, Indian Penal Code, if their marriage is voidable. Consequently the enticement, etc., of such a woman is not indictable under the said section:

A judicial order is not necessary to effect the cancellation of a voidable marriage among *Sunnies*.

Badal Aurat v. *Crown*, 19 C. 79, followed.

Petition, under section 439 of the Criminal Procedure Code, for revision of the order of Sheikh Asgar Ali, District Magistrate, Gujranwala, dated the 10th February, 1910, confirming that of Lala Parma Nand, Magistrate, 2nd Class, Hafizabad, dated the 28th January, 1910, convicting the petitioner.

Lala *Amar Nath*, for the Petitioner.

Judgment.—The lower appellate Court has held that the marriage of *Musammat* Bahishtan to the complainant was voidable, not void and could under certain circumstances be repudiated by her, but that no proper repudiation had taken place. In *Badal Aurat* v. *Queen-Empress* (1), it was held that a judicial order was not necessary to effect the cancellation of a voidable marriage among *Sunnies*.

The elements of an offence under section 498 of the Penal Code have not, in my opinion, been established.

I allow the application and set aside the conviction and sentence.

The petitioner is discharged from his bail.

Petition allowed.

(1) 19 C. 79.

(s. c. 93 P. L. R. 1910.)

PUNJAB CHIEF COURT.

CRIMINAL APPEAL No. 645 OF 1909.

April 16, 1910.

Present:—Sir Arthur Reid, KT., Chief Judge.

SOSNI AND ANOTHER—CONVICTS—APPELLANTS

versus

EMPEROR—RESPONDENT.

Burden of proof—Rape on a child—Complaint of robbery—Report of Chemical Examiner—Confession.

The accused, who belonged to the menial staff of a railway station, were convicted of ravishing a girl 11—13 years of age, who was travelling in a train and was left at the station while getting a drink. Their confessions were recorded by a Magistrate of the first class a day after the occurrence and the Chemical Examiner's report supported the girl's story. On appeal it was contended that the confessions were not admissible in evidence and that the girl having in the first instance complained only of the robbery of her ornaments was not a credible witness:

Held, that the contentions were not valid, for the confessions were validly recorded and appeared to be voluntary, and the fact that the girl in the first instance complained only of robbery of the ornaments to the strangers was natural.

Appeal from the order of the Magistrate, 1st class, Amritsar, exercising enhanced powers under section 30 of the Criminal Procedure Code, dated the 29th November 1909, convicting the appellants.

Mr. *Jalal-ul-din*, for the Appellants.

Judgment.—I see no reason for interference. The statement of the complainant, *Musammat* Roshan, a child 11—13 years of age, was simple and straightforward, and it was natural that she should, in the first instance, complain to the strangers, among whom she found herself, only of the robbery of her ornaments.

KALU *v.* FARMANA.

The unfortunate child had run away from her husband's house, to escape from his embraces, had got into a train, without a ticket and had travelled about 130 miles when she was left at a small station while getting a drink.

The appellants belonged to the menial staff of the station, and I cannot assume without a scrap of evidence in support of the assumption and in the face of the confessions made to the Magistrate of the 1st class by the appellants, the day after the alleged offences were committed, that the girl invented the story of the rape and that the appellants were forced to make false confessions.

The Chemical Examiner's report corroborates the complainant's story, and I see no reason for doubting that the offences were committed as described by her, or that the police investigation was properly conducted, or that the confessions were voluntary and accurately recorded.

The evidence for the defence is worthless.

The record contains ample material for convictions, and the appellants, aged respectively 23 and 22 years, apparently, thought that denial was hopeless.

The offences were brutal and the victim was a child, and the sentences are by no means excessive.

I dismiss the appeal.

This case is a striking illustration of the result of sending a child wife to the house of her husband, a widower, aged 40.

Appeal dismissed.

(s. c. 94 P. L. R. 1910.)

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 1304 OF 1907.

February 25, 1910.

Present:—Mr. Justice Williams and Mr. Justice Shah Din.

KALU AND OTHERS—PLAINTIFFS—APPELLANTS

versus

FARMANA AND OTHERS—DEFENDANTS—RESPONDENTS.

Common land—Village divided into tarfas *and occupied by different tribes—Holdings not equivalent in extent but similar in kind—Settlement Records—Entries not made after full inquiry*—Res judicata—Obiter dictum—*Admission, when not binding—Statement made by several persons representing all the proprietors—Registration Act (III of* 1877), *s.* 17—*Immovable property—Value not shown to exceed Rs.* 100—*Document merely admitting an antecedent right.*

The plaintiffs, Dhamials of the village Jhurmat *Khurd* in the Rawalpindi District, sued for a declaration of their rights as proprietors of the land in suit in the village and to shares in the common land. It was found that the village was occupied by members of three tribes the Budhals, who had a *taraf* of their own, and the Kathrils and Dhamials, who had seven *tarafs* between them, the Kathrils owning three *pattis* out of it and the Dhamials one.

There was nothing to show that the Dhamials acquired their holding in village in any manner different to the Kathrils and Budhals, their holdings were not equivalent in extent but were presumably similar in kind.

At the summary settlement of 1853, the Dhamials were shown as having a share in the *shamilat* of their *taraf*.

When the settlement of 1860 was proceeding, the Kathrils sued the Dhamials to eject them from the lands in their possession alleging that the latter were their tenants. The suit was dismissed but the Court observed in the judgment that the Dhamials had no right in the *shamilat*. In the regular settlement it was decided that the Dhamials had no share in the *shamilat*. In 1868 the Dhamials secured from several Kathril proprietors a stamped acknowledgment that the former were entitled to a share in the *shamilat*. It was contended for the defendants that the document was not admissible in evidence for want of registration. In 1885 Settlement the Dhamials were only recorded as *malikan qabza* of their proprietary holdings and as tenants *ghair maurusi* of two *shamilat* fields:

Held, that the plaintiffs were entitled to the declaration prayed for. The observation in the judgment in 1860 case was a mere *obiter dictum* and was not *res judicata*.

That the acknowledgment was not inadmissible in evidence, for (1) it was not shown that plaintiffs' share in *shamilat* in 1868 had a money value of Rs. 100 and (2) the document merely admitted antecedent right.

Amir-ud-Din v. *Jamal-ud-din*, 26 P. R. 1891; *Wazir Ali* v. *Assa Ram*, 95 P. R. 1894, referred to.

It was not shown that the rights the plaintiffs had in the land and to the *shamilat* were in any way lost or transferred to the defendants.

Further appeal from the order of the Divisional Judge, Rawalpindi Division, dated the 22nd August 1907, reversing the decree of the Munsif, 1st class, Rawalpindi, dated the 27th February 1907, decreeing plaintiffs' claim.

Bhagat *Gobind Das*, for the Appellants.

Messrs. *Raushan Lal* and *Sham Lal*, for the Respondents.

Judgment.—The facts of this case are fully set forth in the judgment of the Divisional Court, and we do not propose to re-produce them here. After a careful consideration of them, however, and of the arguments of the learned counsel, who have appeared before us, we are unable to accept the conclusions at which the learned Divisional Judge has arrived.

KALU *v.* FARMANA.

The first point that we notice is that the village of Jhurmat *Khurd* is occupied by members of three tribes: the Budhals who have a *tarf* of their own, and the Kathrils and Dhamials, who have the second *tarf* between them, the Kathrils owning three *pattis* out of it, and the Dhamials one. There is absolutely nothing on the record to show that the Dhamials acquired their holding in the village in any manner different to the Kathrils and Budhals, and the inference is that their holdings, although not equivalent in extent, are similar in kind, and that all three are entitled to share in the common accessories which attach to the ownership of proprietary rights, in which a right to a share in the *shamilat* is, of course, included. The fact, that the Dhamials appear to have had from the beginning a separate *patti* of their own materially corroborates the view that, as proprietors, they occupied the same position as members of the other tribes.

The second point to notice is that at the Summary Settlement of 1853, the Dhamials were distinctly shown as having a share in the *shamilat* of their *tarf*. This is clear from the statement set out in the learned Divisional Judge's judgment. The three Kathril *pattis* of the 2nd *tarf* had *shamilat* of their own aggregating 152 *ghumaos* (? *bighas*), 2 *kanals* 3 *marlas*, and in addition to that there is shown an item of *shamilat tarf* 168 (probably *kanals*). If the Dhamials had no share in this, it would have been included and amalgamated in the entry of *shamilat* belonging exclusively to the Kathrili *pattis*, and the fact that there is a separate entry of the *shamilat tarf* sufficiently indicates that, in the opinion of the officers making the entry, the fourth or Dhamial *patti* had interest threin.

We now come to the year 1860, when, on the one hand, the Regular Settlement was proceeding, and, on the other, the Khtarils sued the Dhamials to eject them from the lands in their possession, alleging that the latter were their tenants. The case was heard by *Munshi* Amin Chand, Settlement Extra Assistant Commissioner, who dismissed it, thereby upholding the claims of the Dhamials to be proprietors, but added in his judgment, what was for the purposes of the suit before him, the purely irrelevant *obiter dictum* that the Dhamials had no rights in the *shamilat*. There was at that time no question or dispute about the *shamilat-deh*, as the learned Divisional Judge admits, and the finding on this point cannot, therefore, be treated as *res judicata* between the parties. It may, however, be taken as an admission against interest on the part of the Dhamials subject to the following criticisms which go far to deprive it of any value as an admission: (1) We do not know what the Dhamials actually said, the statements of no less than three witnesses being lumped together in one composite whole; (2) we do not know if they appreciated the niceties of the term "*Malikan qabza*;" and (3) their words, which were "*apne mukbuza ke malik*," are fairly capable of the construction that they claimed to own all the land in their possession which, as the dispute then proceeding merely regarded the land in their possession, would not necessarily exclude a claim to own lands not in their possession such as a share in the *shamilat*.

In the Regular Settlement, as the learned Divisional Judge has remarked, it was decided that the *Dhamials* had no share in the *shamilat* (in this Settlement the *shamilat* of the two *tarfs* was amalgamated as *shamilat-deh*) and section 4 of the *Wajib-ul-arz* incorporates that decision in express terms. In the absence of any evidence on this point we are unable to accept the Divisional Judge's view that this decision was come to after full enquiry. We think it infinitely more likely that the entry merely re-produces the finding of *Munshi* Amin Chand in the judgment which he had just delivered and which, as we have indicated was irrelevant, *obiter dictum*, and very possibly based on a misconstruction of the statements made by the Dhamials. Incidentally we notice that *Munshi* Amin Chand in his judgment actually said that the Dhamials were *Maliks* as the Kathrils were.

Lastly, we have the fact that in 1868, the Dhamials secured from several Kathril *maliks* a stamped acknowledgment that the former were entitled to a share in the *shamilat*. The learned Divisional Judge thinks that this document bears the names of five *maliks*, but we doubt whether more than four are genuine, and he comments on the document in the following words: "It was not executed by all the proprietors and was never given effect to in the Revenue papers." It has further been urged that the document is not admissible in evidence, as it is not registered. Dealing with the last point first, we consider the document to be admissible in

evidence for two reasons: *Firstly*, it is nowhere shown that the Dhamials' share in the *shamilat* had in 1838, a money value of Rs. 100, and we are inclined to think that probably it had not; and, *secondly*, the document merely admitted an antecedent right of the Dhamials; it neither created, nor declared the creation or existence of any new right. In each circumstance the authorities are to the effect that registration was not necessary. [See in the cases of *Amir-ud-din* v. *Jamal-ud-din* (1), *Wazir Ali* v. *Assa Ram* (2)].

As regards the fact that only four of the proprietors executed it, this is true, but it must be remembered that the number of Kathril proprietors at the time of the Summary Settlement was only three, and although their descendants were in 1838 somewhat more numerous, yet the execution of the document by so many as four is a very significant fact, especially as the four executants are very fairly representatives of the whole body of Kathril proprietors; and the fact that they executed the document is excellent evidence that the Dhamials have right on their side as regards the executants; and, if so, as regards the executants, they undoubtedly have the same rights as regards the rest.

As regards the failure of the Dhamials to get the revenue papers corrected so as to accord with their agreement, this is, no doubt, a curious circumstance, the more especially as there was a revised Settlement in 1885, or thereabouts at which they do not seem to have produced their agreement and in which at any rate they were only recorded as "*Malikan kabza*" of their proprietary holdings and as tenants "*ghair-maurusi*" of two *shamilat* fields. At the same time the explanation offered, *viz.*, that they intended to produce their agreement when the time came for partition—they certainly seem to have kept the document very carefully for the last forty years—is not in itself unreasonable, even if their action was injudicious, as we think it was; for we believe that but for this delay the claim of the Dhamials to share in the *shamilat* would not have been opposed.

We accordingly accept this appeal and, reversing the finding and decree of the Divisional Court, we restore the decree of the Court of first instance, with the exception that as we believe that the plaintiffs have rather courted this opposition by their dilatory methods of procedure, we leave the parties to bear their own costs throughout.

Appeal accepted.

(1) 26 P. R. 1891.
(2) 95 P. R. 1894.

(s. c. 95 P. L. R. 1910.)

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL NO. 135 OF 1910.

July 1, 1910.

Present:—Mr. Justice Chevis.

Pandit GIRDHARI LAL AND ANOTHER—DEFENDANTS—APPELLANTS

versus

Pandit DEVI DIAL—PLAINTIFF—RESPONDENT.

Copyright—Almanac—Burden of proof—Injunction.

In a suit for injunction on the ground of infringement of plaintiff's copy-right in an almanac published by him, it was found that the tables given in the parties' almanacs tallied, except as regards minutes and seconds, that the calculations were admittedly worked out on what are known as *Makrand* and that there were other almanacs which resembled the defendants':

Held, that these findings were not sufficient to establish piracy on the part of the defendants:

Held, also, that the fact that in previous years the defendants obtained information for their almanacs from plaintiff on payment of money did not affect the case.

The weakness of the defence does not make up for want of proof of the allegations of the plaintiff.

Further appeal from the decree of the Divisional Judge, Lahore Division, dated the 31st January 1910, reversing the order of the Sub-Judge, 1st class, Lahore, dated the 30th April 1908, dismissing plaintiff's claim.

R. B. *Shadi Lal*, and Lala *Moti Lal*, for the Appellants.

R. B. *Lal Chand* and Mr. *Sukh Dial*, for the Respondent.

Judgment.—The plaintiff in this case has for some years past published an almanac copy-right almanac in Hindi. The defendant has for some years published an almanac in Urdu. The plaintiff sues for an injunction to restrain defendant from copying from his almanac and complains of defendant having copied in the almanac for 1906. The defendant denies that he has copied from the plaintiff's almanac.

The first Court found it unproved that defendant has infringed plaintiff's copy-right and dismissed the suit. The learned Divisional Judge, on considering the evidence,

came to a reverse finding and gave a decree as prayed for and awarded Rs. 1,132 as damages. The evidence may be divided into two parts (1) as to defendant's almanac being a copy of plaintiff's, and (2) as to defendant having in past years paid plaintiff Rs. 200 a year for materials for the almanac.

The witnesses on the first point are Shib Dyal, Jiwan Ram and Pars Ram. I have considered their evidence carefully, and all it amounts to is that the tables given in both almanacs tally, except as regards minutes and seconds. The calculations are admittedly worked out on what are known as *Makrand* which is described as an old book of Logarithms. Plaintiff possesses a manuscript copy of the *Makrand*, but he certainly does not possess the only copy in the world, for when he was in the witness-box he was shown, apparently to his surprise, a printed copy. Now it is obvious that any man possessed of the necessary mathematical knowledge can, with the help of a copy of the *Makrand*, make the necessary calculations, working out the number of *gharis* and *pals* from sunrise to sunrise for each day of the coming year. If two men make the calculations independently the result will admittedly be the same, errors accepted. There are other calendars besides those published by the plaintiff and the defendant; other calendars are published both in Lahore and elsewhere. Other calendars, besides the defendant's resemble the plaintiff's, as plaintiff has admitted when in the witness-box. He owns that Narain Das's and Dina Nath's calendars resemble his, but he suggests that these two are copied from his. As if he were the only person in the world who could make the necessary calculations. The figures given in defendant's calendar tally with those in plaintiff's calendar in the main, the difference being only in minutes and seconds, but what does it show? Are we to assume that defendant has copied from plaintiff's calendar, making trifling alterations in minutes and seconds to cloak his offence? It is equally possible that defendant copied from some one else's calendar. Or that defendant made his own calculations, or (for apparently he has not the educational power himself) employed some one else to do the work for him. It is quite true that defendant has failed to prove satisfactorily how he got the work done. Of the three men named by him one is dead, another is not produced as a witness, and the third, Bhagwan Das, only says he corrected some dates said to be favourable for marriages. But the weakness of the defence will not make up for want of proof of the allegation of plagiarism.

I do not propose to enter closely into the evidence as to defendant having paid plaintiff money in past years. The first Court disbelieved this evidence; but the learned Divisional Judge has believed it. The Divisional Judge may perhaps be right, but even assuming this evidence to be true I fail to see how it proves the present charge of plagiarism to be true. Assuming that defendant bought his information from plaintiff in past years, and has now stopped buying it from plaintiff, this does not prove that defendant has now stolen his information from plaintiff. On the other hand; the fact of defendant having ceased to buy his information from plaintiff might be the cause of plaintiff having brought the present claim either out of enmity or of *bona fide* suspicion. That there is bitter ill-feeling between the parties is clear; in fact there have been criminal cases between them, the beginning of the trouble being that in 1904, plaintiff for the first time brought out a calendar in Urdu and called it *Mash-hur-i-Alam Jantri* which was the name under which defendant had for years before then been publishing his Urdu calendar.

In such works as calendars, dictionaries and the like, resemblances must perforce be found, and it is for the plaintiff in such a case clearly to prove plagiarism. That I hold has not been proved in the present case, and it is not sufficient to say that the circumstances are suspicious. It is, of course, easy for plaintiff to suspect that the defendant has taken his information from plaintiff's calendar, but until there is judicial proof that he has done so the claim cannot be decreed.

I accept the appeal and reversing the lower Court's decree, I restore the decree of the first Court dismissing the suit. Plaintiff will pay the defendant's costs throughout.

Appeal accepted.

ATO *v.* MIRO

PUNJAB CHIEF COURT.
FIRST CIVIL APPEAL No. 668 OF 1907.
April 2, 1909.
Present:—Mr. Justice Kensington,
and Mr. Justice Shah Din
Musammat ATO—DEFENDANT—APPELLANT
versus
Musammat MIRO—PLAINTIFF—RESPONDENT.

Custom—Succession—A Muhammadan Rajput dying leaving a minor son and widows—Widows succeed in equal shares on son's death.

A Muhammadan Rajput died leaving a minor son and three widows, one of whom was the mother of the minor: *Held*, on the death of the son without issue, that on the general principles of succession under custom, all the widows were entitled to life-interest in equal shares, which they would have inherited on the death of their husband but for the intervention of the son.

The Full Bench ruling, *Hamira* v. *Ram Singh*, 134 P. R. 1907 ; 85 P. W. R. 1907, does not lay down a general principle that in matters of succession descent should not be traced upwards in order to determine the immediate heir.

Further appeal from the decree of the Additional Divisional Judge, Hoshiarpur Division, dated the 17th May 1907, reversing that of the Sub-Judge, Hoshiarpur, dated the 27th July 1906, dismissing the suit.

Pandit *Sheo Narain*, for the Appellant.

Mirza *Jalal-ud-Din*, for the Respondent.

Judgment.—The essential facts of this case are as follows. Babu Khan, a Muhammadan Rajput, died some 8 years ago leaving three widows and a son. His land was entered in the son's name. On the son's death in 1905, a mutation order was passed in favour of the three widows of Babu Khan and his mother, but on the 4th January 1906, the Collector in appeal decided that the whole of the land should be recorded in the name of one widow, *Musammat* Ato, the mother of the deceased son. His reasons for this rather strange order were (1) that *Musammat* Ato had not been divorced by Babu Khan, (2), that the other two widows had left the village, and (3) that *Musammat* Ato alone was in possession.

The present suit is by *Musammat* Miro, one of the two remaining widows, against *Musammat* Ato, for possession of her $\frac{1}{3}$rd share of the land. The lower appellate Court, differing from the first Court, has given the plaintiff a decree and *Musammat* Ato appeals to this Court.

The appeal was admitted to a hearing on an understanding that the case would have to be decided in accordance with the Full Bench ruling in *Hamira* v. *Ram Singh* (1) and substantially that is the main point argued for *Masammat* Ato. The contention is that the Full Bench has laid down a general principle that in matters of succession descent should not be traced upwards in order to determine the immediate heir. We can find nothing in the ruling to support this. The only question then considered was that of a sister's position compared with that of a daughter, and the ruling is neither directly nor indirectly in point on the case before us.

The parties admittedly do not follow Muhammadan law in matters of succession, and this is also clear from the fact that on Babu Khan's death his son was recognised as heir to all the land without awarding their legal shares to the widows. In this light, we cannot allow plaintiff's claim to be now considered inadmissible on the ground that she sues as heir of the son Fazal Mahomad, and is, therefore, excluded by Muhammadan law as a step-mother.

There is the further difficulty that if *Musammat* Ato's right to the whole of the land be now recognised as heir to her deceased son, the other two widows will have no security for their rights of maintenance under custom. Even the appellant's pleader does not suggest that this maintenance right has been lost.

It appears to us quite clear that on the general principles of succession under custom, see the Introduction to Chapter II of Rattigan's Digest, the widows of Babu Khan are now entitled to the life-interest in his land in equal shares, which they would have inherited at once on his death but for the intervention of the son Fazal Mohammad. The matter has been correctly determined by the lower appellate Court.

The appeal is dismissed with costs to the plaintiff.

Appeal dismissed.

(1) 134 P. R. 1907 ; 85 P. W. R. 1907.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 404 OF 1909.

April 8, 1910.

Present:—Mr. Evans, A. J. C.

NIAMAT ALI—PLAINTIFF—APPELLANT

versus

ILAHI BAKHSH AND OTHERS—DEFENDANTS—RESPONDENTS.

Champerty—Maintenance—Wager—Guarantee—Conditional promise—Agreement to advance money for litigation—Consideration—Public policy—Contract Act (IX of 1872), ss. 23, 30.

An agreement, by which a person, advancing money for the conduct of a litigation, is promised the return of his money without interest and a share in the property is not opposed to public policy; nor is it of the nature of a wager but ought to be treated as a conditional promise or guarantee.

Chedambara Chetty v. *Runga Krishna Muthu Puchaiya Naiker*, 22 W. R. 148; 1 B. L. R. 509; 1 I. A. 241; *Kunwar Ram Lal (Raghunath)* v. *Nil Kunth*, 20 I. A. 112; 20 C. 843, referred to.

Appeal against, the order of the District Judge, Lucknow, dated 17th August 1909, upholding order of the Additional Munsif, Lucknow, dated 25th January 1909.

Babu *Piyare Lal*, for the Appellant.

Babu *Prahabat Chandra*, for Respondent No. 3.

Judgment.—This is an appeal against an order of the District Judge of Lucknow upholding a decision of the Munsif (South) Lucknow. The plaintiff-appellant sued to recover a 4th share in certain property from the respondents in accordance with an agreement, which was that the appellant should conduct certain litigation at his own expense on behalf of the respondents Nos. 1 and 2 and if the claim was successful the money advanced was to be re-paid immediately without interest and the appellant was to receive one-fourth of the property in dispute. The present suit refers to the latter part of the agreement. The Munsif held that the agreement was opposed to public policy and, therefore, void under section 23 of the Contract Act. He held that there was no consideration for the agreement and there was no actual transfer of property but only a promise to transfer the property in case the suit was successful. For this reason he distinguished this case from numerous authorities where it is laid down that there is no law in India which renders an agreement void on account of champerty. He relied on the case of *Chedambara Chetty* v. *Runga Krishna Muthu Puchaiya Naiker* (1), but there is a ruling of the Privy Council in *Kunwar Ram Lal (Raghunath)* v. *Nil Kunth* (2), in which there was an agreement that the plaintiff should prosecute at his own expense a claim to property and if the claim was successful, the defendant agreed in consideration of the expenses incurred by the plaintiff to sell a 9 annas share in the property recovered. It was held that an agreement of this kind to share the subject of litigation would not be opposed to public policy. But if such an agreement was extortionate and inequitable, compensation for legitimate expenses might properly be awarded. It is true that, in this case, the appellant has obtained a decree for the bare sum of money which he had advanced but the risk which he ran in the matter and a reasonable amount of interest on the money advanced may be deemed sufficient consideration for recovery of the property. The learned Judge appears to have upheld the decision of the Court of first instance on the ground that the agreement was a wager pure and simple and, therefore, void under section 30 of the Contract Act. I am of opinion that this view of the law cannot be upheld. The result of a lawsuit is not always absolutely certain; still it cannot be said that an agreement to get a share in the subject of litigation, if the suit is successful, is a wagering contract within the meaning of section 30 of the Contract Act. Claims are decided according to the law as interpreted by the Court and it must be assumed that the final decision of the Court is in accordance with the law. In Anson's Law of Contract (10th Edition, 202) the term "Wager" is explained in the following words:—"To constitute a wager the parties must contemplate the determination of the uncertain event on which the risk depends as the sole condition of their contract. One may thus distinguish a genuine wager from a conditional promise or guarantee." I am of opinion that the agreement in suit is of the nature of a conditional promise or guarantee and the appellant is entitled to maintain his suit to recover the property. I express no opinion as to the liability of the third respondent Sharf-ud-din who has been impleaded as a vendee from respondent No. 1. I accept the appeal and remand the

(1) 22 W. R. 148; 1 B. L. R. 509; 1 I. A. 241.

(2) 20 I. A. 112; 20 C. 843.

case, through the lower appellate Court, to the Court of first instance for decision on the merits. Costs to abide the result.

Appeal accepted.
Case remanded.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 358 OF 1909.
June 20, 1910.

Present:—Mr. Lindsay, O. A. J. C.

Musammat CHHUTKO—DEFENDANT—APPELLANT

versus

JUGGA SINGH AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Pre-emption, suit for—Evidence Act (I of 1872), ss. 92 and 99—Evidence to show the real nature of a transaction—Mortgage in form but really a sale—Pre-emptor not a party to the instrument—Party to an instrument, not entitled to offer evidence to contradict the terms of a document.

In a suit for pre-emption, based on a mortgage deed on the allegation that the mortgage was really a sale but thrown in that form in order to defeat pre-emption, the contention was that oral evidence should not have been admitted to show that the parties to the deed intended a sale and not a mortgage:

Held, that under sections 92 and 99 of the Evidence Act, evidence could be given by the pre-emptor to show the real nature of the transaction, he being no party to the instrument.

Bal Kishen Das v. *W. F. Legge*, 22 A. 149; 27 I. A. 58; 4 C. W. N. 153; *Nawab Begam* v. *Hamid Ali*, 11 O. C. 176; *Musammat Fatima Begam* v. *Muhammat Yasin*, C. A. No. 247 of 1904 and *Mata Parshad* v. *Musammat Audan Kuar*, 3 O. C. 215, referred to.

Appeal against the order of the District Judge, Lucknow, dated 29th day of May 1909, reversing the order of the Munsif of North Lucknow, dated the 7th July, 1908.

Mr. *E. Manuel*, for the Appellant.

Babu *Jiban Krishna Banerjee*, holding brief of Babu *Bisheshar Nath Srivastava*, for the Respondents.

Judgment.—On the 19th July 1906, one Chandika Bakhsh executed a deed of mortgage in favour of *Musammat* Chhutko, the appellant in this case, purporting to create a possessory mortgage of a share in the village of Sirpur in consideration of a loan of Rs. 600. Among other conditions it was provided that redemption could not be claimed till the expiry of 48 years from the date of the mortgage. That the mortgagee was to remain in possession and apply the profits in discharge of the interest accruing on Rs. 500 of the mortgage money, that the balance of Rs. 100 was to be paid at the time of redemption together with interest at the rate of 12 annas per cent. per mensem, and that at the time of redemption the mortgagor was to reimburse the mortgagee all sums spent by her on improvements during the period of her possession and to pay up any balances outstanding on account of loans to tenants. The area of the land so mortgaged was 4 *bighas* 7 *biswas* bringing in a rental of Rs. 33 per annum and bearing revenue at the rate of Rs. 9.0 a year, so that the net profit came to under Rs. 24 a year. The respondents in this second appeal filed a suit for pre-emption against *Musammat* Chhutko and her mortgagor Chandika Bakhsh on the allegation that the transaction between the defendants was in reality one of sale and that it had been cast in the form of a mortgage with the intention of defeating claims for pre-emption. It was further alleged that the consideration for the transfer was Rs. 500 only and not Rs. 600 as represented. The plaintiffs, therefore, claimed a decree for pre-emption on payment of Rs. 500. The mortgagor defendant admitted the case set up by the plaintiffs. *Musammat* Chhutko, on the other hand, insisted that the transaction was one of mortgage only and that the amount advanced to the mortgagor was Rs. 600 as expressed in the deed. She pleaded that the market-value of the property was not less than Rs. 1,000 and that the plaintiffs were not entitled to pre-empt for any smaller sum.

The Court of first instance found that the transaction between the parties was one of mortgage, not of sale and dismissed the suit.

On appeal the learned District Judge was of opinion that the terms of the mortgage-deed coupled with the oral evidence adduced by the plaintiffs proves that the parties intended a sale. He found that the sum advanced to the mortgagor was only Rs. 500 and that the property was not worth more. He, therefore, reversed the decree of the first Court and gave the plaintiffs a decree for pre-emption on payment of Rs. 500.

On behalf of the defendant-appellant only two points have been argued in this Court, namely:—

(1) that evidence was not admissible to show that the parties to the deed intended a sale and not a mortgage, and that the transaction was, in fact,

of a nature different to that represented in the deed: and

(2) that such evidence, even if admissible, was not in the present case sufficient to establish a completed and valid transaction of sale.

With regard to the first point, the argument is that section 99 of the Evidence Act read with section 92, though it allows third parties to offer oral evidence to vary a written contract, does not authorize the reception of evidence to prove that, as in the present case, a mortgage transaction was in reality one of sale and that the plaintiffs could not legally advance evidence to show what was the intention of the parties to the transaction. It is contended that the case set up by the plaintiffs was to the effect that the deed was a fraud on the face of it, and that the plaintiffs were confined to proof of their case on this ground: and could not offer evidence of intention. The cases reported in *Balkishan Das* v. *W. F. Legge* (1) and *Nawab Begum* v. *Hamid Ali* (2), were referred to, but neither of these is in point here. The former case was one between parties to the written instrument: the latter was one in which the question under discussion was one of estoppel. Section 99 of the Evidence Act allows persons who are not parties to a document to give evidence of any facts tending to show a contemporaneous agreement varying the terms of the document and the expression varying must be deemed to embrace contradictions. Section 92, moreover, expressly lays down that the rule of exclusion of evidence of oral agreement to contradict, vary, add to or subtract from the terms of a written contract is limited to the parties to the instrument. The plaintiffs here were not parties to the document and were clearly not precluded from proving the truth, however contradictory it might be of the terms for the written instrument. Their case was not merely that the terms of the deed indicated that the transaction was a sale: they asserted that the transaction was in fact a sale and this being so they were entitled to lead evidence to show that the parties intended a sale.

The case is in many respects similar to an unreported case decided by Mr. Chamier, Additional Judicial Commissioner, on the 29th August 1904 (Second Civil Appeal No. 247 of 1904) *Musammat Fatima Begam* v. *Muhammad Yasin*. In that case too the plaintiffs produced oral evidence to show that the parties intended a sale and not a mortgage and this evidence was ruled to be admissible.

The appellant's learned counsel cites the ruling in *Mata Parshad* v. *Musammat Audan Kuar* (3), a first appeal, decided by Spankie, Additional Judicial Commissioner. This case was distinguished in the judgment of Mr. Chamier to which I have referred and it certainly does not lay down that oral evidence cannot be received from third parties in order to show that a transaction represented to be a mortgage was in fact a sale; all that was held was that in that particular case the evidence fell short of proving that the transfer was one of sale. I find against the appellant on the first point.

As regard the second point, the contention is that there is no evidence to support the finding of the lower appellate Court that the transaction was one of sale, but that it is insufficient to support the finding. This appears to me to be a question which cannot be discussed in second appeal. If there is any evidence to support the finding (as is here admitted), the finding is conclusive.

The appeal is dismissed with costs.

Appeal dismissed.

(1) 22 A. 149; 27 I. A. 58; 4 C. W. N. 153.

(2) 11 O. C. 176.

(3) 3 O. C. 215.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1504 OF 1903.

October 17, 1910.

Present:—Sir Ralph Benson, Judge, and Mr. Justice Krishnaswami Aiyer.

VENKATA VARAHIA DIKSHITAR *alias* DORAISWAMI DIKSHITAR—APPELLANT

versus

SUBBAROYA PILLAI AND OTHERS—RESPONDENTS.

Easements Act (V of 1882), s. 15—Claim for a right of way as an easement—Proof of enjoyment as an easement—False plea of ownership of the way—Whether destroys acquisition of right of easement.

In an action to establish an easement of a right of way over a lane, the plaintiff should prove enjoyment of the way as an easement for the period of prescription.

The fact that in a previous suit plaintiff falsely set up his ownership of the way, will not preclude the acquisition of the right of easement, which has to be proved by independent evidence.

Chunilal Fulchand v. *Mangaldas Govardhandas*, 16 B. 592, referred to.

Second appeal against the decree of the District Court of Tanjore, in Appeal Suit No. 714 of 1907, presented against the decree of the Court of the District Munsif of Tanjore, in Original Suit No. 377 of 1906.

Judgment.—The plaintiff claims an easement of a right of way to his scavenger over a lane. The District Judge has found it in the plaintiff's favour. Section 15 of the Easements Act requires that the enjoyment of the way should have been as an easement for the period of prescription. The Judge has not adverted in his judgment to this requirement. The appellant's Vakil argues that in two prior suits in 1877 and 1893 the plaintiff claimed ownership and could not, therefore, have enjoyed the way as an easement and relies on *Chunilal Fulchand* v. *Mangaldas Govardhandas* (1). In that case the contention in the first suit was apparentiy the evidence relied on to prove enjoyment of an easement and the Court refused to treat enjoyment as owner as evidence of enjoyment of an easement. It may be in the present case, especially having regard to the observations of the Munsif in Exhibit B, that the plaintiff enjoyed the way as an easement though he falsely set up ownership. We do not think such a false plea would necessarily preclude the acquisition of a right of easement. But we think we ought to have a revised finding from the Judge on the question whether the plaintiff has enjoyed the way as an easement as of right for the prescriptive period with reference to the circumstances we have adverted to. They are material for determining *quo animo* did the plaintiff enjoy the way.

The finding will be returned on the evidence on record within one month after the re-opening of the District Court. Seven days will be allowed for filing objections.

In compliance with the order contained in the above judgment, the District Judge of Tanjore submitted the following

FINDING.

I am required to submit a finding on the following issue "Whether the plaintiff has enjoyed the way as an easement as of right for the prescriptive period?"

That the lane or open space has been used for a very long period as a means of access to the plaintiffs' latrine is established by the oral evidence which has now been given support as it is by the reference to the user in Exhibit B and by the circumstance that the lane leads up to the latrine and that a doorway has been provided for entering it. The cross wall referred to in the plaint was also in existence as far back as 1877 (*vide* Exhibit B). There is no doubt that the plaintiff had attempted to assert a claim to exclusive ownership in O. S. No. 148 of 1877. It is not clear whether the subject-matter of O. S. No. 660 of 1893 really covered the lane. The plaintiffs in that suit relied upon the sale-deed Exhibit A, which the 2nd plaintiff then tried to suppress. The sale to him was of $\frac{1}{4}$ of the "house-site." The lane was mentioned as one of the boundaries and was not included in the sale (*vide* Exhibit A). The 2nd plaintiff then set up an altogether baseless claim to the whole house-site. The conduct of the 2nd plaintiff throughout was that of a man who was suppressing the real facts in order thereby to lay claim to rights larger than those which he actually possessed. Thus in the suit of 1877, the fact (which appears to have been admitted on both sides) that there had been open and regular user of the passage was relied on to support the further claim to exclusive ownership. Even after this claim had been defeated, there can be little doubt that the use was openly continued and was enjoyed without question and as of right. If this were not so, there would have been definite evidence of action taken to prevent the use. In the proceedings of 1893 the existence of the lane was not disputed and the question of the use to which it was put was not raised. It seems to be as true now as it was in 1877 that there is no practical means of access to the privy except through the lane and I think the probabilities are in favour of the plaintiffs having enjoyed the passage as an easement both prior and subsequent to 1877 and this in spite of the fact that they then made use of this existing right to attempt to obtain more. I would, therefore, answer in the affirmative the issue remanded by the High Court.

Costs on both sides nil.

This second appeal coming on for final hearing after the return of the finding, the Court delivered the following

(1) 16 B. 592.

Judgment.—We accept the finding and dismiss the second appeal with costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 8 OF 1907.

October 17, 1910.

Present:—Sir Ralph Benson, Judge, and Mr. Justice Krishnaswami Aiyar.

A. M. DAMODARAN NAMBUDIRI—APPELLANT

versus

C. GOPALAN NAIR AND OTHERS—RESPONDENTS.

Landlord and tenant—Malabar Compensation for Tenants Improvements Act (I of 1900)—Suit for redemption of Kanom—*Mode of calculating improvements—Disparity in rent.*

In calculating the value of improvements, made by a tenant, in an action for redemption of a *Kanom*, the disparity in the rent, paid by the tenant at different times, should not be made the sole basis for working up the value of improvements. It is only a circumstance to be taken into account in weighing the evidence as to improvements.

Sangili v. *Mookan*, 16 M. 350, referred to.

Second appeal against the decree of the Subordinate Judge's Court of South Malabar at Palghat, in Appeal Suit No. 162 of 1906, presented against the decree of the Court of the District Munsif of Chowghat, in Original Suit No. 183 of 1905.

Judgment.—The Subordinate Judge assumes from the disparity in the rent before and now that there must have been improvements. This disparity may be a circumstance to be taken into account in weighing the evidence as to improvements but should not form the entire basis of his conclusion as to the improvements. See *Sangili* v. *Mookan* (1). The Subordinate Judge has, no doubt, considered the Commissioner's report as he was entitled to do but he has not referred to the oral evidence of witnesses who have spoken on the question of improvements. We must ask the Subordinate Judge to consider the whole evidence on record and submit a revised finding on the 2nd issue. The finding should be submitted in six weeks and seven days will be allowed for objections.

In compliance with the above order the Subordinate Judge submitted the following

FINDING.

I am asked to submit a revised finding on the following issue "What is the value of improvements."

2. There is no question about the value of *knikurs*. It is Rs. 67-0-6. The dispute between the parties is about the compensation to be paid for the reclamation of the land. The plaintiff says that no reclamation at all has been effected. The 3rd defendant, on the other hand, contends that the land has been reclaimed at considerable cost. The plaintiff does not contend that the mode of calculation adopted by my predecessor with respect to the value to be awarded for the work of reclamation alleged to have been done is wrong. The original *kanom* rent of the land was, as shown by Exhibit A, $6\frac{1}{4}$ *pothies* of paddy. It is undisputed now that a *Pothi* is equal to 3 *paras*. The *kanom* rent was, therefore, $18\frac{3}{4}$ *paras*. In Chavaghat and other places a *para* is considered to be equal to 60 *nazhies*. The usual, however, is that a *para* is 40 *nazhies*. According to the usual rule, the *kanom* rent at the time of the demise evidenced by Exhibit A was, therefore, $28\frac{1}{8}$ *paras* of paddy. The *verumpattom* rent is considered to be twice the *kanom* rent. The *verumpattom* rent of the plaint lands at the time of the plaint demise may be, therefore, considered as $56\frac{1}{4}$ *paras* of paddy. The paddy to be deducted from *verumpattom* rent for Nigudi or Government revenue is 45 *paras*. It is admitted that the present *verumpattom* rent of the land calculated according to the usual rule is 300 *paras* of paddy. The increase in the produce of the land is, therefore, as found by my predecessor, $193\frac{3}{4}$ *paras* of paddy. Its present worth is Rs. 1,325. The cost of labour has been estimated by the Commissioner at Rs. 805. The compensation due to the 3rd defendant, if reclamation has been effected, is, as my predecessor says, Rs. 1,065. The question, therefore, for determination simply is whether the increase of rent is due to natural cause or to processes of reclamation.

3. There are two reports on the record of Commissioner Mr. P. G. Rama Iyer, B. A., B. L., who is now a District Munsif. He was appointed as Commissioner by this Court in appeal. It will be seen from his reports that on personal inspection the Commissioner was satisfied that some work of reclamation was actually done by the tenant in possession. I quote below paras. 2 and 3 of his first report dated 26th July 1906.

(1) 16 M. 350.

"2. The property lies next west of a canal which, in the rainy season, invariably inundates the adjacent lands and in many cases spoils the crops in them."

"3. To prevent this inundation and consequent damage to the crops, the western bank of the canal touching the plaint lands appears to have been raised and strengthened by the tenant. This is evidenced by the breadth and depth of the canal bank in the place where it touches the plaint property and further made clear by the fact that lands to the south and north of the plaint lands are now covered with water while the plaint lands are not so covered."

4. The Commissioner appointed by the District Munsif originally was retired Sub-Magistrate, Mr. Konti Menon. It is true that he allowed nothing for reclamation but the observations made by him, in the remarks column of the account submitted by him on 22nd August 1905, show that he too was of opinion that some portion of the land was deepened.

5. The plaintiff examined in this case four witnesses on his side including himself. None of them said anything at all on the question of reclamation. The 3rd defendant's 1st witness P. Padu Nair has given important evidence for the 3rd defendant. He says that he was the Karyastan of Viyyumma (deceased) who obtained the *kanom* demise evidenced by Exhibit A, that the plaint property was one crop land when he saw it first, that between 1034/1858-1859 and 1038/1862-1863 it was improved by him for Viyyumma's sake and that by reason of the improvement referred to by him the aforesaid land became from 1040/1864-65 a three crop land. He adds that the spaces of the aforesaid land which were on a higher level were lowered to the level of the low lands and that "*taras*" (raised grounds) were formed with the earth excavated and planted with cocoanut plants. Against this evidence the learned pleader for the plaintiff has drawn my attention to the evidence of the 3rd defendant's own second witness Ammunni who is Viyyumma's son. Ammunni, no doubt, denies that the 3rd defendant's 1st witness P. Padu Nair, was Viyyumma's *kariastan*. He adds, however, that he knew the plaint land only after 1050/1874-75, that he never improved the aforesaid land and that he could not say whether his ancestors had improved the aforesaid land. This witness was only 51 years old when he gave evidence before the District Munsif in this case in January 1906. Consequently he was between 4 and 8 years, when according to P. Padu Nair, he (P. Padu Nair) was Viyyumma's *kariastan* and improved the plaint land for her sake. From personal knowledge it is, therefore, impossible for Ammunni to say whether P. Padu Nair was or was not Viyyumma's *kariastan*. My impression is that Ammunni was gained over by the plaintiff. Exhibit I executed by him and by his sister and wife jointly as Viyyumma's legal representatives transferring her rights on the plaint properties to the 3rd defendant supports the 3rd defendant's case considerably. The plaint lands form item No. 8 in it. That item along with items Nos. 3 to 7 in it appear from the aforesaid Exhibit to have been assigned by Ammunni and his wife and sister to the 3rd defendant in 1077/1901-1902 for Rs. 4,500. The rights which fetched the above value are mentioned in Exhibit I as consisting of *kanom*, *kuikur* and *vettukanom*—*vettukanom* is the same as *vettu chamayam* and means "reclamation." The *kanom* on items Nos. 3 to 8 in Exhibit I amounted, according to the aforesaid Exhibit, only to Rs. 500-4-4. The balance, *viz.*, Rs. 3,999-11-8 was, therefore, mainly the value of the *kuikurs* and *vettuchamayams*. It has also to be remembered that without vast reclamation, a land paying $56\frac{1}{4}$ *paras* of paddy as *verumpattam* cannot become capable of paying 300 *paras* of paddy as *verumpattam*.

6. My finding, therefore, is that the plaint lands were deepened and improved and converted into three crop lands by Viyumma as sworn to by the 3rd defendant's 1st witness, P. Padu Nair, and that the 3rd defendant's legal representatives, 9th and 10th respondents in second appeal as Viyyumma's representatives-in-interest, are entitled to get Rs. 1,065 for reclamation and Rs. 67-0-6 for *kuikurs*.

This second appeal coming on for final hearing, after the return of the finding of the lower Court, the Court delivered the following

Judgment.—We accept the finding and dismiss the second appeal with costs. The time for redemption will be extended by three months from this date.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 344 AND 345 OF 1906.

October 18, 1910.

Present:—Sir Ralph Benson, Judge, and Mr. Justice Krishnaswami Aiyar.

ERANHIKKAL KUNHIMMACHA AND ANOTHER—APPELLANTS

versus

THOPPIL PUDIA VITTIL SHEIK PATHUMA BI AND OTHERS—RESPONDENTS.

Limitation—Adverse possession—Necessity for finding whether defendant's possession was adverse or derivative—Failure to account for origin of possession—Legal presumption—Derivative possession.

In a suit for possession of property, where defendant sets up the plea of adverse possession, it is not enough for the Court simply to find against defendant and for plaintiff. The Court should find how long the defendant was in possession, and, if for over the statutory period, whether the possession was only derivative. Without a definite conclusion on these points, no finding should be recorded on the question of limitation in plaintiff's favour.

The mere failure of the defendant to prove the origin of his possession does not give rise to a legal presumption that his possession was only derivative. It is a question in each case on the facts, whether having failed to prove the origin of his possession, the defendant may be deemed to have come into possession under the plaintiff or under persons who got into possession from the plaintiff.

Second appeals against the decrees of the Subordinate Judge's Court of South Malabar at Calicut, in Appeal Suits Nos. 414 and 415 of 1905, presented against the decrees of the Court of the Additional District Munsif of Calicut, in Original Suits No. 676 and 677 of 1903.

Judgment.—The appeal abates as regards the 1st appellant and the 8th respondent in S. A. No. 344 and as regards the 2nd appellant in S. A. No. 345.

We accept the finding of the Judge that the property belonged to the plaintiff. The 6th and the 7th defendants raised a plea of adverse possession. That is the subject of the 2nd issue. The Subordinate Judge has given no reason for his finding in the plaintiff's favour on the 2nd issue. He does not say how long the contesting defendants have been in possession and if for over the statutory period whether the possession is only derivative. It is impossible to hold against the plea of limitation without a definite conclusion on these points. The possession of the 6th and 7th defendants, even if it was derived from Simmamutti, would not necessarily prevent the running of time if the plaintiff after Simmamutti's death renewed the lease in favour of Sadakka and afterwards of his son.

As regards S. A. No. 345 we cannot agree with the Subordinate Judge that there is any legal presumption that the possession of the 3rd and 4th defendants was derivative. It is a question in each case on the facts whether having failed to prove the origin of his possession, the defendant may be deemed to have come into possession under persons who got into possession from the plaintiff.

We must ask the Subordinate Judge to return a revised finding on the 2nd issue in each case on the evidence on record within one month after re-opening of the Court.

Seven days will be allowed for filing objections.

In compliance with the above order the Subordinate Judge submitted the following

FINDING.

The following is the issue on which I am asked by the High Court to submit my finding in this case.—

"Does the land belong in *jenm* to the plaintiff and, if so, is her right to recover it time-barred?"

2. The land sued for in this case is the plot A in the Commissioner's plan, Exhibit AAA. The District Munsif and my predecessor both found that the aforesaid plot and the plot B formed portions of Eranhickal *paramba* and belonged in *jenm* to the plaintiff's *tarwad*. Their findings were based on the *pattas* D and E and other documents filed in O. S. No 77 of 1903 heard herewith and appear to me to have been accepted by the High Court. Eranhickal *paramba* itself is a portion of Pandarathoppil *paramba* and we have Exhibits B, C, GG series and MM in the aforesaid suit to show that the entire Pandarathoppil *paramba* is registered in the revenue accounts in the name of the plaintiff's *tarwad* and that other portions of the aforesaid *paramba* than those now in suit are held by tenants under registered leases or demises given by the above-mentioned *tarwad*. The 6th and 7th defendants in this case, who are 4th and 3rd defendants respectively in O. S. No. 77 of 1903, wherein the whole evidence was recorded have no documents on their side to show that Eranhickal

paramba or any portion of it belonged to Simamutty and his brothers, that they made a gift of it to their sister Kunhi Umaya and that as Kunhi Umaya's great-grand-daughter and grand-son they came in possession of the aforesaid property. There can be no doubt under such circumstances that the plot A in dispute in this case once belonged in *jenm* to the plaintiff's (1st respondent's) *tarwad*. Whether it still remains as the *jenm* of the aforesaid *tarwad* depends upon the decision of the question of adverse possession set up by the aforesaid defendants, who are the appellants.

3. The plaintiff herself admits in para. 7 of the plaint that along with others the defendants Nos. 6 and 7 (appellants) are now in possession of the plot sued for. She says in the same para. that they got possession through the 3rd defendant. In paras. Nos. 2 and 3 the plaintiff explains how finally under her *tarwad* the 3rd defendant happened to be in possession of the plaint property. The case which she puts forward is that the aforesaid property was demised from her *tarwad* on *kanom* to Eranhickal Simamutty above-mentioned in Kanni 1019 (September—October 1843), that that *kanom* was renewed in his (Simamutty's heir Sadaka's) name and that the 3rd defendant as Sadaka's son took renewal of the aforesaid demise in 1069 (1894). It is not explained how Sadaka could be Simamutty's heir. Admittedly, Simamutty was a follower of Mukkathaym. Exhibit HH shows that Simamutty had a son called Avulla Koya living in 1881 and the genealogical table given in the District Munsif's judgment and admitted by both sides as correct shows that he had also a sister called Kunhi Umaya and two brothers called Ittan Kutti and Mamu Koya. Sadaka's relationship with Simamutty was simply that he was Kunhi Umaya's daughter's son. That did not make him Simamutty's heir under Muhammadan law and it cannot be said that the Kychit said to have been executed by him as such was valid.

4. The plaintiff has not produced the Kychit said to have been executed to her *tarwad* by Simamutty in 1019 (1843) and by Sadaka in 1039 (1863—1864). Exhibit NN, the plain copy of a document-list, no doubt, shows that in a suit of 1843 the palintiff's *tarwad* produced or intended to produce a Kychit executed by Simamutty for a portion of Eranhickal *paramba* in 1019 (1843). There is, however, nothing in the aforesaid Kychit to show that even if the Kychit above referred to was genuine, it referred to the plot A now in suit. With regard to Sadaka's Kychit of 1039 (1863-1864), what we have on the record is simply the 3rd defendant's admission of it in the registered *pattomchit* Exhibit BB executed by him to the plaintiff's *tarwad* in 1069 (1894). The admission he made in it was only of a "chartu" in his father's name and it gives no date for that "chartu". The word "chartu" means either a lease or a *kanom*. If Sadaka had *kanom*, there is no explanation why that was not expressly mentioned in Exhibit BB and why under that Exhibit, no *kanom* was allowed to the 3rd defendant,

5. Coming now to the evidence produced by the 6th and 7th defendants (appellants), as 4th and 3rd defendants respectively in O. S. No. 77 of 1903, it will be seen from Exhibits V and VI series, the Municipal tax receipts, that the 7th defendant and his father Imichi Koya (deceased) paid the Municipal assessment of the house in plot A from 1869. There are then Exhibits XI and XII. They show that the 7th defendant's father's brother Ittan Kutti Mella had possession of a portion of Pandarathoppil *paramba* and a house in it in 1824 and 1851. I have mentioned already that the plaint property is a portion of Pandarathoppil *paramba* above-mentioned. On reference to Exhibit HH it has been pointed out by me at another place that Simamutty had a son called Avulla Koya. The aforesaid Exhibit is the copy of plaint which Avulla Koya instituted to recover his share of the house in plot A. The 6th and 7th defendants were the 1st and 2nd defendants in that case. Exhibit III shows that they contended in the aforesaid case that Avulla Koya had no right to the house and that the suit against them was dismissed in March 1882 because the 7th defendant took oath in support of his contention. Exhibit VIII refers to another suit by three of the sons of Sadaka to recover the *paramba*, Plot A, from the 6th and 7th defendants. Exhibit LL is the judgment in that case. The District Munsif dismissed it in May 1895 on the ground that the 6th and 7th defendants were in possession of the aforesaid plot adeversely to the plaintiff for more

than 12 years. I am not bound now to enquire whether the reasons given by the District Munsif to dismiss the aforesaid suit were correct. For the purpose of this case, it is sufficient to show that adverse possession of the plot A was set up by the 6th and 7th defendants in that case too.

6. The plaintiff's 2nd witness Ahamad Koya, plaintiff's son, says in his evidence that he made the 6th and 7th defendants parties to this suit because he learned 3 years ago that they were in possession of the house sued for. The plaintiff's 4th witness Uthankoya admits that the 7th defendant's father and 6th defendant's grandfather Imbichi Koya (deceased) was living in the house in plot A ever since he knew it and that the 6th and 7th defendants reside in it now. The plainttff's 5th witness Mamod says in his cross-examination that the 7th defendant lives in the house in plot A. The plaintiff's 6th witness Mussan Kutti Haji adds that ever since he knew the plot A he saw the 6th and 7th defendants live in the house in it and that they have taken the produce of it since 20 years. The plaintiff's 7th witness, the 1st defendant, also supports the 6th and 7th defendants' long possession of the plot A and the house in it. The 6th and 7th defendants as 4th and 3rd defendants respectively in the connected Case No. 77 of 1903 have examined 5 witnesses including the 3rd and 5th defendants and they have all sworn that for nearly 50 years the 7th defendant's father and 6th defendant's grandfather Imbichi Koya and 6th and 7th defendants have been in exclusive possession of the plot A and the house in it. It will be seen from the evidence of the 7th defendant (3rd defendant in O. S. No. 77 of 1903) that his father Imbichi Koya died 35 years ago. There is no evidence on the plaintiff's side to show that Imbichi Koya and defendants Nos. 6 and 7 derived possession of the plaint property from Sadaka or his son, the 3rd defendant in this case, or paid rent to either of them. The attempt made by the plaintiff to show that Sadaka was in joint possession of the plot A and the house in it has failed. The evidence of the plaintiff's own 6th witness Mussankutty shows that Sadaka died more than 20 years ago and that he used to live in his wife's house. It is true that the defendants' 1st witness made a careless statement that Sadaka took the produce of the plaint *paramba* for one or two years and that he lived in that *paramba* before he married. I attach no weight to it. Sadaka was a relation of Imbichi Koya and probably as such he lived in the plaint *paramba* for a short time. There is no evidence that he enjoyed the produce of the plaint *paramba* on the strength of his alleged title.

7. My finding on the issue referred to me for trial in this case is that though the plaint property, plot A in the plan AAA, belonged originally in *jenm* to the plaintiff's *tarwad*, that *tarwad* has lost its right by lapse of time and that the plaintiff's right to recover it now from its present occupants, the 6th and 7th defendants, is time-barred.

A. S. No. 415 of 1903.

S. A. No. 345 of 1906.

FINDING.

The land No. 1 in this suit is the plot B in the Commissioner's plan Exhibit AAA. The finding of the lower Court and of this Court in appeal to the effect that the aforesaid plot belonged in *jenm* to the plaintiff's *tarwad* has been accepted by the High Court. The issue referred to me for trial is as follows:—

"Whether the plaintiff's right to item No. 1 is barred by limitation."?

8. The case of the plaintiff (1st respondent) is that the plot B above-mentioned was demised on *kanom* by her ancestress Sheik Patumma (deceased) to S. V. Avulla Koya in 1033 (1857-1858) that after Avulla Koya's death one Koya Moidin married his (Avulla Koya's) widow and took renewal of the aforesaid *kanom* in 1047 (1871), that in 1058 (1882) his son assigned the aforesaid right to the 1st defendant, that the 1st defendant then attorned to the plaintiff's *tarwad* and took a renewed demise, that sometime afterwards he leased the property to the 2nd defendant and that the 3rd and 4th defendants who are the 7th and 6th defendants respectively in O. S. No. 676 of 1903 are now in unlawful possession of the aforesaid property, they having taken it without valid title from the 2nd defendant.

9. It is trae that the plaintiff has not produced the Kychit evidencing the demise of 1033 (1857-1858) in favour of Avulla Koya referred to by her. It appears, however, to have been filed as Exhibit C in the suit evidenced by Exhibits LL. There

is further corroboration of the plaintiff's oral evidence in reference to it in the registered *kanom*-deed Exhibit OO executed by her *tarwad* in 1046 (1871) to Koya Moidin who married Avulla Koya's widow. The aforesaid Exhibit says that the transaction under it was the renewal of an old *kanom*. The plaintiff's 2nd witness, the plaintiff's son, has sworn to the demise of 1033 (1857-1858) and the plaintiff's 4th and 5th witnesses have given evidence about Koya Moidin's possession of the plot B sued for under it. I have referred already to Exhibit OO which shows that the plaintiff's *tarwad* granted a renewed mortgage in favour of Avulla Koya's wife's second husband Koya Moidin (deceased) in 1046 (1871) in respect of the aforesaid plot. That Koya Moidin was in possession under the aforesaid renewed mortgage has been sworn to by the plaintiff's 2nd, 4th, 5th, 7th, 8th and 9th witnesses and I believe them. Exhibits PP and QQ show that in 1058 (1882) Koya Moidin's children assigned the right which Koya Moidin possessed under Exhibit OO to the present 1st defendant and that in 1883 the 1st defendant attorned to the plaintiff's *tarwad* and obtained a renewal. The 1st defendant was accordingly in possession of the plot A as sworn to by him as the plaintiff's 7th witness till 1073 (1898). Exhibit RR shows that in March 1898 the 1st defendant demised the plot B on a *kanom* of Rs. 3 to the 2nd defendant. There is the evidence of the 1st and 2nd defendants (plaintiff's 7th and 8th witnesses) to show that under Exhibit RR the 2nd defendant too was in possession of the aforesaid plot for some time. Exhibit SS supports the 2nd defendant's evidence that even before the date of Exhibit RR he was living in the house in plot B sued for. Besides all these, the plaintiff has her account-books Exhibits G to AA that she collected rent of the plaint property from the various persons in possession above-mentioned till 1894. The 3rd and 4th defendants have no reliable evidence on the record to establish that they had possession of the plot B before 1900. The Municipal receipts, Exhibits V and VI, have not been shown to have reference to the properties in this suit. It is admitted that the 1st defendant obtained decree in O. S. No. 417 of 1900 for the possession of the plaint property against the 2nd defendant on the strength of Exhibit RR. In execution of that decree, he was resisted by the 3rd defendant. That led to suit No. 1 of 1901 and, there, the 1st defendant, failed because the District Munsif held that the judgment in O. S. No. 540 of 1894 established that the 3rd and 4th defendants had adverse possession of the plaint property for more than 12 years—*vide* Exhibit ZZ. In my finding in the connected case, I have referred to the judgment in the aforesaid case. It is Exhibit LL and referred only to the plot A and the house in it. Further, Exhibit LL was based on Exhibits II and III in this case which referred only to the house in plot A and as the District Munsif observes the defendants Nos. 3 and 4 did not contend in their written statement in that case that they had possession of the *paramba* A or B. There is also the fact that the plaintiff is not a party to Exhibits LL and ZZ. I disbelieve the oral evidence on the 3rd and 4th defendants' side to the effect that they have held possession of the plot B for more than 12 years before the institution of this suit.

10. My finding on the issue referred to me for trial in this case is that the plaintiff's right to item No. 1 (plot B) is not barred by limitation.

These second appeals coming on for final hearing after the return of the finding of the lower Court, the Court delivered the following

Judgment.

S. A. No 344.

We accept the finding and in reversal of the decrees of the Courts below dismiss the suit with costs throughout.

Appeal No. 344 allowed.

S. A. No. 345.

We accept the finding and dismiss the second appeal with costs. The plaintiff will have two months from this date for redemption.

Appeal No. 345 dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 415 OF 1908.

October 24, 1910.

Present:—Sir Ralph Benson, Judge, and Mr. Justice Krishnaswami Aiyar.

PAZHANCHERI PANANGATBLAHAYIL KUNJUNNI NAIR—APPELLANT

versus

PAZHANCHERI MANNATHAN PARAMBETH KALAPURAYIL KUNJUNNI NAIR—RESPONDENT.

Chit fund—Payment of part of prize to a subscriber—Agreement between starter and subscriber for payment of balance on subscriber's furnishing security—Failure of starter to pay balance of prize money—Whether relieves subscriber from obligation to pay future instalments—Default in payment of instalments—Action for recovery of last two instalments—Stipulation for payment of all future instalments in default of any one instalment—Waiver—Limitation.

A *kuri* was started by plaintiff's predecessor in 1893. It was to consist of 14 tickets of Rs. 500 each and it was to continue for 13 years. Defendant, one of the subscribers, won a prize at the 6th drawing. A portion of the prize-money was paid to him by the plaintiff and the balance was reserved with the latter for payment to defendant when he gave security for payment of future subscriptions. It was found that defendant offered the security and that plaintiff defaulted to pay the balance reserved with him. It was also a condition that in default of defendant's payment of any one instalment, all future instalments would become due at once. Plaintiff credited the unpaid prize-money towards subsequent instalments and sued defendant for the last two instalments. Defendant pleaded that he was not liable to pay the future instalments, as plaintiff did not give him the balance of his prize-money and that as he made default in payment of the instalment due for 1900, all the instalments became then due and the suit was barred by limitation:

Held, (1) that, apart from the special agreement, a default in payment of the prize-money did not relieve the defendant from liability to pay future subscriptions.

(2) that as it was found that plaintiff had waived the benefit of the stipulation for payment of all overdue instalments in default of any one instalment, the suit was not barred by limitation.

Sri Raja Satracherla v. *Sri Raja Setarama*, 3 M. 61, *Nagappa* v. *Ismail*, 12 M. 192, *Badi Babi Sahibal* v. *Sami Pillai*, 18 M. 257 at p. 261, *Abinash Chandra Bose* v. *Bama Bewa*, 13 C. W. N. 1010 at p. 1013; 4 Ind. Cas. 17, referred to.

Second appeal against the decree of the Subordinate Judge's Court of South Malabar at Calicut, in Appeal Suit No. 422 of 1907, presented against the decree of the Court of the District Munsif of Chowghat, in Original Suit No. 341 of 1906.

Judgment.—Before disposing of the second appeal, we must ask the Subordinate Judge to return a finding on the evidence on record on the question whether Exhibit F is genuine.

The finding should be submitted within three weeks from this date and seven days will be allowed for filing objections.

In compliance with the above order the Subordinate Judge submitted the following

FINDING.

In this case I have been directed by the High Court to submit a finding on the following issue:—

Whether Exhibit F is genuine?

Plaintiff's *anandravan* examined as plaintiff's witness on 6th February 1907 stated that the letter Exhibit F was sent to Vakil Mr. Thomas in reply to the letter Exhibit D. He did not see the defendant sign it. This is what the witness said:—"Exhibit F is also in the handwriting of Palapetti Sankara Nair. I am acquainted with the signature of the defendant. Exhibit F contains defendant's signature." The defendant examined as his witness on the same day merely stated: "I have not sent any registered notice to the plaintiff." He did not specially deny his signature in Exhibit F. The letter purports to have been sent to Mr. Thomas and the defendant's statement that he did not send any registered letter to the plaintiff is true. The defendant admits that Palapetti Sankaran Nair who is alleged to have written the letter used to write some documents for him. This Sankaran Nair is proved by plaintiff's witness to be the writer of Exhibit H. He was present in Court on 6th February 1907 as defendant's witness and the defendant did not care to examine him to contradict the evidence of plaintiff's *anandravan*. On comparing Exhibit H with Exhibit F, I think that Exhibit F is in Sankaran Nair's handwriting. On comparing defendant's genuine signature in his *vakalath* with the signature in Exhibit F, I think that the letter is genuine. It is unreasonable to think that somebody at plaintiff's instance sent the letter Exhibit F to Mr. Thomas after putting defendant's false signature in it. For these reasons I find the issue in the affirmative.

This second appeal coming on for final hearing on Tuesday the 18th instant after the return of the finding of the lower Court, and having stood over for consideration till this day the Court delivered the following

Judgment.—A *kuri* was started in June 1893 by the *Karnavan* of the plaintiff's *tarwad*. It consisted of 14 tickets of Rs. 500 each and it was to continue for 13 years. The defendant held one ticket. The collections of each year were to be put to auction among the ticket-holders and the person who was the lowest bidder was to have the prize, the difference between Rs. 7,000 and the prize being distributed among the remaining ticket-holders. The defendant got the prize in June 1897 after the 5th instalment. But the prize of Rs. 4,730 was not paid to him but only Rs. 2,540-10-2. Rs. 1,933-9-4 were reserved according to the receipt Exhibit A dated the 8th June 1898 with the originator of the *kuri*. It was to be paid to the defendant on his furnishing security for Rs. 4,000 being the remaining subscriptions to the *kuri* by means of a registered mortgage document. We must accept in second appeal the finding of the Subordinate Judge that the defendant was ready to give the mortgage bond but that the plaintiff defaulted to pay the balance reserved with him. The plaintiff has credited the balance and the interest due thereon under Exhibit A towards subsequent instalments and practically sues for the last two instalments and interest. It is found by the Subordinate Judge that by reason of the plaintiff's failure to pay the balance reserved with him, the defendant was absolved from paying the future instalments. There appears to be no warrant for this view. It evidently was no part of the agreement under which the *kuri* was started. The defendant in his written statement did not raise the contention that there was any stipulation to that effect in the *kuri* agreement and no issue was taken raising such a question. The Subordinate Judge merely says that it is the rule in all *kuris* for the subscriber not to pay future instalments if default be made in the payment of the prize. He refers to no evidence in support of the statement and the learned Vakil for the respondent was unable to refer us to any such evidence. It is impossible to argue as a matter of law apart from special agreement that default in the payment of the prize-money relieves the subscriber from liability to pay future subscriptions. Such a termination of liability can only be on the ground that the whole contract is put an end to. The contract began to operate from 1893. The defendant paid the subscriptions and received the profits for 6 years and more than half the prize-money. Under those circumstances it is difficult to see how he could terminate the contract. It is sufficient to refer to the admission of Mr. Ramachendra Aiyar that if the defendant was paid the prize money on a later day and chose to accept it, the acceptance would revive the obligation to pay the future instalments, as a sufficient answer to the contention that the plaintiff's default put an end to the contract to pay future instalments.

It is noteworthy that Exhibit A, which provides for a mortgage document to pay the future instalments amounting to Rs. 4,000, does not proceed to absolve the defendant from liability under the mortgage in the event of the balance of the prize-money being withheld. We must hold, therefore, that whatever remedy the defendant might have against the plaintff for the recovery of the sum reserved, he could not be absolved from the obligation to pay the future subscriptions.

The next question is whether the plaintiff's claim is barred. Although the suit for the last two instalments is in time, it is contended with reference to the statement in paragraph 7 of the plaint that the whole subscriptions became due in June 1900 when the defendant made default in the payment of the instalment of that year. The plaintiff relied upon an agreement with the defendant that the balance that was reserved with the former should with interest be appropriated towards the successive instalments. The District Munsif finds the agreement to be true but the Subordinate Judge disbelieves it. Exhibit B, which the defendant deliberately omitted to answer, shows that the instalment of June 1899, which is subsequent to the plaintiff's default in payment of the balance of prize money, must have been met as alleged by him out of the interest due from the plaintiff and a payment from the defendant of the sum of Rs. 325-15-8, for Exhibit B makes a demand only for the instalments of June 1900 and 1901. Exhibits D and L also support the plaintiff's case. The Subordinate Judge's judgment makes no reference to Exhibit F. It has now been found to be genuine. If necessary we would be inclined to call for a fresh finding from the Subordi-

nate Judge on the question of agreement to appropriate the balance reserved with the plaintiff towards future instalments. But in the view we take about the plaintiff's waiver of the stipulation referred to in paragraph 7 of the plaint that the whole subscriptions were to become due on default in payment of any one instalment, we think it unnecessary to call for a revised finding on the question of the agreement. The stipulation mentioned in paragraph 7 of the plaint is in the plaintiff's favour. It is perfectly competent to him to waive it. The Munsif considered the question of waiver under the issue of limitation and found in its favour No special ground was taken with reference to waiver in the Memorandum of Appeal to the lower appellate Court except the general one of limitation. The Subordinate Judge is of opinion that the circumstances proved in this case are not sufficient in law to amount to waiver On the other hand, we are of opinion that Exhibits B, D and F are sufficient. The Subordinate Judge does not discredit the payment of Rs. 325 and odd in June 1899. The plaintiff avers it and Exhibit B, which is a demand for the subscriptions of 1900 and 1901 less the interest due which the defendant did not choose to answer, supports the plaintiff's case. We must, therefore, hold that the claim is not barred by limitation. See *Sri Raja Satracherla* v. *Sri Raja Setarama* (1); *Nagappa* v. *Ismail* (2), *Badi Bibi Sahibal* v. *Sami Pillai* (3) and *Abinash Chandra Bose* v. *Bama Bewa* (4).

As to interest, the Munsif has found on the evidence of the plaintiff's witness No. 1 that he is entitled to 12 per cent. from the date of default. The Subordinate Judge has given no finding on the issue. The plaintiff's witness No. 1 swears to the provision about interest. He is not cross-examined on the point. The defendant as defendant's witness No. 1 does not deny it. We must, therefore, agree with the District Munsif.

We reverse the decree of the Subordinate Judge and restore that of the District Munsif with costs in this and in the lower appellate Court.

Decree reversed.

(1) 3 M. 61.
(2) 12 M. 192.
(3) 18 M. 257 at p. 261.
(4) 13 C. W. N. 1010 at p. 1013 : 4 Ind. Cas. 17

MADRAS HIGH COURT.

FULL BENCH.

FIRST CIVIL APPEAL No. 12 OF 1907.

October 20, 1910.

Present:—Sir Arnold White, KT., Chief Justice, Mr. Justice Krishnaswami Aiyar and Mr. Justice Ayling.

BOGANADAM RANGIAH CHETTY —APPELLANT

versus

BOGANADAM SUBRAMANIA CHETTY AND OTHERS—RESPONDENTS.

Court Fees Act (VII of 1870), s. 7 Cl. IV (b) and cl. V, and Sch. I, arts. 1 and 17 (VI)—Suit for partition by a co-parcener in joint possession—Court-fee—Ad valorem fee.

Held, by Sir Arnold White, C. J., and Krishnaswami Ayar, J. (Aiyling, J. dissenting), that in a suit for partition of joint family property, where the plaintiff is in joint possession with the other co-parceners, the Court-fee is to be fixed under article 1 of Schedule I of the Court Fees Act and not under article 17 (VI) of Schedule II of the Act.

Dagdu v. *Totaram*, 33 B. 658; 10 Bom. L. R. 1074; 4 Ind. Cas. 242, *Bidhata Roy* v. *Ram Charitra Roy*, 6 C. L. J. 651; 12 C. W. N. 37, *Kirty Churn Mitter* v. *Aunath Nath Deb*, 8 C. 757, and *Mohendra Chandra Ganguli* v. *Ashutosh Ganguli*, 20 C. 762, dissented from.

Velu Goundan v. *Kumaravelu Goundan*, 20 M. 289, followed.

Quære:—Whether a suit for joint possession by a co-parcener, excluded from possession, would fall under section 7, clause IV (*b*) or section 7, clause (V) of the Court Fees Act.

Per *Aiyling, J.*, dissenting:

The Court-fee in the case referred to should be fixed under section 17 (VI) of Schedule II.

Appeal against the decree of the District Court of North Arcot, in Original Suit No. 18 of 1905.

This appeal coming on for hearing before the Honourable Mr. Justice Munro and the Honourable Mr. Justice Abdur Rahim on Thursday and Friday, the 25th and 26th days of August 1910, the Court made the following

ORDER OF REFERENCE TO A FULL BENCH.

The suit was under section 525 of the Civil Procedure Code to file an award made in an arbitration for dividing joint family properties. The suit was dismissed, and hence this appeal. The preliminary objection is taken that the Court-fee paid, Rs. 10, is insufficient. The order refusing to file the award is a decree, and the question in dispute is whether the Court-fee payable on the appeal is to be fixed under article 1 of Schedule I of the Court Fees Act or under

article 17 (vi) of Schedule II. It is contended that if the appellant had sued for partition of the joint family property, the Court-fee on the plaint would have been only Rs. 10, and that the Court-fee for the appeal should be the same. For the proposition that the Court-fee on the plaint in such a suit is Rs. 10, reliance is placed upon *Kirty Churn Mitter* v. *Annath Nath Deb* (1) and *Mohendro Chandra Ganguli* v. *Ashutosh Ganguli* (2). A Bench of this Court, in *Reference under Court Fees Act, section 5* (3), refused to follow the above decision and held that a suit for partition of joint family property is chargeable with an *ad valorem* fee. In *Velu Goundan* v. *Kumaravelu Goundan* (4), the same view was accepted though the point does not appear to have been argued, the actual matter decided being that the value of the suit for the purpose of jurisdiction was the amount at which the plaintiff valued his share. The Calcutta High Court in a recent decision in *Bidhata Roy* v. *Ram Charitra Roy* (5) have dissented from the view taken in *Reference under Court Fees Act, section 5* (3) and *Velu Goundan* v. *Kumaravelu Goundan* (4). If the Court-fee is to be fixed under article 1 of Schedule I of the Court Fees Act, it is, we take it, because the suit is considered to fall under section 7, clause (iv) (*b*) of the Court Fees Act. We find considerable difficulty in holding that a suit for partition of joint family property, when the plaintiff—as here—is in joint possession with the other co-parceners, falls under this provision. From the statements made at the bar it does not appear that the practice in this Court has been uniform. The question is one likely to arise frequently, and we think it should be definitely settled. We, therefore, refer to a Full Bench the question whether, in a suit for partition of joint family property where the plaintiff is in joint possession with the other co-parceners, the fee is to be fixed under article 1 of Schedule I of the Court Fees Act or under article 17 (vi) of Schedule II of the Act.

OPINION OF THE FULL BENCH.

White, C. J.—The point which has been referred to us is by no means free from difficulty.

I think section 7 (iv) (*b*) of the Court Fees Act, 1870, applies when the right, which is sought to be enforced, is a right to share as a separate sharer in joint family property, in other words, it applies to the ordinary suit for partition.

It was argued that section 7 iv (*b*) of the Court Fees Act only applies when the right which is sought to be enforced is a right to share as a joint sharer in joint family property, but it seems to me it is not likely that the legislature would have intended to make specific provision for a comparatively rare form of action and to make no specific provision for a very common form of action.

If 'to share' in section 7 iv (*b*) means to share as a separate sharer, the Court-fee, in a suit for partition of joint family property when the plaintiff is in joint possession with the other co-parceners, is otherwise provided for, is governed by section 7 iv (*b*), and is *ad valorem*.

I have had the advantage of reading the judgments which my learned brethren are about to deliver and I agree with Krishnawsami Aiyar, J., that our answer to the question which has been referred to us, should be that article 1 of the 1st Schedule of the Court Fees Act applies.

Krishnaswami Aiyar, J.—The question, stated in the order of reference for our decision, is as follows :—

"Whether, in a suit for partition of joint family property where the plaintiff is in joint possession with the other co-parceners, the fee is to be fixed under article 1 of Schedule I of the Court Fees Act or under article 17 (vi) of Schedule II of the Act."

Whichever of the two provisions applies, we have first of all to determine what is the "subject-matter in dispute."

The plaintiff being in joint possession of the whole, whether that possession is actual or constructive, seeks to convert that into separate possession of his share. It may, therefore, be said that the value of the subject-matter in dispute is the difference between the value of the separate possession of the share and the value of the joint possession of the whole or, as it has been well put in *Rugendro Loll Gossami* v. *Shama Churn Lahoory* (6), "It is the value of the convenience of changing the form of the enjoyment of the plaintiff's share." It seems

(1) 8 C. 757.
(2) 20 C. 762.
(3) 4 M. L. J. 110.
(4) 20 M. 289.
(5) 6 C. L. J. 651; 12 C. W. N. 37.
(6) 4 C. L. R. 417.

S. N. DAR, B. A. LL. B.,
Vakil High Court,
SRINAGAR (Kashmir)

to me that it may at once be conceded that it is not possible to estimate this difference in value or this convenience in the form of the enjoyment at a money value. But this concession is not enough to settle the application of article 17 (vi) of the 2nd Schedule to the Act. It is further necessary, to bring the case within the article, that it is not otherwise provided for by the Act. And herein lies the difficulty.

If either section 7 iv (*b*) or section 7 (v) should be applicable, there would be a provision under the Act which would exclude the application of article 17 (vi). The referring order does not ask us to decide between section 7 iv (*b*) and section 7 (v). The learned Judges who have made the reference say that as between these two clauses section 7 iv (*b*) would apply to the present case if article 17 (vi) was out of the case. Section 7 iv (*b*) empowers the plaintiff to state the amount of the value of the relief sought. Section 7 (v) prescribes special rules for ascertaining the value. But in both the cases, the fee payable is *ad valorem* under article 1 of Schedule I of the Court Fees Act.

Section 7 iv (*b*) is in these terms: "In suits to enforce the right to share in any property on the ground that it is joint family property." What is the meaning of this clause? Does it cover a suit for partition of joint family property where the plaintiff is in joint possession. It has no application where the property is not the property of a joint family. It must be admitted that a suit by a tenant in common in joint possession for the partition of the common property not belonging to a joint family cannot fall under this clause. As the relief in such a case cannot be estimated at a money value, article 17 (vi) is the only provision applicable. But it does not follow from this, as suggested by Mr. Justice Mookerjee in *Bidhata Roy* v. *Ram Charitra Roy* (5), that where the property belongs to a joint family, the suit to enforce the right to share in it may not fall within the special provision enacted in section 7 iv (*b*). It has been argued that the language of the clause is not "to enforce the right to a share in the property" but "to enforce the right to share." This difference, it is said, indicates that the clause does not deal with the common suit for partition amongst the members of a Hindu family, but with the possible case of a co-parcener suing for joint possession where he has been excluded from it or for participation in the profits of the common property or it may be for a mere declaration of the right to joint possession coupled with a claim to participation in any benefit to which the joint family is entitled. Without, in any way repudiating the possibility of such cases being within the scope of the clause in question, [as to which, compare *Gundo Anandrav* v. *Krishnarav Govind* (7) and *Muttakke* v. *Thimmappa* (8)], we may ask the question whether it is at all likely that special provision is made in this clause for such rare cases without dealing with the common case of a suit for partition by a co-parcener in possession. It may also be pointed out, adopting the language of Candy, J., in *Raoji* v. *Bala* (9), with reference to similar words in article 127 of the Limitation Act, that the clause provides for a suit "to enforce the right" and not "to establish the right." It has also to be borne in mind that the clause in question does not deal with a suit *to share* in any property which would be more susceptible of the meaning of participation in enjoyment but of a suit to enforce the right to share. Stress has been laid upon the fact that the clause uses the verb 'to share' and not the noun 'share.' And it is argued that if a co parcener's suit for partition was intended to be covered by the clause, the clause would run "in suits to enforce the right to a share in any property." But there seems to be no point in this observation, for the language of the clause is more in accordance with the theory of the Hindu Law as regards a co-parcener not being entitled to a definite share until actual partition. He is only entitled to share in the joint family property until partition and becomes entitled to a definite share when a decree for partition is made in the suit. As observed by the Privy Council in *Appovier* v. *Rama Subba Aiyan* (10), "according to the true notion of an undivided family in Hindu Law, no individual member of that family, whilst it remains undivided, can predicate of the joint and undivided property that he, that particular member, has a certain definite share." In *Pirthi Pal Singh* v.

(7) 4 B. H. C. R. A. C. 55.
(8) 15 M. 186 at p. 191.
(9) 15 B. 135.
(10) 11 M. I. A. 75 at p. 89; 8 W. R. P. C.) 1.

Thakur Jewahir Singh (11), their Lordships again observed: "Until partition no member of a joint Hindu family is entitled to a definite portion of the family estate." There appears to be, therefore, no objection to the legislature having avoided the phrase 'a right to a share' and preferred the expression 'a right to share.' But it has been further argued that the words "on the ground that it is joint family property" preclude the construction that a suit for partition is covered by the clause. This result is arrived at by construing the phrase "on the ground that it is joint family property" to mean "on the ground that it is property of a continuing joint family." There appears to be no warrant for so understanding the words of the clause. There is a joint family at the date of the suit. The plaintiff's right to have the property divided is on the ground that the property belongs to the joint family on that date. There is no further cause of action necessary to entitle the plaintiff to sue. The fact that it is joint family property is sufficient to entitle a co-parcener without more to claim his share by partition. I am unable, therefore, to accept the reasoning of the Bombay High Court in *Dogdu* v. *Totaram* (12) or of the Calcutta High Court in *Bidhata Roy* v. *Ram Charitra Roy* (5). The former of these cases is not in accord with the decision in *Motibhai* v. *Haridas* (13) and it is not clear whether it was a case where the plaintiff was in joint possession. There is no force in the remark that, as the other clauses of section 7 (iv) deal with reliefs incapable of valuation, section 7 iv (*b*) should only be understood as referring to an abstract claim or right, for, as already pointed out, a suit by a co-parcener in possession for division of his share is not capable of estimation at a money value. It may be a good argument against allowing a suit by a co-parcener out of possession for division or joint possession to fall within it. The Calcutta case merely refuses to disturb the current of authority in that Court as established by the decisions in *Kirty Churn Mitter* v. *Aunath Nath Deb* (1) and *Mohendro Chandra Ganguli* v. *Ashutosh Ganguli* (2). It may be that the actual decision in *Wali Ullah* v. *Durga Prasad and Saidan* (14) is open to no exception as the plaintiff there does not appear to have been in joint possession when he asked for partition. This is, however, apart from the question of the correctness of the approval there expressed of the Calcutta cases. But whatever doubts may still exist as regards the cogency of the above reasoning, they seem to me to be completely set at rest by the corresponding language of the various Limitation Acts and the interpretation that has been uniformly placed upon it. When the Court Fees Act was passed, the Limitation Act in force in the country was Act XIV of 1859. Section 1 clause 13 of that Act ran as follows: "To suits to enforce the right to share in any property movable or immovable on the ground that it is joint family property—the period of twelve years" from certain specified dates. Now it will be noticed at a glance that the difference between the first portion of this clause and section 7 iv cl. (*b*) is that "in" is substituted for the opening word "*to*" and the words "movable or immovable" are omitted. Being a law of Limitation, the rest of the clause proceeds to specify a starting point for the running of the prescribed period. And it may also be that the clause assumes that the plaintiff is out of possession, though there are no express words to say so, for otherwise limitation ought not to be allowed to run against him. The fact, therefore, that the clause of the Limitation Act is applied to a plaintiff out of possession while the clause of the Court Fees Act is sought to be applied to a co-parcener in possession has no bearing upon the interpretation of the words "to enforce the right to share in any property on the ground that it is joint family property" which are words common to both the enactments. Act IX of 1871, which introduced into the 1st column of article 127 the result of judicial decisions as to the plaintiff contemplated being one out of possession, made no change whatever in the rest of the language of the 1st part of the old clause. The words "to enforce a right to share" were retained as before. The article ran thus: "By a Hindu excluded from joint family property to enforce a right to share therein." The same language has been retained in the Limitation Acts of 1877 and 1908 with the mere change of the

(11) 14 I. A. 37 at p. 59 ; 14 C. 493.
(12) 33 B. 658; 11 Bom. L. R. 1074; 4 Ind. Cas. 243.
(13) 22 B. 315.
(14) 28 A. 340; A. W. N. (1908) 38; 3 A. L. J. 81.

word "Hindu" into "person." Clause 13 of section 1 of Act XIV of 1859 and article 127 of the subsequent Limitation Acts have always been construed by the Privy Council and by the Courts in India as applicable to suits for partition by a co-parcener in a Hindu joint family. Section 7, clause iv (*b*), of the Court Fees Act, which followed almost *verbatim* the language of clause 13 of section 1 of the Limitation Act of 1859, is bound to receive the same construction. In *Lakshman Dada Naik* v. *Ramachandra Dada Naik* (15) and *Appasami Odayar* v. *Subramanya Odayar* (16), the Privy Council construed the provision of the first Limitation Act. In the latter case they said: "By section 1, clause 13, of Act XIV of 1859, a suit for a share of the family property not brought within 12 years from the date of the last participation in the profits of it would be barred". The same view was taken by the Indian High Courts. See *Wooma Soonduree Dossee* v. *Dwarkanath Roy* (17); *Gossain Dass Koondoo* v. *Seroo Koomaree Debia* (18); *Govindan Pilai* v. *Chidambara Pillai* (19) and *Hansji Chhiba* v. *Valabh Chhiba* (20). Article 127 of the Limitation Act of 1871 received the same construction. [*Kali Kishore Roy* v. *Dhunnjoy Roy* (21)]. The same interpretation was put upon the provision of the Limitation Act of 1877 both by the Privy Council and by the High Courts in India. *Rai Rugunath Bali* v. *Rai Maharaj Bali* (22); *Pirthi Pal Singh* v. *Thakur Jewahir Singh* (11); *Hari* v. *Maruti* (23) and *Nilo Ramchandra* v. *Govind Balla* (24). The remark in *Muttakke* v. *Thimmappa* (8), where, speaking of a suit for a declaration that plaintiff as a member of an Aliyasantana family was joint in estate with the defendants and that he was entitled to the registry in his name of the family property, the Court said that article 127 did not refer to a suit for a share, must be treated as erroneous in view of the overwhelming consensus of opinion already noticed. In the light, therefore, of the provisions contained in the various Limitation Acts and especially of the language of clause 13, section 1, of Act XIV of 1859 and the interpretation uniformly placed on them, it is impossible to resist the conclusion that section 7, clause iv(*b*), of the Court Fees Act, does apply to a suit by a co-parcener in possession for partition of joint family property. This view is in accordance with the opinion expressed in *Velu Goundan* v. *Kumarvleu Goundan* (4). The case in *Reference under Court Fees Act, section* 5 (3) was not one of joint family property and could not, therefore, fall under section 7, clause iv (*b*).

During the course of the argument, the question was raised whether section 7, clause v, was not the more appropriate provision. Reference was made to *Balvant Ganesh* v. *Nana Chintamon* (25) and *Dagdu* v. *Totaram* (12) as in support of that view. It is not clear from the facts set out in these cases whether the plaintiff was in joint possession at the date of suit. It is impossible, therefore, to rely on them as any authority for the view that section 7, clause v, is applicable to a suit where the plaintiff in possession seeks for partition. The learned Judges who made the reference have not stated any question for our consideration as to whether any, and if so, what suits for partition would fall under that clause.

Nor is it necessary for us to express any opinion on the question which was referred to, though not fully discussed, in the course of the argument whether a suit for joint possession by a co-parcener excluded from possession would fall within section 7 clause iv(*b*) or section 7 clause v of the Court Fees Act. When such a question arises it will be material to consider whether a suit for joint possession is not as much a suit for possession as a suit for exclusive possession and whether, both kinds of suits being in ejectment, (see William on Ejectment p. 178 and Freeman on Co-tenancy, sections 290 and 293) they should not both be held to fall within section 7 (v).

I would answer the question referred by saying that article 1 schedule I applies.

Ayling, J.—I agree in the view expressed by Batchelor and Beaman, JJ., in *Dagdu* v. *Totaram* (12) that a suit to recover by partition a definite and ascertained share of specified property cannot fall under section 7 iv(*b*) of the Court Fees Act. This clause appears to be designed to cover merely the rare, but quite possible, cases where the

(15) 5 B. 48.
(16) 15 I. A. 167; 12 M. 26.
(17) 11 W. R. 72.
(18) 19 W. R. 192.
(19) 3 M. H. C. R. 99.
(20) 7 B. 297.
(21) 3 C. 228.
(22) 12 I. A. 112; 11 C. 777.
(23) 6 B. 741.
(24) 10 B. 24.
(25) 18 B. 209.

plaintiff's status as a co-parcener is in dispute, and is sought to be enforced. On this view alone, its inclusion with the other cases of doubtful or difficult valuation contained in the section is intelligible. I do not think it is safe to proceed by analogy of the way article 127 of the Limitation Act has been interpreted.

If section 7 iv(*b*) be ruled out, such a suit must fall under article 17 (vi) of Schedule II or under section 7 (v) of the Court Fees Act. I have no hesitation in concurring in the opinion of Garth, C. J., in *Kirty Churn Mitter* v. *Aunath Nath Deb* (1), as to the correct method of regarding the relief claimed in suits for partition by a co-parcener who is in joint enjoyment at the time of suit; his prayer is merely to change the form of enjoyment and could only be valued by deducting from the value of his share as ascertained in partition the value of his beneficial enjoyment as co-parcener before partition. Apart from personal considerations, which it is impossible to appraise, the two should be equal. It appears to me eminently a case in which it is impossible to estimate in money the value of the suit. To tax such a suit on the value of the partitioned share without deduction under section 7 (v) seems to me inequitable. This point of view does not appear to have been presented to the Court either in *Velu Goundan* v. *Kumaravelu Goundan* (4), *Motibhai* v. *Haridas*, (13) or *Dagdu* v. *Totaram* (12).

In *Wali Ullah* v. *Durga Prasad* and *Saidan* (14), the remarks of Garth, C. J. are quoted with approval. But the learned Judges decided that an *ad valorem* fee was leviable under the circumstances of the case under disposal. The plaintiff appears to have been the purchaser of the undivided share of a co-parcener, and the suit was brought to establish his title and to recover possession of his share, the claim of partition being added merely to make the relief sought effectual. Such a case is easily distinguishable from the suit of a co-parcener in joint possession, who merely seeks to convert his joint possession into separate enjoyment.

In *Balwant Ganesh* v. *Nana Chintamon* (25) also, Garth C. J.'s *dictum* is quoted with approval, though in the case under disposal, a different decision was arrived at—on what grounds, it is not easy to say

For the above reasons, I think the Court fee should be fixed in cases of the class referred to under section 17 (vi) of Schedule II.

MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 115 OF 1907.

October 11, 1910.

Present:—Sir Arnold White, KT., Chief Justice, and Mr. Justice Ayling.

VENKATACHARIAR (MINOR) THROUGH HIS FATHER AND GUARDIAN ATHAN KEELA TIRUMALIGAI APPAVA CHARIAR SWAMI—APPELLANT

versus

ATHAN SADAGOPA CHARIAR SWAMIGAL AND OTHERS—RESPONDENTS.

Will, construction of—Hindu Law—Achariya Purusha, *devise by*—'Svikara nemanam', *meaning of—Adoption—Will recognizing a person as heir, and directing legatee to perform spiritual functions—Devise to a* persona designata*—Declaration as to invalidity of adoption—Specific Relief Act (I of 1877), s. 42.*

A Hindu testator, who belonged to the class of *Achariya Purushas*, by his last Will and testament made a '*Svikara nemanam*' of appellant. The Will recited that the appellant was the testator's heir and was to perform the various religious and spiritual duties performed by the executant (who was an *Achariya purusha*) and receive the honours and emoluments attached to the same:

Held, (1) that, apart from the question of the validity of the '*svikara nemanam*' (adoption) of the appellant, the Will was valid and enforceable as a devise to a '*persona designata*'.

Nidhoomoni Debiya v. *Saroda Pershad Mukerjee*, 3 I. A. 253; 26 W. R. 91, applied.

Fanindra Deb Raikat v. *Rajeswar Dass*, 12 I. A. 72; 11 C. 463, referred to.

(2) that by the use of the words '*svikara nemanam*' in the Will, the testator meant to make a nomination subject to all its legal consequences.

A. S. No. 12 of 1903, referred to.

(3) that while passing a decree, establishing appellant's rights under the Will, it was discretionary with the Court to make or not a declaration against adoption of the appellant.

Chinnasawmi Mudeliar v. *Ambalavana Mudeliar*, 29 M. 48, distinguished.

Appeal against the decree of the Subordinate Judge's Court of Tuticorin, in Original Suit No. 21 of 1904.

Judgment.—The plaintiffs sue as the nearest reversioners of the late Sadagopa Chari of Alwar Tirunagari to set aside a Will alleged to have been executed by him on the 26th June 1903, and an adoption of the 2nd defendant said to have been made by him on the same day: also for the recovery of various properties of the said Sadagopa Chari in the

hands of the 2nd defendant and for sundry incidental reliefs. There was an alternative prayer for partition in case the Court found that there was a valid adoption.

The Subordinate Judge found that there was no adoption: that the alleged Will (Exhibit II) was executed by Sadagopa Chari while in a sound and disposing state of mind: but that it was intended by him merely as an instrument giving his widow (1st defendant) authority to adopt, and, therefore, conveyed no right to the 2nd defendant. He, therefore, gave a decree awarding the plaintiffs the first set of reliefs sued for.

The main contention now set up by the appellant (2nd defendant) is that, apart from any question of the fact and validity of the adoption, Exhibit II operates as a valid and effective Will in his favour, giving him an indisputable title to the plaint properties and that the suit should, therefore, have been dismissed. This contention appears to be sound.

A reference to the heading of the document Exhibit II, shows that it purports to be a Will: and it is certainly drawn up in the form of one. That it bears the signature of Sadagopa Chari, not only at the end, but at the foot of each sheet is not seriously disputed. The evidence as to the mental and bodily condition of the testator on the 26th June 1903, is conflicting; but the balance is certainly on the side of the appellant's contention that at the time of execution he was in a sound and disposing state of mind. The evidence to the contrary (of plaintiffs' witnesses Nos. 12—15) is interested and untrustworthy and cannot be accepted against that of the Sub-Registrar (defendant's witness No. 8). The latter deposes that he was called to the house to register the Will which he read out to the testator, who was emaciated and weak but in full possession of his mental powers. Numerous other witnesses speak to the same effect. Sadagopa Chari lived for 13 days afterwards and there is nothing in the nature of his illness to suggest that he would be either unconscious or in any way affected in mind, so long before his death.

The Subordinate Judge has, in fact, recorded a definite finding which is fully warranted by the evidence, *i. e.*, that Sadagopa Chari was of a sound and disposing state of mind at the time he executed Exhibit II (*vide* paragraph 62 of his judgment).

Further on, however, on grounds which are extremely difficult to understand, he comes to the conclusion that "the mind of the testator was not alert enough to control the terms of the Will and to see that the idea he entertained was expressed in clear and unambiguous language"; the said idea being, according to the Subordinate Judge, nothing more than to give his widow, the 1st defendant, power to adopt the appellant, the 2nd defendant.

The Will in question is a long document which contains nothing to support such an idea. It begins by reciting that the executant, being in fear of death, has that day made adoption (*Svikara nemanam*) of the appellant and then proceeds in the most methodical way to declare the appellant his heir, and to direct that he (the appellant) shall perform the various spiritual and religious duties performed by the executant (who was an Accharaya Purusha) and receive the honours and emoluments attached to the same. The exact meaning of the words, *Svikara nemanam*, are in dispute: but neither side in this Court supports the Subordinate Judge's view that it signifies the nomination of a boy for the purpose of subsequent adoption, and we see no reason to adopt such an interpretation. We find it impossible to understand how the Subordinate Judge, in the face of his previous finding (based on recorded evidence) as to the testator's mental state, could have arrived at such a conclusion which in effect makes nonsense of his earlier finding on issue No. 6.

Almost the only reason assigned by the Subordinate Judge in support of his view is that Sadagopa Chari believed his wife to be pregnant at the time, and would thus be very unlikely to execute such a document as Exhibit II, if he understood its contents. The evidence of this supposed pregnancy is very untrustworthy and we regard it as certain that if Sadagopa Chari had had any such idea in his mind, he would not have hesitated to make provision for the contingency of the birth of a posthumous son. The suggestion that he was prevented by feelings of delicacy from even referring to it in plain terms, and that the phrase "existing daughter" contains a subtle implication of such a notion, we can only characterise as ridiculous.

Returning to the provisions of Exhibit II, it will be found that after simply reciting the fact of adoption, each of the successive provisions is made in favour of Venkata Chariar by name without any qualifying description as adopted son or otherwise. It is in fact a clear case of devise to a "*persona designata*" of a similar character to that dealt with in *Nidhoomoni Debya* v. *Sarola Pershad Mookerjee* (1). The respondents' contention in this connection is thus worded by his Vakil:—

"The testator believed that he held a spiritual office; that he was competent, unlike ordinary Hindus, to adopt himself by nominating a successor to that office: and that by virtue of such a nomination the nominee became his adopted son for all purposes. Believing that he had made such a nomination, he executed Exhibit II. The devise by the latter was conditional on appellant having previously acquired the status of an adopted son by the procedure above indicated: and it was only in such capacity that he intended appellant to benefit."

He seeks in fact to bring the case under the ruling in *Ramindra Deb Raikat* v. *Rajeswar Dass* (2).

Whether this point was argued before the Subordinate Judge is doubtful: it is certainly not referred to in his judgment, nor is it deducible from the pleadings. It depends entirely on the testator having been under some misapprehension as to the acquisition by the devisee of some status prior to the execution of the Will. In the reported case the testator had made an adoption of the devisee which was found to be invalid as being contrary to a special family or caste custom.

In the present case, we cannot find ground for holding that the testator was under any misapprehension at all. Supposing him to be, as has been found, in a sound and disposing state of mind, he could not possibly have been under any mistake as to the *fact* of any act or ceremony he may have performed: any misconception could only have related to its legal effects. The learned Vakil for the respondents suggests that what Sadagopa Chari had done, was not an adoption in the ordinary Hindu sense of the term by giving and taking of a boy, but the appointment of a spiritual successor indicated by the phrase "*nemanam.*" The appellant, of course, maintains that an ordinary adoption had been effected. The use of the double-barrelled phrase "*Sivkara nemanam*" in Exhibit II may suggest that both had been done. But assuming, for the sake of argument, that Sadagopa Chari had merely effected an adoption by nomination (if the phrase may be permitted), what reason is there for holding that he was under any misconception as to its legal results? It is suggested that this Court in disposing of A. S. No. 12 of 1903 decided certain questions as to the nature of the property held by members of the same Achariya Purusha family and the effect of nomination of heirs among them in such a way as would, had it been known to Sadagopa Chari, have deterred him from executing this Will. Exhibit XVIII is the judgment in the case in question, which was disposed of in November 1904. Now all the judgment says is this. The property of these Achariya Purushas, except in so far as it consisted of *inams* attached to temple offices, is ordinary private property, and not in any way similar to that attached to *mutts* and other religious foundations. As to the devolution of the *inams*, the judgment decides nothing, the point not being in dispute; but as regards the other property the nomination is found to operate as an oral Will and to convey full rights to the person nominated. As to the post of *guru*, which is presumably what Sadagopa Chari had in mind when he referred in Exhibit II to the performance of *Samashrenam*, *Mantropadesam etc.*, the judgment says the nomination "could hardly be said to carry with it any rights in the legal sense of the term. At the best it could only be treated as a desire by deceased that the profession of *guru* carried on by him should be continued by the plaintiff and it would be for the disciples to determine whether the plaintiff should be accepted as successor to their deceased spiritual preceptor."

We can find nothing in the above in conflict with the views which Sadagopa Chari might reasonably be supposed to have held regarding the effect of a nomination. We say "supposed," because there is absolutely no evidence on the point. The judgment recognises nomination of an heir as carrying with it

(1) 3 I. A. 253; 26 W. R. 91.
(2) 12 I. A. 72; 11 C. 463.

just the same right to property as an oral Will : it leaves its effect on the *guruship* in the hands of the disciples (which must always be the case), and it does not touch the question of succession to the Temple Offices. Supposing the effect of this pronouncement to have been made known to Sadagopa Chari on the morning of the 25th June 1903, there is no reason to suppose that it would, in any way, have affected his subsequent proceedings.

We do not find any reason for refusing to give effect to the Will on the ground that there was a condition precedent to it which has not been fulfilled.

A further point raised by the respondents' Vakil, which calls for some remark, relates to the alienability by Will of portions of the plaint property. We do not understand this plea to be set up in connection with any items except the *inams* attached to Temple Offices. The other property enjoyed by Sadagopa Chari would, if the decision in A. S. No. 12 of 1903 were applied, be alienable by Will like ordinary Hindu private property. Whether the *inams* can be transferred by Will is a debateable point, raising questions of mixed law and fact. It is an entirely new plea. Not only is it covered by none of the issues, but nowhere is it raised in the plaint. There are passages both in the plaint and in the written statement of the appellant, in which the plaint properties generally are spoken of as attached to an *adhinam* though other passages refer to the *full rights* of the holders (*e. g.* paragraph 10 of the plaint). But nowhere in the plaint is there any suggestion that the Will is ineffective for this reason : or drawing any distinction between the temple service *inams* and other plaint items. We do not consider that a plea of this kind can be allowed to be set up now.

The suit must, therefore, fail in so far as it relates to the setting aside of the Will and the recovery of the property transferred by the latter. The respondents' Vakil contends that he is nevertheless entitled to a declaration against the adoption, unless the finding of the Subordinate Judge on issue No. 5 is reversed. We do not think this can be admitted. The grant of a declaration under section 42, Specific Relief Act, is discretionary with the Court ; and in the present case if the Will is held to be efficacious, no legal character or right to property is involved. The respondent relies on *Chinnasami Mudaliar* v. *Ambalavana Mudaliar* (3) but that case is clearly distinguishable on the ground that the disputed adoption there involved the admission of the alleged adopted son to a co-parcenary with his father, who was plaintiff in the suit.

The Subordinate Judge's decree must be set aside and the suit dismissed with costs in both Courts.

Suit dismissed.

(3) 29 M. 48.

MADRAS HIGH COURT.

FULL BENCH.

SECOND CIVIL APPEAL No. 7 OF 1908.

November 3, 1910.

Present:—Sir Arnold White, KT., Chief Justice, Mr. Justice Krishnaswami Aiyar and Mr. Justice Ayling.

NARAYANAN CHETTY AND ANOTHER—APPELLANTS

versus

MUTHIAH SERVAI AND OTHERS—RESPONDENTS.

Lease—Agreement to lease—Registration—Admissibility, in a suit for specific performance—Registration Act (III of 1877), ss. 3, 17 (d),49—Transfer of Property Act (IV of 1882), s. 4—Trusts Act (II of 1882), s. 91.

An agreement in writing to grant a lease, which requires registration, cannot be received in evidence in a suit for specific performance of such agreement, whether possession was or was not granted in pursuance of the agreement.

Rajah of Vencatagiri v. *Narayana Reddi*, 17 M. (F. B.) 456, followed.

Konduri Srinivasu Charyulu v. *Gottumukala Vencataraja*, 17 M. L. J. 218, overruled.

Banjaraya Raju Garu v. *Jagannatha Raju Garu*, 1 M. W. N. 485, 7 M. L. T. 278; 5 Ind. Cas. 615, explained and distinguished.

S. A. No. 973 of 1904, dissented from.

Satyendra Nath Bose v. *Anil Chandra Ghosh*, 14 C. W. N. 65 ; 5 Ind. Cas. 38, dissented from.

Section 49 of the Registration Act consists of two parts. It provides first "that no document, required by section 17 to be registered, shall affect any immovable property comprised therein". The second part of the section says that such a document "shall not be received as evidence of any transaction affecting such property," *i. e.*, the immovable property comprised therein. As regards the immovable property, other than that comprised in the instrument or a transaction in respect thereof, the section contains no prohibition against the admissibility of the instrument. The two parts of the section deal with different subjects. The first part pre-supposes that the document itself is the transaction or the mode in which it is carried out. The second part relates to cases where the document itself is not the trans-

action, but is only the record of a transaction, or being itself a transaction contains a reference to or a recital of another transaction which affects the immovable property comprised therein.

Second appeal against the decree of the District Court of Madura, in Appeal Suit No. 458 of 1906, presented against the decree of the Court of the District Munsif of Sivaganga, in Original Suit No. 315 of 1905.

This second appeal coming on for hearing on Tuesday, the eighth day of February, 1910, before their Lordships Mr. Justice Benson and Mr. Justice Krishnaswami Aiyar and having stood over for consideration till Thursday, the 31st day of March 1910, the Court made the following

ORDER OF REFERENCE TO THE FULL BENCH.

Benson, J.—I am not at present satisfied, that the decision in the case of *Konduri Srinivasa Charyulu* v. *Gottumukkalu Venkataraja* (1) is not in accordance with the principle underlying the decision of the Full Bench in *Raja of Venkatagiri* v. *Narayana Reddi* (2) and does not govern the present case. It is not, however, altogether easy to appreciate the grounds on which the Full Bench proceeded. The question before us, is one of great importance and of considerable difficulty. I am, therefore, of opinion that a reference to the Full Bench in the terms proposed by my learned brother is desirable.

Krishnaswami Aiyar, J.—The suit is to compel specific performance of an agreement to give the plaintiff a sub-lease. Exhibit A, which is called a receipt, is in terms a promise to execute a sub-lease and to get it registered on a future date. The document comes within the definition of a lease in section 3 of the Registration Act and is compulsorily registrable under clause (*d*) of section 17. The Courts below have dismissed the suit holding that the document was inadmissible in evidence and that the suit, therefore, was not maintainable. The appellant's Vakil relies upon the Full Bench decision in *Raja of Venkatagiri* v. *Narayana Reddi* (2) and *Konduri Srinivasa Charyulu* v. *Gottumukkala Venkataraja* (1) (Wallis and Boddam, JJ., not Wallis and Benson, JJ., as incorrectly stated in the report). If the latter case is correctly decided, the appellant is entitled to succeed. In *Raja of Venkatagiri* v. *Narayana Reddi* (2), the question was as to the admissibility of a *qabuliat* executed by the lessee in proof of a contract on the part of the lessor to execute a cowle and to get the *qabuliat* registered. The action itself was for damages "for the breach of contract on the part of the defendant in refusing to register the *qabuliat* and to give the plaintiff a cowle and also in disturbing his possession." The contract to grant a cowle was not in writing. A draft cowle prepared by the plaintiff had not been executed by the defendant. The contract to grant a cowle and to register the *qabuliat*, could only be regarded as oral. No question could properly be raised with regard to the admissibility of the *qabuliat* in evidence of such an oral contract. The *qabuliat* which was in writing and came within the definition of lease, required registration and was inadmissible under section 49 to prove transaction affecting immovable property. But it was apparently thought that there was nothing to prevent its admissibility to prove the perfectly valid oral agreement to grant a cowle and to register the *qabuliat*. The decision of the Full Bench, therefore, in allowing the *qabuliat* to be received in evidence of the contract to grant a cowle and to register the *qabuliat* is not an authority for the position that an unregistered lease or agreement to grant a lease can be used in evidence for proving the lease or the agreement to grant it; see, however, the judgment of Subramania Aiyar and Miller, JJ., in S. A. No. 973 of 1904. It was argued that in a suit for specific performance, the written agreement to grant the lease is not used as evidence of a transaction affecting immovable property. It was also contended that it is only a lease that creates an interest in the property and not a mere agreement to give a lease and in the absence of creation of any interest in the lessee, we cannot speak of an agreement to grant a lease of immovable property as affecting the immovable property. It is difficult to accept this argument. Section 49 provides that a document required by section 17 to be registered shall not affect the immovable property comprised therein and further that it shall not be received as evidence of any transaction affecting such property. Can it be said that an agreement to grant a lease of immovable property is

(1) 17 M. L. J. 218.
(2) 17 M. 456.

not a transaction affecting the property? Such an agreement creates an equitable interest in favour of the promisee, (see Fry on Specific Performance, 4th Edition, page 589) and must, therefore, be regarded as a transaction affecting the property though it does not amount to the transfer of an interest under the Transfer of Property Act. Courts of equity treat a tenant in possession under an instrument, which would be specifically enforceable, as in the same position as if a valid lease were in existence—see Redman's "Landlord and Tenant" page 130—and in the present case possession was given under Exhibit A. Section 17 of the Act requiring the registration of the agreement to lease, it is difficult to suppose that section 49, which renders the unregistered document inadmissible, allows the admissibility of the document to prove the agreement on the ground that it does not affect the immovable property comprised in it. Why should registration of an agreement to lease be compulsory if the transaction can be proved by an unregistered instrument? It may be said that the provision for compulsory registration of an agreement to lease has sufficient scope for its operation in the fact that non-registration subjects the instrument to the risk of priority of a later instrument registered. But this is not a sufficient reason for including agreements to lease in section 17 and not in section 18. For the rule as to priority applies to optionally registrable instruments as well. It seems also proper to bear in mind that having specified in clause *(b)* of section 17 instruments creating a right in immovable property of one hundred rupees and upwards, the legislature has taken care to except from this clause "a document not itself creating such an interest but merely creating a right to obtain another document which will when executed create such an interest." The enactment of the exception is some evidence to show that but for it, a document, which is only an agreement to execute another, may be deemed to affect the property comprised in it. As an agreement to grant a lease, however, falls within clause *(d)* and not within clauses *(b)* and *(c)*, in respect of which the exception referred to has been enacted, it may well be considered that, by the inclusion of the agreement to give a lease in the very definition of a lease and the separate specification of leases of immovable property in clause *(d)* of section 17 as requiring registration, the legislature has indicated that agreements to lease immovable property do create an interest in such property or at all events affect such property so as to render the unregistered agreement to lease inadmissible in evidence of the transaction.

It is worthy of remark that the Full Bench in *Raja of Venkatagiri* v. *Naragana Reddy* (2) did not dissent from the decision in *Hurjivan Viriji* v. *Jamsetji Nowroji* (3), where the suit was to compel the defendant to produce the document for registration or to execute another document and duly register the same or to recover damages for wrongfully preventing the registration of the document already executed and the suit was dismissed on the ground that the document could not be received as evidence of the contract between the parties. The Full Bench merely observed that the High Court of Bombay had overlooked the prayer for damages for non-registration of the document. The authority of the Bombay decision as regards the non-admissibility of the document, so far as the suit was for specific performance of the contract to give the lease, is not rejected. But if the case of *Konduri Srinivasa Charyulu* v. *Gottumukkala Venkataraja* (1) be correctly decided, the appellant is entitled to judgment. That was a suit for specific performance of an agreement to grant a lease. This Court was of opinion that the Full Bench decision in *Raja of Venkatagiri* v. *Narayana Reddy* (2) was authority for the view "that the document embodying the agreement to lease does not require registration to be admissible in evidence where it is only used for the purpose of proving the contract for the breach of which the action is brought." The Full Bench did not use the unregistered *qabuliat* to prove a written contract to grant the lease but to prove an oral agreement to grant a cowle (for the draft cowle had not been executed) and to register the *qabuliat*. There appears, therefore, to have been a misapprehension in *Konduri Srinivasa Charyulu* v. *Gottumukkala Venkataraja* (1) as to the true grounds of decision in *Raja of Venkatagiri* v. *Narayana Reddy* (2), if I have understood it aright. I may add that we have found some difficulty in appreciating the grounds of that decision. As I entertain doubts about the correctness of the decision in *Konduri Srinivasa Charyulu*

(3) 9 B. 63.

v. *Gottumukkala Venkataraja* (1), I think it desirable to refer to the Full Bench the following question:

"Whether an agreement in writing to grant a lease which requires registration can be received in evidence in a suit for specific performance of such agreement, (1) where possession is given in pursuance of the agreement, (2) where it is not."

Mr. *C. S. Venkata Chariar*, for the Appellant.

Mr. *S. Srinivasa Aiyangar*, for the Respondents Nos. 2 to 5.

OPINION OF THE FULL BENCH.

We answer the question referred in the negative. It is immaterial whether possession has passed or not in accordance with the agreement. It is clear that the decision of the Full Bench in *Raja of Venkatagiri* v. *Narayana Reddy* (2), does not cover the point. As is explained in the order of reference, what was held in *Raja of Venkatagiri* v. *Narayana Reddy* (2), was that a *kabuliat* signed by the lessee but inadmissible to prove the lease for want of registration was admissible to prove the *karar* or the agreement to lease which preceded it. The decision in *Konduru Srinivasa Charyulu* v. *Gottumukkala Venkataraja* (1) would seem to have proceeded upon a misapprehension of the Full Bench case. The learned Judges who decided it assumed that the Full Bench case was a suit for damages for the breach of an agreement in writing to let which was unregistered though compulsorily registrable. They held, and, in our opinion, rightly that there was no distinction between a suit for specific performance of such an agreement and one for damages for the breach of it. The learned Judges merely applied, as we venture to think, erroneously the decision of the Full Bench to the case before them. They did not discuss the provisions of the Registration Act. Mr. Justice Boddam who was a party to this decision took the opposite view in Second Appeal No. 525 of 1903, sitting with Mr. Justice Sankaran Nair. The judgment of Subramania Aiyar and Miller, JJ., in Second Appeal No. 973 of 1904, is open to the same observation as the decision in *Konduru Srinivasa Charyulu* v. *Gottumukkala Venkataraja* (1). Our attention was invited to the judgment of the learned Chief Justice and Mr. Justice Miller in Second Appeal No. 979 of 1904 [*Bangarayya Garu* v. *P. Jagannatha Raju Garu* (4)]. The document in that case was not an agreement to lease. There the instrument recited a request by the executant and an agreement by the other party to give certain lands to her and an actual grant of the same, and contained a promise to manage the lands and enjoy them subject to certain terms. The operative part of the instrument was held to require registration. The question was whether for want of registration, it was inadmissible to prove the recital. The learned Judges held that the document was admissible to prove the recital, *i. e.*, the admission by the plaintiff of the existence of an agreement to give some lands to the plaintiff which itself was not in writing or at all events did not require registration. But there are certain observations in their judgment which have been pressed upon us. After referring to *Raja of Venkatagiri* v. *Narayana Reddi* (2) and *Konduri Srinivasa Charyulu* v. *Gottumukkala Venkataraja* (1), the learned Judges observe "that an agreement to lease immovable property is not actually a transaction affecting land unless in cases where by the agreement itself a right in the land is created" and that "on that ground it *may* be held that evidence can be given of such an agreement by means of an unregistered document which is compulsorily registrable." We do not think this can be regarded as an adjudication on the question which has been referred to us. The decision in *Satyendra Nath Bose* v. *Anil Chandra Ghosh* (5) is that of a single Judge sitting on the Original Side. He simply followed the decision in *Konduri Srinivasa Charyulu* v. *Gottumukkala Venkataraja* (1). As regards the suggestion made in that case that a lease is the sale of a limited interest and that an agreement to lease stands on the same footing as an agreement to sell *pro tanto*, the learned Judge would seem to have overlooked the fact that the legal incidents of the two transactions are entirely different. An agreement to lease is expressly included in the definition of lease in the Registration Act while it cannot be suggested that an agreement to sell falls within any definition of sale. Clause (*h*) of section 17 excludes an agreement to sell from the class of compulsorily registrable documents and section 54 of the Transfer of Pro-

(4) 1 M. W. N. 485; 7 M. L. T. 278; 5 Ind. Cas. 615.
(5) 14 C. W. N. 65; 5 Ind. Cas. 38.

perty Act provides that a contract to sell does not create an interest in the property. It is true that an agreement to lease may likewise not create an interest in immovable property though clause (*h*) of section 17 has no application to it, and there is no statutory provision in India which says so. But Mr. S. Srinivasa Iyengar has in his able argument drawn our attention to the provisions of section 40 of the Transfer of Property Act and section 91 of the Trusts Act. The first of these provisions speaks of an obligation arising out of a contract and annexed to the ownership of immovable property but not amounting to an interest therein or easement thereon being enforceable against a transferee with notice or a gratuitous transferee of the property *affected* thereby. This shows that a contract to sell or an agreement to lease immovable property is a transaction which affects the property. In fact, the illustration to that section puts the case of an agreement to sell being enforceable against the transferee with notice, as he has taken property affected by the previous contract to sell it. Section 91 of the Trusts Act puts the same case of a person acquiring property with notice that another person has entered into an existing contract *affecting* that property of which specific performance could be enforced and consequently becoming liable to hold the property for the benefit of the other. When, therefore, section 49 of the Registration Act declares that a document compulsorily registrable but remaining unregistered shall not be "received in evidence of a transaction affecting such property" or, as put by the Calcutta High Court, see *Ulfatunnissa Elahijan Bibi* v. *Hosain Khan*(6) "of a transaction so far as it affects such property" it would seem that the legislature meant to indicate that the instrument should not be received in evidence even where the transaction sought to be proved did not amount to a transfer of interest in immovable property but only created an obligation to transfer the property.

Section 49 consists of two parts. It provides first "that no document required by section 17 to be registered shall affect any immovable property comprised therein etc." The second part of the section says that such a document "shall not be received as evidence of any transaction affecting such property" *i. e.*, as we take it, the immovable property comprised therein. As regards immovable property other than that comprised in the instrument or a transaction in respect thereof, the section contains no prohibition against the admissibility of the instrument. We must assume that the two parts of the section deal with different subjects. See Wilson, J. in the order of Reference to the Full Bench in *Ulfatunnissa Elahijan Bibi* v. *Hossain Khan*(6). The first part apparently presupposes that the document itself is the transaction or the mode in which it is carried out. The second part of the section seems to relate to cases where the document itself is not the transaction but is only a record of a transaction or being itself a transaction contains a reference to or a recital of another transaction which affects the immovable property comprised therein. Even in the last case the document may be inadmissible to prove the other transaction provided it affects the immovable property comprised therein. As the Registration Act deals only with written instruments, it may be doubted whether the transaction referred to in section 49 can be merely oral. It is unnecessary to define the exact scope of this clause as to inadmissibility for proving a transaction affecting such property. It is enough for the purpose of this reference to say that a contract to lease immovable property, which is compulsorily registrable under section 17, clause (*d*), affects the immovable property [See Green, J. in *Raju Babu* v. *Krishnarav Ramachandra* (7)] and cannot if unregistered affect the property or be received in evidence to prove the contract. Suits for specific performance of a contract to sell were referred to in the course of the argument as suits affecting property. That is, no doubt, true as the relief asked for is the conveyance of property. The doctrine of *lis pendens* has been held to apply to a transfer of immovable property pending a suit for specific performance. *Turner* v. *Wright* (8); *Hadley* v. *The London Bank of Scotland*(9); *Pranjivan Govardhan Das* v. *Baju* (10); *Mati Lal Pal* v. *Preo Nath Mitra*(11). If a transaction like a contract to sell or lease immovable property does not affect it, it is difficult to see how a suit to

(6) 9 C. 520 at p. 525.

(7) 2 B. 273 at p. 285.

(8) 49 E. R. 252.

(9) 46 E. R. 562.

(10) 4 B. 34.

(11) 9 C. L. J. 96; 13 C. W. N. 226; 3 Ind. Cas. 696.

enforce the transaction can be regarded as affecting it. A contract to sell immovable property in writing, though it may affect the property without passing an interest in it, is exempted from registration by clause (*h*) [now clause (2) v] of section 17 of the Registration Act. But an agreement in writing to let, falling within clause (*d*) of section 17, is not. It cannot be, therefore, received in evidence of the transaction which affects the immovable property comprised therein.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 389 OF 1906.

October 17, 1910.

Present:—Sir Ralph Benson, Judge, and Mr. Justice Krishnaswami Aiyar.

PODIA *alias* HAMMAD MUKRI BEARI —APPELLANT

versus

ABDUL RAIMAN BEARI AND OTHERS— RESPONDENTS.

Charitable Trusts—Suit for removal of trustee of mosque and injunction—Right to injunction—Whether carries with it right to possession of lands attached to the mosque.

A right to pray for removal of the trustee of a mosque from his office and for an injunction restraining him from performing the duties thereof, does not necessarily carry with it the right to possession of the lands attached to the mosque.

Kamaraja v. *Asanali Shariff*, 23 M. 99, referred to.

Second appeal against the decree of the District Court of South Canara, in Appeal Suit No. 241 of 1905, presented against the decree of the Court of the District Munsif of Puttur, in Original Suit No. 278 of 1904.

Judgment.—The plaintiffs as worshippers would be entitled to ask for an injunction in the terms of the decree in this case. But it is another question whether they are entitled to possession of the lands, *vide Kamaraju* v. *Asanali Sheriff* (1). It is contended for them that they are entitled to possession as *jamats*. The lower Courts do not say what are the rights of *jamats*. We would ask the District Court to return a finding on the issue: "What are the rights of the plaintiffs as *jamats* and are they entitled to ask for possession of the lands sued for?" Fresh evidence may be taken. Two months will be allowed for the return of the finding and ten days for filing objections.

(1) 23 M. 99.

In compliance with the order contained in the above judgment, the District Judge submitted the following

FINDING.

Plaintiffs, as worshippers and *jamat moktessors* of Ajlamogru mosque, sued to recover plaint property with mesne profits, etc., from defendants and to turn 1st defendant out of his office of *mukri* and get an injunction against defendants hereafter.

2. They succeeded. First defendant appealed, but this Court dismissed the appeal.

3. On second appeal, I am called on for a finding on fresh evidence as to "What are the rights of plaintiffs as *jamats* and are they entitled to ask for possession of the lands sued for?"

4. Fresh evidence has been taken, and it appears that *jamats* mean the congregation of a mosque, the worshippers at, and subscribers to, a mosque. There are mosques of various kinds. Some are private. Some are under the mosque committee and are managed by *sanad moktessors* and some, like the plaint mosque, belong to the body of worshippers or *jamats*. In such a case the practice is for the *jamats* to elect a set of managing *moktessors* who in their turn appoint the *mukri*. In the present case, it is clear that the mosque is not the private property of first defendant and he is not hereditary *mukri*. But Exhibit N, in *Fasli* 1251, the Collector appointed a man of different family as *mukri* as requested by the *jamats*. Now in a mosque of this kind, when the property belongs to the mosque and the *mukri* is a mosque servant appointed by the *jamats*, it follows of necessity that if, as in the present case, the *mukri* is removed, the *jamats*, *i.e.*, the sub-committee appointed by the general body of worshippers must take over all the mosque properties and manage them till they appoint a fresh *mukri*. The present plaintiffs were elected as *jamats* for purposes of this suit, which is shown not only by their evidence now taken but by the fact that they sued under section 30 as representing all the worshippers. They are the only body now in existence who can do anything, and I, therefore, find that they are entitled to ask for possession of the lands on behalf of the mosque and to manage the affairs of the mosque till they appoint a fresh *mukri*. They have in fact been managing and in possession since the Munsif's decree. First

defendant's contentions are as before that the whole thing belongs to him.

This second appeal coming on for final hearing this day after the return of the finding of the lower appellate Court, the Court delivered the following

Judgment.—The District Judge finds that the plaintiffs are the *jamats* appointed to manage the institution. We accept the finding and dismiss the second appeal with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 107 OF 1910.

November 11, 1910.

Present:—Mr. Justice Banerji.

NATHU—PLAINTIFF—APPELLANT

versus

Syed DILAWAR ALI AND OTHERS—DEFENDANTS—RESPONDENTS.

Pre-emption—Wajib-ul-arz—*Presumption*—*Custom or contract.*

A record in the *Wajib-ul-arz* must be deemed to be the record of a custom unless the document itself indicates or it is otherwise proved that the clause relating to pre-emption is the embodiment of a new contract.

Majidan Bibi v. *Sheikh Hayatan*, A. W. N. (1897) 3, *Bhimsen* v. *Moti Ram*, 7 A. L. J. 902; 7 Ind. Cas. 181, followed.

Second appeal from the decision of the District Judge of Aligarh, dated the 18th of November, 1909.

Mr. *Ibn Ahmad*, for the Appellant.

Mr. *Ghulam Mujtaba*, for the Respondents.

Judgment.—This appeal arises out of suit for pre-emption and the only question to be determined is whether the *Wajib-ul-arz* on which the plaintiff relies contains the record of a custom or contract. The *Wajib-ul-arz* referred to is that of the year 1870, and paragraph 18 of it is headed "mention of transfer of shares and pre-emption" (*zikar intikal hakiat* and *hakshufa*). The clause provides that, "every co-sharer is competent to transfer his share or interest first to a co-sharer in the *patti* descended from the same ancestor; if they do not take, then to other co-sharers in the village. If they do not take, then to any one he might please. If there be a dispute about the price, the custom about the price prevailing in the neighbouring villages will be acted upon." The Court of first instance held that this was the record of a custom. The lower appellate Court, on the other hand, was of opinion that the *Wajib-ul-arz* contained the entry of a contract.

The rule as to the construction of documents of this nature was laid down in the oft-quoted case of *Majidan Bibi* v. *Sheikh Hayatan* (1). That rule was affirmed in the recent Full Bench ruling in *Bhimsen* v. *Moti Ram* (2). It is to the effect that a record in the *Wajib-ul-arz* must be deemed to be the record of a custom unless the document itself indicates or it is otherwise proved that the clause relating to pre-emption is the embodiment of a new contract. The learned Judge of the Court below thinks that the record must be deemed to be the record of a contract, because it is not described as the record of a custom, and also because the document in its pre-amble makes mention of an *ikrar*. The learned Vakil for the respondent has not laid any stress on the use of the word *ikrar* in the pre-amble but he contends that as in the body of the *Wajib-ul-arz* there are other clauses which contain mention of customs relating to different matters, clause 18 must be regarded as the entry of a contract as it is not stated in it that pre-emption prevails as a custom. I am unable to agree with him. It is impossible to say from the terms of the document itself that the entry relating to pre-emption is not the entry of a custom and there is nothing which clearly indicates that it is the entry of a contract. There is no evidence outside the entry to prove that it records a contract. Therefore, it must be presumed to be the entry of a custom according to the rulings to which I have referred above. The fact that in regard to other matters mention is made of custom, does not necessarily indicate that what is entered in the *Wajib-ul-arz* in regard to pre-emption is not the entry of a custom. I think the view taken by the Court of first instance was correct. I, accordingly, allow the appeal, set aside the decree of the Court below, and restore that of the Court of first instance with costs in all Courts including fees in this Court on the higher scale. I extend the time for payment of the purchase-money for a period of two months from this date.

Appeal allowed.

(1) A. W. N. (1897) 3.
(2) 7 A. L. J. 902; 7 Ind. Cas. 181.

S. N. DAR, B. A. LL. B.
Vakil High Court,
SRINAGAR, Kashmir

KALLU *v.* AJUDHYA PERSHAD.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL FROM ORDER NO. 70 OF 1910.

November 15, 1910.

Present:—Sir George Knox, KT., Judge, and Mr. Justice Karamat Husain.

KALLU AND ANOTHER—DEFENDANTS—APPELLANTS

versus

AJUDHYA PERSHAD AND OTHERS—PLAINTIFFS—DEFENDANTS—RESPONDENTS.

Pre-emption—Wajib-ul-arz—*Partition*—*Old* Wajib-ul-arz *copied*—Hissadaran deh, *meaning of.*

The pre-emptive clause of a *Wajib-ul-arz* gave right of pre-emption, *first*, to co-sharers, who were relatives, *secondly*, to *hissadaran ek jaddi*, and *thirdly*, to *hissadaran deh*. The village was partitioned into several *mahals*. After partition the same pre-emptive clause was retained in each of the *mahals*: *Held*, that the words *hissadaran deh* meant co-sharers in the village and not in the *mahal*.

First appeal from an order of the District Judge of Cawnpore, dated 8th June 1910.

Mr. *Abdul Raoof*, for the Appellants.

Mr. *Damodar Das*, for the Respondents.

Judgment.—This appeal relates to village Akbarpur Aima. This village is divided into five *mahals*. At some previous time the village formed only one *mahal* and the *Wajib ul-arz* prepared for the village at that time recorded a custom whereby in cases of transfer of property a right of pre-emption was recognized, *first*, in favour of co-sharers who are relatives; *secondly*, of "*hissadaran ek jaddi*" and *thirdly*, of "*hissadaran deh.*"

When this *mahal* was split up into separate *mahals*, in each of the separate *mahals* a separate *Wajib-ul-arz* was drawn up and in each of these *Wajib-ul-arzes* a right of pre-emption was recorded as existing in favour of co-sharers who are relatives and then of *hissadaran ekjaddi* and lastly of *hissadaran deh*. Ajudhya Prasad, who was plaintiff in the Court of first instance, sued to enforce a right of pre-emption with respect to certain shares which the respondents had sold to Kallu and Rahim Baksh. Ajudhya Prasad was a co-sharer in two of the *mahals*, *viz.*, Makdum Baksh and Syedan Bibi. Kallu and Rahim Baksh had no share in either of these *mahals* but are co-sharers in *mahal* Wazir-un-nissa.

The lower appellate Court found that as Ajudhya Prasad was co-sharer with the vendors in *mahals* Makdum Baksh and Syedan Bibi, he had a preferential claim to pre-empt the shares of the property under sale in these two *mahals*.

HARSARAN *v.* DILRAJI.

In appeal it has been contended before us that on the correct interpretation of the *wajib-ul arz*, Adjudhya Prasad has no preferential right to pre-empt. Ajudhya Prasad is not shown to be a relation of the vendors nor is he shown to be a "*hissadar ek jaddi*" with the vendors. He and the appellants being *hissadaran deh* stand upon the same plane so far as pre-emption is concerned The learned Judge says in his judgment that it has been several times ruled, the last time quite recently, that the word '*deh*' in such a *Wajib-ul-arz* means *mahal* and it was on this ground that he gave preference to Ajudhya Prasad We know of no such ruling and we have not been referred to any. We do not know what ruling was before the learned Judge. Nothing has been pointed out in the *Wajib-ul-arz* which points to any intention on the part of the co-sharers when they partitioned the original *mahal* to hold at arm's length any of those who might happen to be then or thereafter co-sharers in the ring fence formed by the original *mahal*. The very fact that when the *mahal* was partitioned the new *Wajib-ul-arzes* which might easily have written "*hissadaran mahal*" deliberately retained the old words "*hissadaran deh*", points in the opposite direction, and continues the custom then in existence.

We decree the appeal, set aside the decree and judgment of the lower appellate Court and restore the decree of the Court of first instance with costs in all Courts.

Appeal decreed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 186 OF 1910.

November 14, 1910.

Present:—Mr. Justice Griffin.

HARSARAN—PLAINTIFF—APPELLANT

versus

Musammat DILRAJI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Pre-emption—Benami *purchase*—*Suit against ostensible purchaser*—*Real purchaser not made party*—*Suit not maintainable.*

B purchased a property in the name of his wife D. H brought a suit of pre-emption against D, the ostensible purchaser and did not make B a party to the suit. If the suit had been brought against B, it would have been dismissed as B was a co-sharer against whom H had no right of pre-emption:

Held, under the circumstances, that the suit as brought against the ostensible purchaser was not maintainable.

SAHAB SINGH *v.* PHUMAN.

Second appeal against the decision of the Additional Subordinate Judge of Gorakhpore, dated the 8th of December 1909.

Mr. *Girdhari Lal Agrawala*, for the Appellant.

Messrs. *Govind Prashad* and *Parmeshwor Dayal*, for the Respondents.

Judgment.—This appeal arises out of a suit for pre-emption filed by the plaintiff against one *Musammat* Dilraji who is the person shown as the vendee in the sale-deed. Her defence was that the real purchaser of the property was her husband, Brij Nath, who was a co-sharer in the village and against whom the plaintiff had no right of pre-emption.

The Court of first instance upheld this defence and dismissed the plaintiff's suit, the lower appellate Court has confirmed the decree of the Court of first instance.

In second appeal to this Court it is contended that the plaintiff is entitled to maintain the suit against *Musammat* Dilraji who is the ostensible purchaser according to the recital in the sale-deed.

It is urged on behalf of the appellant that the *benamee* purchaser should not be allowed to defeat the claim for pre-emption.

This plea has not any force in this particular case inasmuch as on the findings of the Court of first instance the plaintiff would have no right of pre-emption against Brij Nath if the sale-deed had been executed in his favour: it is only because Brij Nath had the sale-deed executed in his wife's name that the plaintiff has any right to come into Court and seek pre-emption.

In Second Appeal No. 1173 of 1908, decided by a Bench of this Court, the facts are somewhat similar and it having been found that the real purchaser was not the person whose name appeared in the sale-deed, the plaintiff's suit was dismissed.

The lower appellate Court has not come to any finding as to the question as to whether the defendant's husband was a co-sharer in the village and whether the plaintiff had any right of pre-emption as against him. It is not necessary to remit an issue to the Court below for a finding on this point; there is ample evidence on the record to support the finding of the first Court on this issue.

It, therefore, appears that the plaintiff is seeking to pre-empt certain property which was purchased by Brji Nath against whom the plaintiff has no right of pre-emption whatsoever.

The plaintiff's suit was rightly dismissed. Inasmuch as the conduct of the defendants *Musammat* Dilraji and of Brij Nath in entering into this *benamee* purchase has given rise to this litigation, the plaintiff is entitled to get at least some part of his costs from the defendant *Musammat* Dilraji.

I modify the order of the Court below so far as to allow the plaintiff his costs in the Court of first instance from *Musammat* Dilraji and the parties will bear their own costs in this and the lower appellate Court.

Order modified.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 1157 OF 1908.

October 21, 1910.

Present:—Sir Arthur Reid, KT., Chief Judge, and Mr. Justice Kensington.

SAHAB SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

PHUMAN—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act XIV of 1882), s. 539—Suit by a Lambardar *for the removal of the* mahant *of a* Dharmsala *and cancellation of alienations of endowed property—Collector's sanction necessary.*

One out of four or five *lambardars* and two other residents of a village sued for the removal of the *Bhai* or *mahant* of a *dharmsala* and for the cancellation of alienations of the endowed property alleged to have been effected by him:

Held, that the sanction of the Collector was necessary and that the suit could not proceed without such sanction.

Dalip Singh v. *Ishar Singh*, 78 P.R. 1907; 193 P. L. R. 1908; *Bansi Dhar* v. *Changa Ram*, 7 P.R. 1908; 176 P. L. R. 1908; 20 P. W. R. 1908, followed.

Abid Ali v. *Ghulam Jalal*, 94 P. R. 1885; *Sapuran Singh* v. *Gulab Singh*, 29 P. R. 1897, distinguished.

Sir Dinsha Manakji Petit v. *Sir Jamsetji Jijibhai*, 33 B. 509; 11 Bom. L. R. 85; 5 M. L. T. 301; 2 Ind. Cas. 701 and *Budree Das Mukim* v. *Chuni Lal Johury*, 33 C. 789; 10 C. W. N. 581, not followed.

Further appeal from the order of the Divisional Judge, Amballa Division, dated the 15th July 1908, confirming that of the Additional District Judge, Ludhiana, dated the 20th January 1908, dismissing plaintiffs' claim.

Rai Sahib Pandit *Sheo Narain*, for the Appellants.

Lala *Lajpat Rai*, for the Respondents.

Judgment.—The sole question for consideration is whether the suit could proceed without the sanction of the Collector

under section 539 of the late Code of Civil Procedure, Act XIV of 1882. The lower appellate Court, without citing authority, held that it could not.

The suit was by one out of four or five *lambardars*, and two other residents of a village against the *Bhai or mahant* of a *dharmsala* for his removal and the cancellation of alienations of endowed property alleged to have been effected by him. *Dalip Singh* v. *Ishar Singh* (1) and *Bansi Dhar* v. *Changa Ram* (2) are directly in point, and we see no reason for differing from the exposition of the law contained in them, *viz.*, that the sanction of the Collector was necessary. *Abid Ali* v. *Gulam Jalal* (3) and *Sapuran Singh* v. *Gulab Singh* (4) cited for the appellants, dealt with clearly distinguishable facts.

In the former, the relief sought was cancellation of alienation of property alleged to belong to a shrine, and in the latter it was an injunction to restrain the custodian of the shrine from converting a building, alleged to have been erected for religious purposes, into shops.

In neither suit was the removal of the *mohant* or custodian sought.

We see no reason for accepting *Sir Dinsha Mankji Petit* v. *Sir Jamsetji Jijibhai* (5) and *Budree Das Mukim* v. *Chuni Lal Johury* (6) in preference to the rulings of this Court above cited, even if it be held that they are to any extent opposed to those rulings.

The appeal fails and is dismissed with costs. Judgment pronounced.

Appeal dismissed.

(1) 78 P. R. 1907; 193 P. L. R. 1908.
(2) 7 P. R. 1908; 176 P. L. R. 1908; 20 P. W. R. 1908.
(3) 94 P. R. 1885. (4) 29 P. R. 1897.
(5) 33 B. 509; 11 Bom. L. R. 85; 5 M. L. T. 301; 2 Ind. Cas. 701.
(6) 33 C. 789; 10 C. W. N. 581.

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 102 OF 1909.

October 28, 1910.

Present:—Mr. Justice Griffin.

MANTURNA KUARI AND OTHERS—DEFENDANTS—APPELLANTS

versus

BANI SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Agra Tenancy Act (II of 1901), s. 182—Second appeal—Revision—Delay of 5½ months in filing revision.

Where a District Judge gives a judgment in his appellate jurisdiction in an ejectment suit, a second appeal lies to the High Court under section 182 of the Agra Tenancy Act of 1901.

After a delay of five and half months, a revision cannot be entertained.

Revision against a decree of the District Judge of Ghazipur.

Mr. *Haribans Sahai*, for the Applicant.

Messrs. *M. L. Agarwala* and *Parmeshwar Dayal*, for the Opposite Party.

Judgment.—This is an application for the revision of an order of the learned District Judge of Ghazipur, reversing the order of the Assistant Collector and directing that the defendants be ejected from a certain holding. The ground taken in the application for revision is that the learned District Judge has no jurisdiction to hear the appeal. I note that the Assistant Collector dismissed the plaintiff's suit for ejectment on the ground that the relationship of landlord and tenant did not exist between the parties and that the defendants were mere trespassers. In that judgment it was held by the Assistant Collector that a Revenue Court had no jurisdiction to order the ejectment of the defendants. A preliminary objection is raised against the hearing of this application on the ground that under the provisions of section 182 of the Tenancy Act, the defendants could have appealed against the decision of the learned District Judge. As they have not done so, their remedy by way of revision is barred. There is probably some force in this contention but without discussing it further, it is sufficient to say that this application must fail, *first* on account of the dilatoriness of the defendants in not taking action until after the expiry of five and half months from the date of the learned District Judge's order, and, *secondly*, on the merits inasmuch as both the Courts below found that the defendants are liable to ejectment either as tenants or trespassers. The application is dismissed with costs.

Application dismissed.

KHAGENDRA NATH *v.* BHUPENDRA NARAYAN.

CALCUTTA HIGH COURT.
CRIMINAL REVISION No. 1088 OF 1910.
November 7, 1910.
Present:—Mr. Justice Holmwood and Mr. Justice Fletcher.
KHAGENDRA NATH MITRA—
PETITIONER
versus
BHUPENDRA NARAYAN DUTT—
OPPOSITE PARTY.

Calcutta Municipal Act (III B. C. of 1899), s. 3, cl. (29) and s. 632—Nuisance—Building wall to prevent neighbour from acquiring easement, if nuisance—May be otherwise nuisance—Duty of Court in abating nuisance.

The building of a wall however high on a man's own property for the purpose of preventing his neighbour from acquiring rights of easement over his land, is not in itself a nuisance under the Calcutta Municipal Act.

Bhagwan Dass v. *Rash Behari Mallick*, 14 C. W. N. 637; 6 I. C. 595, referred to and commented upon.

But although the height of the wall may not be a nuisance, yet the accumulation of filth and want of space to clear the drainage between it and the neighbour's house may cause it to be a nuisance.

The Court should not pull down the wall to a lesser height, but should consider whether the nuisance may not be abated by some means of clearing the space.

Rule against the order of the Municipal Magistrate of Calcutta, dated July 30, 1910.

Babus *Bordo Nath Dutt* and *Charu Chandra Dey*, for the Petitioner.

Mr. *J. Chowdhury* with Babus *D. N. Bagchi* and *Sachindra Prasad Ghose*, for the Opposite Party.

Judgment.

Holmwood, J.—This was a rule calling upon the Municipal Magistrate to show cause why his order dated the 30th July 1910, should not be set aside on the ground that it was passed without jurisdiction. The order is in respect of a wall nearly forty feet high, which has been erected by the petitioner between his premises and the adjoining premises of the complainant, 79 and 80 Bechu Chatterjee Street. There was a wall to mark the boundary on approximately the same site before, but this was only a low wall and met with no objection. It is contended by the complainant that the new wall has partly encroached on his land but with this we have nothing to do as that, like many other questions that have been discussed in this case, is a purely civil matter.

I may say at the outset that I most strongly deprecate the use of the Municipal Act for the purpose of interfering in any way with the rights of private ownership beyond those limited powers which the Corporation have obtained by statute for the necessary protection of the public and the enforcement of proper sanitation. A great deal has been said in this case about the distinction between a public and a private nuisance. A public nuisance is one that affects the King's subjects at large or a considerable portion of them such as the inhabitants of a town.

A private nuisance, on the other hand, is one that affects only one person or a certain determinate number of persons and is only amenable to the Civil law.

But in section 632 of the Municipal Act (Bengal III of 1899), the Chairman or any person who resides in Calcutta is empowered to complain to a Magistrate of the existence of any nuisance, and this must be taken to be any nuisance under the Act as defined in section 3, clause 29. Now under that section "nuisance includes any act, omission, place or thing which causes or is likely to cause injury, danger, annoyance or offence to the sense of sight, smell or hearing, or which is or may be dangerous to life or injurious to health or property."

This definition is wider than the common law of "public nuisance," but does not certainly extend to the exclusion of all private nuisance as was sought to be argued on the authority of *Bhagwan Dass* v. *Rash Behari Mallick* (1). I do not think that the learned Judges who decided that case intended to lay down any such general proposition as that which has found its way into the head-note of the case, of course, without the revision of the learned Judges themselves. They are dealing with a particular case where an act of private ownership primarily only creating a private nuisance produces results which bring it within the definition of a nuisance in section 3 of the Act. The word "includes" shows that such acts are rendered amenable to Municipal law as opposed to Penal law over and above what is generally understood as a public nuisance. The acts themselves are in the nature of public nuisance but they may only affect the lives and property of individuals or defined bodies of persons resident in a specified area. The smallest infant residing in its parent's house within the jurisdiction of the Corporation of Calcutta

(1) 14 C. W. N. ; 6 Ind. Cas. 595.

has a right to have its life and health protected against any act of any person which is or may be a danger to it, and the distinction between a private and public nuisance becomes in this view of the matter purely academical.

The question is, has a nuisance been created by any act of the petitioner that falls within the definition as given in the statute? If it has, the Municipal Magistrate clearly has jurisdiction under clause 2 of section 632 to make such enquiry as he thinks necessary, and, if he sees fit, to direct the Chairman to exercise any of the powers vested in him by the Act or to take such measures as to such Magistrate may seem reasonable and practicable for preventing, abating, diminishing or remedying such nuisance.

Now the building of a wall however high on a man's own property for the purpose of preventing his neighbour from acquiring rights of easement over his land is not in itself a nuisance under this Act. That is a question for the Civil Courts and I wish to carefully guard myself from being thought to derogate in any way from the private rights of ownership in these matters on the mere averment that a private nuisance has been created.

But the findings in this case go beyond that and bring the case strictly within the definition of a *quasi* public nuisance as it is defined in the Act. Passing over certain findings, which do not concern the question of nuisance as defined in the Act but are purely civil matters, I find that it has been found as a fact on the evidence of the Health Officer of Calcutta and of one of the leading Presidency Surgeons, whose testimony is wholly independent and unimpeachable, that the wall in question is or may be injurious to health and as it is likely in their opinion to propagate the seeds of consumption and typhoid fever, it is unquestionable that it created a plague spot in the midst of a populous area which commencing with the inhabitants of the adjoining tenements including the petitioner himself and his family may become a very serious menace and nuisance to the public inhabiting that neighbourhood.

This being so, the wall clearly falls within the definition of a nuisance as defined in section 3 of the Act and we may pass over the further finding that it affects the security of the complainant's building, although that also finds some support from the testimony of Mr. Johnstone who was claimed as an expert by the defence.

On this ground alone, I am able to find that the Magistrate had jurisdiction to deal with the matter. But the further question arises whether he has exercised that jurisdiction properly. The only matter which causes the wall to be a nuisance within the meaning of the Act is not its height but the accumulation of filth and want of space to clear the drainage between it and the opposite party's house. Now this might conceivably be remedied by other action short of pulling down the wall to a height of 12 feet and indeed it is difficult to see how the reduction of the wall to such a height gets rid of the nuisance actually found to exist under the Act. It is clear that arches in the lower part of the wall would serve the purpose of cleaning the space behind it and would not interfere with the petitioner's screening off his premises from the opposite party's observation which he is legally entitled to do. I, therefore, think that the case must go back to the Municipal Magistrate for further consideration and for passing such an order as will abate the nuisance which is found to exist at the foot of the wall and behind it without interfering with the petitioner's right to screen off his premises.

With reference to the insanitary irregularities in the surface of the wall, he must further consider whether the petitioner's offer to plaster and whitewash the surface of the wall opposite the objector's premises will not sufficiently meet the necessities of the case. With these remarks, the case is remanded to the lower Court for passing a reasonable and proper order for abating the nuisance.

Fletcher, J.—I agree.

Case remanded.

CALCUTTA HIGH COURT.

CRIMINAL APPEAL NO. 744 OF 1910.

November 7, 1910.

Present:—Mr. Justice Holmwood and Mr. Justice Fletcher.

MON MOHAN GHOSH—ACCUSED—APPELLANT

versus

EMPEROR—COMPLAINANT—RESPONDENT.

Penal Code (Act XLV of 1860), s. 124A—Sedition—

MON MOHAN *v.* EMPEROR.

Newspaper—Printer—Fair comment—Admissibility in evidence of articles other than one complained of—Evidence Act (I of 1872), s. 15—Journalist not expected to write with precision.

In order to use other articles than that complained of as seditious for the purpose of showing the meaning of certain expressions used in the article complained of and also to show the intention of the writer, it is necessary to show who the writer was and that all the articles produced were by the same hand.

The writer may be guilty of exciting or attempting to excite feelings of "disaffection", as that term is used in section 124 A of the Penal Code, no matter how guardedly he may attempt to conceal his real object, but the printer and publisher cannot be punished if the concealed object is not established by evidence on the record.

Queen-Empress v. *Amba Pershad*, 20 A. 55 at p. 68, relied on.

A man may comment upon any measure or act of Government, whether legislative or executive, and freely express his opinion upon it. He may express the strongest condemnation of such measures and he may do so severely, and even unreasonably, perversely or unfairly. So long as he confines himself to that, he will be protected by the explanation. But if he goes beyond, and, whether in the course of comments upon measures or not, holds up the Government itself to the hatred of his readers—as for instance by attributing to it every sort of evil and misfortune suffered by the people, or dwelling on its foreign origin and character, or imputing to it base motives or accusing it of hostility or indifference to the people—then he is guilty under section 124A and the explanation will not save him.

Queen Empress v. *Tilak*, 22 B. 112, relied upon.

A writer in a newspaper called upon the Nationalist Party to "once more assume their legitimate place in the struggle for Indian liberties": *Held*, that the use of the word "liberties" in the plural would not *prima facie* point to liberation of the country from foreign rule, but to certain specific liberties, and that the words were not seditious.

A writer is entitled to express his opinion on the Reform Scheme, and the mere fact that he states that the scheme is not a genuine reform or not a genuine measure of constitutional progress, cannot be seditious.

A writer wrote the following in a newspaper: "We shall not break the law and, therefore, we need not fear the law. But if a corrupt police, unscrupulous officials or a partial judiciary make use of the honourable publicity of our political methods to harass the men who stand in front by illegal ukases, suborned and perjured evidence or unjust decision; shall we shrink from the toll that we have to pay on our march to freedom: *Held*, that these words did not fall within section 124 A of the Penal Code.

There is no harm in a writer stating that if his association, which he believes to be a lawful one, is suppressed, the proclamation suppressing it will be arbitrary.

A statement that the Reform Scheme is monstrous and misbegotten, because it is not founded upon democratic principles, is not by itself one that exceeds fair and reasonable comment.

A journalist is not expected to write with the accuracy and precision of a lawyer or a man of science; he may do himself injustice by hasty expression out of keeping with the general character and tendency of the articles.

A journalist wrote: "Until these demands are granted, we shall use the pressure of that refusal of co-operation which is termed passive resistance. The *Swadeshi*—Boycott movement still moves by its own impetus. We must free our social and economic development from the incubus of the litigious resort to the ruinously expensive British Court": *Held* that, the words were not seditious.

Appeal against the order of the Chief Presidency Magistrate of Calcutta, dated June 18, 1910, sentencing the accused to undergo rigorous imprisonment for six months under section 124 A of the Indian Penal Code.

Mr. *B. C. Chatterjee*, with Babu *Monmotha Nath Mukerjee*, for the Appellant.

The *Advocate-General* and Mr. *Orr*, Deputy Legal Remembrancer, for the Crown.

Counsel said that the article which is the subject-matter of the suit was headed "To my countrymen," and appeared on December 25, 1909. In April last, on the sanction of the Local Government, a search-warrant was issued, and the "Sri Narain" press, where the paper used to be printed, was searched. Subsequently, the appellant was arrested. The writer of the article was Arabindo Ghose, who could not be arrested as he was absconding.—(Mr. Chatterjee next read the judgment of the lower Court and the article in question).

Mr. Justice Holmwood: We do not find where any attack on the Government comes in or where there is any incitement to disaffection.

The Advocate-General, who appeared for the Crown, with Mr. Orr, said: If your Lordships desire me to address you at this stage, I must first of all draw your Lordships' attention to the exact wording of the section, on which the charge was framed.

Mr. Justice Holmwood. We must call upon you to answer. We do not see anything on the face of the article.

The Advocate-General then read section 124A, and said that upon a careful consideration of the authorities, there could be no doubt that the various portions of the article, and the article taken as a whole, tended to excite disaffection. The expression "disaffection" had been the subject-matter of various decisions, and the word had been variously interpreted. In *Queen-Empress* v. *Jogendra Chandra Bose* (1), it had been held that disaffection meant "feeling contrary to

(1) 19 C. 35 at p. 47.

affection." There was another decision in *Queen-Empress* v. *Tilak* (2), which said "disaffection" meant "hatred and every form of ill-will towards Government." In *Queen Empress* v. *Ram Chandra Narain* (3), it was held that disaffection signified political alienation or discontent, and could not mean want of affection, dislike, or hatred. In the same volume and in the same ruling, Justice Ranade held that the word meant positive political distemper and that there must be some positive feeling of aversion and not mere absence of good-will.

Mr. Justice Holmwood: All of them seem to amount to the same thing. There must be an active attack on the Government itself.

The Advocate-General:—Some words which tend to create ill-will towards Government.

Mr. Justice Fletcher: Are they not entitled to criticise the acts of the Government?

The Advocate-General:—The writer of this article and the printer and publisher were entitled to criticise the policy and the acts of the Government. But if they do not stop at merely expressing disapprobation and go further and impute wrong motives to Government, then they over-step the limits of the law.

Mr. Justice Fletcher: What is the improper motive imputed?

The Advocate-General: I will show that presently. They are entitled to discuss the Reforms Scheme, but they should not say "It is a monstrous, misbegotten scheme, which has humiliated our countrymen."

Mr. Justice Holmwood:—Here, he is attacking a particular reform of Lord Morley's. He is not attacking the British Government.

The Advocate-General: Certain points in that article refer to Government. There is a direct reference to it. There should be no imputation of corruption against the Government. There is a direct attack here involving imputation of corruption and want of scruple and fairness, in three branches of administration. First of all take the judiciary.

Mr. Justice Holmwood: But it does not come under section 124A. It is not the Government.

The Advocate-General: The administration of the country is carried on by various branches.

(2) 22 B. 112 at p. 134.
(3) 22 B. 151 at p. 156.

Mr. Justice Fletcher: Do you say that the High Court is a part of the Government of India?—I think it is not.

The Advocate-General: I would certainly say that the Government means the administration of the country generally. The officials form part of the administration and, therefore, Government.

Mr. Justice Fletcher: Is a junior officer the Government of the country?

Mr. Justice Holmwood: Is a *chowkidar* the Government of the country?

The Advocate-General then cited cases of *Queen-Empress* v. *Amba Pershad* (4) and *Queen-Empress* v. *Tilak*(2) and said, "Government established by law" meant British rule and its representatives as such. The judiciary is regarded as a representative of the British rule. Continuing, the Advocate-General said that the result of the decisions was that the word "sedition" meant exciting disloyalty to the Government. The whole of the article tended to urge the fellow-countrymen of the writer to abandon the policy of the Moderates; and it referred to the Government, the Administration, and to the policy of Lord Morley.

Mr. Justice Fletcher:—He is open to criticise the action of Lord Morley.

The Advocate-General:—Quite so, but he must be.—

Mr. Justice Fletcher: Does the policy of Lord Morley come under the section 124A, as part of the Government of India?

The Advocate-General: The criticism of the policy of Lord Morley would not amount to an offence under section 124A provided he is within reasonable limits. But if there is an attack upon that policy, which is in such terms as to indicate that it was deceiving the people, then it comes within the definition. The criticism must be without malignity. It must not be immoderate and must not impute any corrupt motive. In support of his contention, the Advocate-General cited cases reported in *R.* v. *Sullivan* (5); *R.* v. *Collins* (6) and *R. Burdettt* (7).

The Advocate-General, continuing his argument, said that in ascertaining whether or not an article had over-stepped the limits of law, all the Judges both in England and

(4) 20 A. 55 at p. 68.
(5) 11 Cox. C. C. 44 atp. 49.
(6) 9 Car. & P. 456 at p. 461.
(7) 1 State Trials (New Series) 50.

in this Court had in terms decided that regard was to be had to the conditions of the country at the time when the article was written or published. In support of his contention, counsel cited the case of *Apurba* v. *Emperor* (8).

Mr. Justice Fletcher: The article was published on the 24th December, and no proceedings were taken till the 2nd April.

The Advocate-General: That is so.

Mr. Justice Fletcher: The state of the country required that the action should have been taken sometime earlier.

The Advocate-General: This sort of publication does not come immediately to the attention of the authorities. I do not think your Lordships will give any effect to that. The learned Magistrate has found that at the time it was published, the country was in a state of unrest, and not in a state at any rate in which it was reasonable to allow to continue the publication of such articles.

Continuing, the Advocate-General said that there were certain points in that publication which brought the writer within section 124 A. The article, after having mentioned the policy of the Government of India as a "monstrous scheme," further went on to state that the fellow-countrymen of the writer had been humiliated by that scheme. The Government had been vilified by this article. Not only that, but the expression "arbitrary executive" was also used. The mere use of the word "arbitrary" in connection with the executive Government of the country was a vilification of the executive and of the Government. Further, the article used the terms: "Corrupt police," "unscrupulous officials" and "partial judiciary." Those were the three branches of the administration.

Mr. Justice Holmwood: If it was said that the English Government supported a corrupt judiciary that would have been a different matter. Here it is stated that if there happened to be a partial judiciary or corrupt police or unscrupulous officials, then we must organise our political efforts to get rid of it.

Mr. Justice Fletcher: How are the Police "Government established by law" in British India?

The Advocate-General: They are branches of the administration which is established by law in British India. To attack those branches of administration is to attack the Government and the administration.

Mr. Justice Holmwood: If you merely say that certain underlings happen to be corrupt, it seems to me you make no attacks on the Government.

The Advocate-General: If a particular officer had been attacked it would have been quite different but here it is stated that the officers generally are unscrupulous.

Mr. Justice Fletcher: Any class of officials mentioned?

The Advocate-General: They actually say officials who carry on the administration. If you take the whole of the article, there is no question that it steps beyond the limits of fair and proper criticism. It imputes wrong and evil motives. Continuing, the Advocate-General said the article further imputed "madness to Government in crushing down lawful political activity." It was absolutely untrue, and assigned ill-will against Government. Dealing with "Passive Resistance", the article said "*Swadeshi*-boycott is an effective method."

Mr. Justice Holmwood: The whole article appears to be an attack on the Moderates.

The Advocate-General: But in the course of the attack on the Moderate policy, there are various points which are undoubtedly attacks on Government itself. They are advocating the use of boycott, and it is ill-will towards Government.

Mr. Justice Fletcher: The *Swadeshi*-boycott movement is against the use of foreign goods. It does not mean boycotting Government.

The Advocate-General: I would be very sorry to define the word "boycott."

Mr. Justice Holmwood: That is against the use of foreign goods. It has been used unfortunately by some persons to break law and as a political weapon. It, however, does not mean boycotting Government.

The Advocate-General: It is a direct attempt to stir up ill-will towards the Government.

Mr. Justice Holmwood: Supposing by the force of your logic and by your legal knowledge you succeed in satisfying us, as Judges, that the law has been infringed, how are we to hold that the illiterate printer would not take a different view, when we took

(8) 35 C. 141 at p. 154; 7 C. L. J. 49; 7 Cr. L. J. 10; 2 M. L. T. 500.

a different view. When we first read the article?

The Advocate-General: The state of the mind of the printer is immaterial. The point is this: "Does this article come within the limits of the law?" In this connection, I may mention that the printer was once convicted before under section 124 A in connection with a paper, that was fairly notorious, the *Nabasakti*.

The Advocate-General then went on reading the article in question. While he was reading the portion commenting on the Reform Scheme of Lord Morley, Mr. Justice Fletcher said: Is this anything more than a comment on the administration or other actions of the Government.

The Advocate-General: It is for your Lordships to determine after reading what follows. The article in question is a letter addressed to his countrymen, asking them to believe that the Reforms were not genuine in their initiation.

Mr. Justice Fletcher: "Genuineness and success of constitutional progress." That is from his point of view.

Mr. Justice Holmwood: He is looking forward to local self-government. It is a comment.

The Advocate-General: It indicates that this new scheme had not any genuine initiation.

Mr. Justice Fletcher: In the opinion of this gentleman who is the writer, it is not worth having.

The Advocate-General: If he had so expressed himself, there could not have been any objection. Is it legal and right of the individual to state that these reforms were wanting in genuineness?

Mr. Justice Fletcher: We have no control over the Executive Government. That is the theme.

The Advocate-General: It will be for your Lordships to say whether he will be entitled to ask his readers to believe that the Reforms had no genuine initiation.

Mr. Justice Fletcher: Genuine initiation of constitutional progress.

Mr. Justice Holmwood: Is it seditious to ask a despotic government—not despotic government, absolute government, for a full share of reform?

Mr. Justice Fletcher: I should hesitate to call the Government of India despotic?

The Advocate-General: There would be no contravention in asking for a full share of reform.

Mr. Justice Holmwood: He complains that there has been no delegation of executive control to anybody outside the Government. He says it is no genuine initiation.

The Advocate-General: He say it is a "monstrous scheme, it is misbegotten."

Mr. Justice Fletcher: Can't he say it is not a genuine constitutional reform?

The Advocate-General: But when he goes on to say that it is "a misbegotten and monstrous scheme", it shows ill-will towards Government.

Mr. Justice Holmwood: A misbegotten and mischievous child would be a deformity. The scheme is deformed. Is that seditious?

The Advocate-General: Can that be anything but hatred and ill-will? It is tantamount to saying that Government is not entitled to your affection. Continuing, the Advocate-General said that before proceeding to discuss the actual words and the actual meaning of the article, he would remind their Lordships that until this stage the appellant had never challenged the fact of the article coming within section 124 A. That appeared from the judgment of the Magistrate who said that the appellant had not disputed the point.

Mr. Chatterjee: He did take that point and pleaded not guilty.

The Advocate-General then said that there was some discussion on Tuesday as to the true meaning of the word "Government" within section 124A. That had been placed beyond any doubt by the statutory definition of "Government" which is incorporated in the Indian Penal Code. Section 17 of the Code defined Government in this way: "The word 'Government' denotes the person or persons authorised by law to administer executive government in any part of British India." Then the comment on that in the Code said: "Government means local government of the Province." Then the general Clauses Act declared: "Government should include Local Government as well as the Government of India." Counsel read the section and referred to a case reported in *Bajoo Singh* v. *Queen-Empress* (9), where it was held that a Collector acting in the management of a *khas mahal* property of the Government was,

(9) 26 C. 158.

as such, Government in exercising the duties of his position. The importance of that definition was only evidence in its application to a portion of the article. In other portions of the article, "the Government" was specially referred to. For the purpose of section 124A, they must read the Code definition. If they attacked an official who administered the Government, they, within the meaning of the Code, attacked the Government itself. Counsel then referred to the article and said that the law enabled the interpretation of the intention of that article in question to be gathered from other publications by the same author and said that the words "struggle for Indian liberties" were used in the article and it meant "struggle for Indian liberties" as understood according to the ideals of the Nationalist party. What was their ideal? The other article said: "Our ideal of *Swaraj* is absolute self-rule, free from foreign control." It was a criminal meaning. In 1907, Justices Mitter and Fletcher decided in *Beni Bhushan Roy* v. *Emperor* (10), that *Swaraj* "did not necessarily mean Government of the country to the exclusion of the present Government, but its ordinary acceptance is Home Rule under the Government." The writer of this article, however, had chosen to make it perfectly clear that in his view *Swaraj* did not mean what was laid down by this Court.

Continuing to read the article, the Advocate-General pointed out passages which made the article criminal. He said that the word "struggle" was used in the sense in which it was used by the same writer in an article which appeared in the July number of the *Karmayogin* under the head-line "Doctrine of Sacrifice." There the writer said: "In the struggle of a subject nation to realise a separate existence." First of all the writer gave the main issues which divided the Moderates and the Nationalists and then he urged his countrymen to abandon the Moderate policy which had brought humiliation.

Mr. Justice Fletcher. He means humiliation to the Moderate party.

The Advocate-General. Is he justified to say that the Moderates were humiliated by the Government?

(10) 34 C. 991; 6 C. L. J. 699; 11 C. W. N. 1050; 6 Cr. L. J. 297.

Mr. Justice Holmwood: You mean that he is trying to create ill-will against the Moderates.

The Advocate-General: Creating ill-will against the Government.

Mr. Justice Fletcher: Can you not say that the action of the Government has humiliated so and so?

The Advocate-General: Is it legal to say that? Does it not excite discontent? I ask your Lordships to take an ordinary view of the matter.

Mr. Justice Fletcher: Your argument is that any criticism on the Reform Scheme is not allowable.

The Advocate-General: I do not mean that. But he had no right to say. "it is a monstrous, misbegotten scheme."

Mr. Justice Holmwood: He is charging the Moderates with misleading the people. He is not blaming Lord Morley but the Moderates.

The Advocate-General: He denounced the Moderate policy and advocated the Nationalist policy, which is a criminal policy. He had described the policy of the Government as "monstrous."

Mr. Justice Fletcher: Take the duty on tobacco. The intention of the Government is well-known; it is to raise the revenue. But some smokers may say that it is a monstrous policy.

Mr. Justice Holmwood: Some have already said so.

The Advocate-General next read another extract in which the writer said: "If we don't take part, the Nationalist movement will disappear and the void will be filled up by violent activity." This was, no doubt, a threat.

Mr. Justice Fletcher: I don't follow your argument. The writer does not use any threat.

The Advocate-General: It is a threat no doubt and used by one whose brother was transported for life for an offence against the State.

Mr. Justice Fletcher: We must not take that into consideration. It is outside the record. We must take into consideration that he was acquitted.

The Advocate-General: Therefore, he ought to be more careful.

Mr. Justice Fletcher: On what ground was he acquitted?

The Advocate-General: I don't know.

Mr. Justice Fletcher: I read the judgment and I found that he was acquitted because the Sessions Judge did not believe the only evidence against him.

The Advocate-General referred to the portions of the article in which the writer spoke of corrupt police, unscrupulous officials and partial judiciary and observed that it had been put in a subtle way by using a subjunctive. It had a reflex action on the Government. It would have been less harmful and criminal if the article had appeared in a paper like the *Nineteenth Century*.

Mr. Justice Fletcher: I don't think it makes any difference in criminality.

The Advocate-General: I mean difference in effect.

Mr. Justice Fletcher: The Presidency Magistrate does not take into consideration the intention of the writer. He only says the present article is on the face of it seditious.

Mr. Justice Holmwood: He based his opinion on this article alone.

The Advocate-General: The other articles were exhibited.

The Advocate-General in conclusion asked their Lordships to consider that the appellant had been previously convicted in the *Navasakti* sedition case.

Mr. Chatterjee, on behalf of the appellant: He urged that the article which was the subject-matter of the charge ought not to be read along with other articles. Counsel submitted that in the absence of Arabindo Ghose the question as to whether the article was written by him could not be gone into at all. If their Lordships had taken it for granted that the article was written by Arabindo Ghose, if he was placed on his trial, and if he succeeded in proving that he did not write the article, what would be the result? There was no evidence that the two articles were written by the same man and those two articles could not be interpreted one in the light of the other. Counsel reviewed the article, saying that it subjected the moderates to scathing criticism. The writer advocated the necessity of union between the Nationalists and the Moderates, and argued that since the Moderates would not join them, the Nationalists must have their own organisation. He had criticised the Reform Scheme with a view to its improvement. The writer not only criticised the present Reform Scheme but condemned the men who tried to bring the Government into hatred. In connection with that he advocated two methods namely "self help" and "passive resistance." With regard to the latter, he asked his countrymen to withhold voluntary association by way of protest against any Government measure. It was not seditious. Counsel said that the Advocate-General was not conversant with the political ideals of the Indian people. The people of this country had imbibed the ideal of self-government and the writer was looking at the Reform Scheme from the height of that aspiration. He advocated the *Swadeshi*-boycott movement. There was no doubt that the word "boycott" had been used by certain evil minded persons for unlawful purposes. What the Indian public had been advocating for the last few years was a system of voluntary protection, by a sort of ordinance amongst themselves to refrain from purchasing foreign goods. Only the other day the Governor of Bombay told the people that the aim of the English in this country was to train the Indians up in self-government, but they must go step by step through the path chalked out for them by the law of the country. That was exactly what the writer of the article had done. Looking from this point of view the article became an asset on the side of the Government.

Continuing, Mr. Chatterjee said that the inevitability of peril referred to those who might suffer at the hands of over-zealous officials. By "desperate and sullen nation" the writer meant that the nation was already desperate and sullen, but he used a figure of speech, which was often used in poetry. He thought if the Socities were arbitrarily stopped, the nation would become desperate and sullen and this would be followed by violent reaction. The writer made two appeals side by side, one to the people, not to break the law, and the other to the Government not to cripple the aspirations of the people. On the one hand, there was a fearless call to the people to work and an unhesitating condemnation of the measures which were considered by him to be repressive. Then the word "humiliated" referred to the humiliation of the Moderates.

Mr. Justice Fletcher: He says the Moderates are humiliated by the Government.

Mr. Chatterjee: Certainly not. It is a mere quotation from Lord Morley's speech. This is an attack on Lord Morley's scheme

by quoting his own words. And I think the Moderates are not satisfied with the Reform Scheme.

Mr. Justice Fletcher: We don't know that.

Referring to the observation of the Advocate-General that the state of the country ought to be taken into consideration, Mr. Chatterjee said that he would only refer to the utterances made the other day by His Excellency the Governor of Bombay.

Mr. Justice Fletcher: We don't wish to hear what the Government of Bombay had said.

Mr. Chatterjee: The prosecution was started four months after it was written. It showed that there was no urgency in the case. The Advocate-General had said that the delay was due to secure the sanction of the Local Government.

Mr. Justice Holmwood: We have no evidence on that.

Mr. Justice Fletcher: The article appeared on the 25th December.

Mr. Chatterjee: It was a very peaceful day, at least in Calcutta.

Referring to the expressions "No genuine initiation of constitutional progress" and "Humiliation of Moderates", Mr. Chatterjee observed that it was no reflection on the Government. The author of the Reform Scheme had himself said that India was not fit for self-government and the writer twitted the Moderates who expected some sort of self-government. Mr. Chatterjee next said that when the writer used the phrase "inevitability of peril", he meant it would come in the end. To save the situation he advocated constitution of organisation. Following the well-known saying that "when bad men associate, good men combine", the writer said —here was the anarchical work, let them combine and do the work according to law.

Mr. Chatterjee next submitted that when the writer asked his people to prepare for the evils, he meant the sufferings that might come at the hands of over-zealous officials. Suppose a man was arrested and kept confined for two years after which he was acquitted. The sufferings of that man were due to the zeal of some official.

Mr. Justice Fletcher: No such case had ever happened.

Mr. Chatterjee: Take the case of Arabindo Ghose.

Mr. Justice Holmwood: That was an accident.

Mr. Chatterjee said that he was glad that the enunciation of ideals as described in this article was described by the Advocate-General as admirable but it was urged that, taken in the light of the other articles, it was objectionable. Counsel wanted to read the other articles to show that there was nothing objectionable in it.

Mr. Justice Holmwood: It is unnecessary to refer to other articles.

The Advocate-General: That was not exactly what I said.

Mr. Justice Fletcher: I quite understand your point.

In conclusion, Mr. Chatterjee said that the writer of the article always spoke of lawful organisations and not secret associations.

Judgment.

Holmwood, J.—I have had the advantage of reading the judgment which my learned brother is about to deliver and I find myself in agreement with him that the present appellant, the printer and publisher of the *Karmayogin*, cannot be convicted under section 124A, Indian Penal Code, on the article, which we have before us in this case.

It is unfortunate that of a series of articles alleged to have been written by one and the same hand, the prosecution should have selected the one which on the face of it appears the least amenable to a charge of sedition, and it is doubly unfortunate that the case should have been so inadequately tried in the lower Court. It is true that under the law, the printer and publisher of a seditious article can be punished merely on proof that the article is calculated to excite feelings of hatred, dislike, ill-will, enmity or hostility towards the Government established by law in British India but that renders it all the more incumbent on the prosecution to show either that the article does, as a fact, bring the Government into hatred or contempt or that the intention of the writer was to excite disaffection. Edge, C. J., in delivering the judgment of Full Court in *Queen-Empress* v. *Amba Pershad*(4), points out that the writer may be guilty of exciting or attempting to excite feelings of "disaffection" as that term is used in section 124A, no matter how guardedly he may attempt to conceal his real object but it is idle to contend that the printer and publisher can be punished if the concealed

object is not established by evidence on the record. Now in this case although the prosecution alleged that a series of articles had been written by one individual and had those articles produced by a police officer who said that it was his duty to read them and if objectionable to forward them to his superiors, no evidence was offered who that individual was, nor whether all the articles were by the same author.

It was urged by the learned Advocate-General that these articles were admissible under section 15 of the Evidence Act for the purpose of showing that the publication of the article before us in this case was not accidental, but that has obviously nothing to do with their admissibility for this purpose of showing the intention of the writer. In order to use them for the purpose it was necessary to show who the writer was and that all the articles produced were by the same hand. This not having been done, we are compelled to take the article before us as it stands without any of the informing commentaries which were sought to be drawn from one previous article in particular by the learned Advocate-General.

The author of the present article may be a very ingenious and subtle master of language—there are indications throughout the article that he is. Several of his conditional hypotheses, if they were interpreted with the double meaning that is sought to be read into them from other sources on the footing that the aims of the Nationalist party are really different from what they purport to be in this article, might bear a very sinister interpretation indeed, but as the possible author of this and the other article is not before us, and there is nothing to show that they are the work of one and the same hand, it would be extremely unfair to the appellant to judge him by any standard other than that of what the article before us really purports to contain.

The learned Presidency Magistrate in the Court below has not dealt with the purport of the article as a whole. He has selected isolated passages and, in my opinion, given them an interpretation that they will not bear and in some cases appended a quite inaccurate account of what they purport to convey. For instance, the article does not attack the Government when it is criticising the alleged inadequacy of the Reform Scheme. It attacks the Moderate Party who have bee assumed to have expressed their concurrence with the scheme. Again the writer nowhere suggests that without recourse being had to violence, advancement is impossible, as the learned Magistrate finds he does—and so on in the passages of the judgment.

Having regard to the very inadequate way in which the case was dealt with in the lower Court, I have had to seriously consider whether it would not be our duty to direct a re-trial, but, having regard to the fact that the appellant had already served more than half his sentence before he was admitted to bail and to the fact that the prosecution must be presumed to have abstained from proving the identity and intention of the writer upon grounds which to them seemed good and sufficient, I do not think any good purpose would be served by carrying the case against the present appellant any further. I, therefore, concur with my learned brother that the appeal must be allowed, the conviction and sentence set aside, and the appellant acquitted and released from bail.

Fletcher, J.—The appellant in this case has been convicted by the learned Officiating Chief Presidency Magistrate of an offence punishable under section 124A of the Indian Penal Code as being the printer and publisher of an article entitled "To my countrymen", which appeared in the issue of the *Karmayogin* newspaper on the 25th December, 1909, and has been sentenced to undergo six months' rigorous imprisonment.

The appellant has preferred an appeal to this Court against the conviction and sentence passed upon him. The article forming the subject of the charge purports to be an open letter addressed by one Arabinda Ghosh to his countrymen. The principles applicable to cases of this nature are not open to doubt, and all that we have to do is to apply those principles to the case now before us.

Section 124A of the Indian Penal Code coupled with the three explanations thereto contains in clear and concise language the law in this country relating to sedition which is practically identical with the law in England. It may, however, be useful in passing to quote one judicial utterance as to the limits permitted by the law to writers commenting on the actions of the Government. In charging the Jury in *Queen-Empress* v. *Tilak* (2), Strachey, J., made the following remarks:—"It (*i. e.*, the

section) shows clearly what a public speaker or writer may do, and what he may not do. A man may criticise or comment upon any measure or act of the Government, whether legislative or executive, and freely express his opinion upon it. He may discuss the Income Tax Act, the Epidemic Diseases Act, or any military expedition or the suppression of plague or famine, or the administration of justice. He may express the strongest condemnation of such measures and he may do so severely and even unreasonably, perversely and unfairly. So long as he confines himself to that, he will be protected by the explanation. But if he goes beyond, and, whether in the course of comments upon measures or not, holds up the Government itself to the hatred or contempt of his readers—as for instance by attributing to it every sort of evil and misfortune suffered by the people, or dwelling adversely on its foreign origin and character, or imputing to it base motives, or accusing it of hostility or indifference to the welfare of the people—then he is guilty under the section and the explanation will not save him." Now in this case the general theme of the article is a severe criticism on the policy of what is called the Moderate Party and a call to his countrymen to "come forward and take up their burden." The learned Advocate-General in course of his argument has taken us through the whole of the article, line by line, and pointed out the portions which in his view are open to complaint. The learned Advocate has, moreover, relied upon two other articles, Exhibits 161 and 181, which he states were written by the same writer and appeared in the issues of the *Karmayogin* on the 24th and 31st July, 1909. These two articles he claimed to use for the purpose of showing the meaning of certain expressions used in the article complained of and also to show the intention of the writer.

But as we pointed out during the argument that, apart from all other questions, these articles were not proved in such a manner as to entitle us to take them into consideration. We must, therefore, deal with the article complained of as it stands.

Now the first word that the learned Advocate-General has laid stress upon is the call to the Nationalist Party to "once more assume their legitimate place in the struggle for Indian liberties." This, it is said, is a clear invitation by the writer to his countrymen to join in a movement having for its attainment the liberation of India from foreign rule. But, in my opinion, the words standing alone are capable of a much more innocent meaning. The use of the word "liberties" in the plural would not *prima facie* point to liberation of the country from foreign rule but to certain specific liberties, and this view appears to be supported by the subsequent portion of the article when the writer sets out what the demand of the Nationalist Party must be, *viz.*, an effective voice in legislation and finance and some control over the Executive.

The next portion of the article, on which the learned Advocate-General laid stress, is the portion "the survival of moderate politics in India depended on two factors, the genuineness of the promised reforms and the use made of them by the conventionists of the opportunity given them by the practical suppression of Nationalist public activity. Had the reforms been a genuine initiation of constitutional progress, the moderate tactics might have received some justification from events. The reforms have shown that nothing can be expected from persistence in moderate politics except retrogression, disappointment and humiliation." The argument put forward on this part of the article is that the statement that the reforms are not "genuine" or a "genuine initiation of constitutional progress" holds the Government up to hatred and contempt as implying that they have given the people something that is not "genuine." To my mind this is a very far fetched argument. The writer was obviously entitled to express his opinion on the Reform Scheme, and the mere fact that he states that the scheme is not a genuine reform or not a genuine measure of constitutional progress cannot be seditious. But then it is said that the statement that "nothing can be expected from persistence in moderate politics except retrogression, disappointment and humiliation" followed subsequently by the words "discomfited and humiliated by the Government" are obviously seditious, as the words mean that the Government has humiliated a large portion of the people, *viz.*, the Moderate Party, and, therefore, the statement brings the Government into hatred or contempt. It is obvious that this is not the natural or ordinary meaning of the words. The natural mean-

ing is that the Moderate Party has been humiliated by accepting the Reform Scheme which is not a measure of "constitutional progress."

Then a portion of the article was relied upon as showing that the writer was advocating that violent methods should be used if necessary. The words are: "If the Nationalist stand back any longer, either the national movement will disappear or the void created will be filled by a sinister and violent activity."

But that the intention is not such as shown by the sentence that immediately follows:—"Neither result can be tolerated by men desirous of their country's development and freedom." The learned Advocate-General next referred us to the following part of the article: "The fear of the law is for those who break the law. Our aims are great and honourable and free from stain or reproach. Our methods are peaceful though resolute and strenuous. We shall not break the law and, therefore, we need not fear the law. But if a corrupt police, unscrupulous officials or a partial judiciary make use of the honourable publicity of our political method to harass the men who stand in front by illegal ukases, suborned and perjured evidence or unjust decision, shall we shrink from the toll that we have to pay on our march to freedom? ..... We must have our associations, our organisations, our means of propaganda, and, if they are suppressed by arbitrary proclamations, we shall have done our duty by our motherland and not on us will rest any responsibility for the madness which crushes down open and lawful political activity, in order to give a desperate and sullen nation into the hands of those fiercely enthusiastic and unscrupulous forces that have arisen among us, inside and outside India."

The argument on the first part of this paragraph is that, as the Government appoint the Police officials and judiciary, to describe them as corrupt, unscrupulous and partial reflects upon the Government and brings it into hatred and contempt. But though the words used are such that one may strongly disapprove of, I am unable to see that the words taken in their context necessarily bear this meaning. The first portion of the paragraph states that the movement is to be a movement within the law, and then follows the sentence commencing "But if" which words clearly govern the sentence which follows. It seems to me reasonably clear that the writer does not intend to designate all the police officials and judiciary as corrupt, unscrupulous and partial. It is also to be remembered that the article is not one written on the Police officials or judiciary. Although one may regret the use of such words, I cannot bring myself to believe that the use of these words in the context in which they are used falls within section 124A of the Indian Penal Code.

The other three expressions in the paragraph which have been dealt with are the expressions "arbitrary proclamations", "madness" and "a desperate and sullen nation."

It is very obvious that the expression "arbitrary proclamation' coupled with the word "associations" points to proclamations under the Criminal Law Amendment Act suppressing associations. I take it, however, that there is no particular harm in a writer stating that if his association, which he believes to be a lawful one, is suppressed, the proclamation will be arbitrary. It is difficult to deal seriously with the other two expressions "madness" and "a desperate and sullen nation."

That the first of these two expressions charges the Government with insanity cannot be argued. It is said, however, that the meaning of the word as used is that of recklessness and, therefore, falls within section 124A. The word, however, is clearly used to indicate act of folly which in the context is clearly innocuous. Similarly with regard to the expression "a desperate and sullen nation," the learned Advocate argued that these words were seditious as implying that the Government had made the nation desperate and sullen, and, therefore, brought the Government into hatred and contempt. But if arguments of this nature were assented to, the right of comment on the action of the Government given by law would be wholly taken away.

Then we come to what the writer states is to be the demand of the Nationalist party. "We demand, therefore, not the monstrous and misbegotten scheme, which has just been brought into being, but a measure of reform based upon democratic principles—. . . an effective voice in legislation and finance, some check upon an arbitrary executive. We demand also the gradual devolution of Exe-

cutive Government out of the hands of the bureaucracy into those of the people. Until these demands are granted, we shall use the pressure of that refusal of co-operation which is termed passive resistance. We shall exercise that pressure within the limits allowed us by the law but apart from that limitation, the extent to which we shall use it depends on expediency and the amount of resistance we have to overcome."

The argument for the Crown is that the use of the words "monstrous and misbegotten scheme" as applied to the Reform Scheme holds the Government up to "ridicule and vituperation." But that does not appear to be the natural consequence of these words. Doubtless the words are a strong condemnation of the Reform Scheme framed by the Government. The law, however, permits comments on actions of the Government provided they do not bring the Government into hatred or contempt or promote disloyalty. A statement that the Reform Scheme is monstrous and misbegotten, because it is not founded upon democratic principles, is not by itself one that exceeds fair and reasonable comment.

The next words that the learned Advocate-General much relied on were the words "arbitrary executive" which he stated were "sufficient of themselves to contravene the law." He argued that any constitutional lawyer would know that the Executive Government in India was not an arbitrary Executive, as no person is liable to be deprived of his liberty or to have his property forfeited without recourse to the Courts of law. In the first place, however, it is to be noticed that we must look at the words used by the writer not as if he were a constitutional lawyer but as a writer in a journal.

I quote from the very pertinent remarks made by Strachey, J., in charging the Jury in *Tilak's case*(2): " A journalist is not expected to write with the accuracy and precision of a lawyer or a man of science: he may do himself injustice by hasty expression out of keeping with the general character and tendency of the articles." Moreover there is a more general and popular meaning to the words " arbitrary executive " than that given by the learned Advocate-General. Further if the definition given by the learned Advocate is correct, it may be a matter of opinion how far the Government does or does not fall within that definition.

The next expression to which exception was taken was " passive resistance." The writer has, however, defined it himself as being " refusal of co-operation within the limits allowed us by the law." It seems difficult to deduce a seditious meaning from the phrase. But then it is said that although the writer states that the pressure is to be used within the limits allowed by the law, yet there is a covert threat to use pressure outside those limits if necessary.

All I can say on this argument is that I have not been able to discover the covert threat from the words used. The next and last part of the article which the learned Advocate-General has called our attention to is " The movement of arbitration successful in its inception has been dropped as a result of repression. The *Swadeshi*-Boycott movement still moves by its own impetus. We must free our social and economic development from the incubus of the litigious resort to the ruinously expensive British Court."

The learned Advocate General stated that the expression "*Swadeshi*-Boycott " referred to a boycott of the Government. But it is a matter of public knowledge that it refers to a boycott of foreign goods; and again he laid stress upon the expression "ruinously expensive British Courts." The question as to the expense involved in litigation before the Courts is surely a matter on which a writer is entitled to comment.

This is not the first time, nor will it, I imagine, be the last when the Courts will be described as ruinously expensive, and I cannot see how such a statement can come within section 124A.

I have now dealt with the arguments that have been made before us in detail on the article and I have given the best consideration I can to the article as a whole, and I have come to the conclusion that it does not appear from the article that it is such as is likely to cause disaffection, or produce hatred or contempt of the Government, nor can I find from the article that such was the intention of the writer.

Doubtless to many, if not to most people, the writer's view on the great Reform Scheme would appear to be unreasonable and one that does not recognise the great advance

that has been made. But with that we are not concerned. All that we have to decide is whether the law, as it is, has or has not been broken by the appellant by the publication of this article, and I have come to the conclusion that it has not.

The learned Advocate-General has pressed upon us strongly to take into consideration the state of the country at the time this article was published. The authorities show that that is a matter to be taken into consideration, but that obviously does not entitle the Court to convert an article, not falling within the mischief aimed at by section 124A, into one that does.

In my opinion the appeal ought to be allowed and the conviction and sentence set aside.

Appeal allowed.

(s. c. 1 M. W. N. 711.)

MADRAS HIGH COURT.

CIVIL APPEAL AGAINST ORDER No. 183 OF 1909.

October 13, 1910.

Present:—Mr. Justice Abdur Rahim and Mr Justice Krishnaswami Aiyar.

CHIDAMBARAM CHETTY—DEFENDANT—APPELLANT

versus

KARUPPAN CHETTY AND OTHERS—PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), s. 6, Sch. I art. 164—Ex parte decree—Setting aside—Minority—New or old Act applicable—General Clauses Act (X of 1897), s. 6—Interpretation of statute—Act enforced some months after its passing—Effect.

An *ex parte* decree was passed on the 4th of September, 1894. The 3rd defendant, then a minor, said that he attained majority on the 16th of January 1909, applied on the 25th of January to set aside the *ex parte* decree. The new Limitation Act came into force on the 1st of January 1909: *Held*, that the application to set aside the *ex parte* decree was governed by the new Act and as article 164 gives only 30 days from the date of the decree, the application was barred.

Section 6 of the new Limitation Act avails only as regards suits and applications for execution and does not apply to other applications.

As the legislature has deliberately modified section 7 of the old Act so as to confine the operation of disability to suits and applications for the execution of decrees, it will be against all principles of interpretation to allow minority to operate as a ground of disability in cases so deliberately excluded on other general principles. Section 6 of the General Clauses Act and sections 3 and 30 and article 164 of the Limitation Act clearly indicate that the intention of the legislature is that the new Act applies. The right to apply to set aside an *ex parte* decree, assuming it is a right, is acquired under the Code of Civil Procedure and not under the Limitation Act. The Limitation Act merely limits the period within which the right given by the Procedure Code may be exercised. There is no hardship in applying the new Limitation Act, as the same, though passed in August 1908, only came into force nearly five months later on the first of January 1909 and thus gave ample notice to all who would be seriously affected by the change in the law to seek their remedy under the old law before the new Act came into operation.

Appeal against the order of the Court of the Subordinate Judge of Madura East, dated the 27th March 1909, in I. A. No. 55 of 1909 (in O. S. No. 25 of 1894).

Mr. *Joseph Satya Nadar*, for the Appellant.

Mr. *S. Srinivasa Iyengar*, for the Respondents.

Judgment.—This case is covered by the decision in *Kali Amma* v. *Palappakkara Manakal* (1). An *ex parte* decree was passed on the 4th September 1894. The 3rd defendant, a minor, who says he attained majority on the 16th January 1909, applies on the 25th *idem* to set aside the *ex parte* decree. The new Limitation Act came into force on the 1st of January 1909. If this Act applies, it is clear that the application is barred. Article 164 of the new Act gives 30 days from the date of the decree for the application. The other alternative of 30 days from the date when the applicant becomes aware of the decree where he was not served with notice, has no application to the facts of this case as it is not alleged that notice was not served. The period of 30 days from the date of the decree would have expired on the 4th of October 1894. The appellant pleads the disability of minority. But under section 6 of the new Limitation Act, it avails only as regards suit and application for execution. It follows that if the new Act applies, the application is barred. But the appellant contends on the authority of *Moro Sadhsiv* v. *Visaji Raghunath* (2), that on general principles apart from section 6 of the Act a fresh period must be held to run from the cessation of minority. Assuming that case to have been rightly decided it has no application to the present because section 7 of the old Limitation Act has been deliberately modified so as to confine the operation of disability to suits and applications for the execution of decrees and it will be against all principles of interpretation to allow

(1) 1 M. W. N. 516; 7 M. L. T. 115; 20 M. L. J. 347; 5 Ind. Cas. 420.

(2) 16 B. 536.

minority to operate as a ground of disability in cases deliberately excluded from section 6. An application to set aside an *ex parte* decree unlike an application under section 230 of the old Code of Civil Procedure is specially provided for by article 164 which is one of the applications falling within section 3.

It is then contended that section 7 of Act XV of 1877 under which the disability of minority applies to all applications governs this case. Such a contention runs counter to the express provision of section 3 of Act IX of 1908. It runs "subject to the provisions contained in sections 4 to 25 (inclusive), every suit instituted, appeal preferred and application made, after the period of limitation prescribed therefor by the 1st Schedule shall be dismissed * * *". There is nothing in section 6 (of the Act) that applies to this case. We may, therefore, read the clause so far as this case is concerned without the words "subject to the provisions contained in sections 4 to 25 (inclusive)." The present application is one made after the period of limitation prescribed for it by article 164 of the 1st Schedule. It follows that the application ought to be dismissed. It is argued, however, that section 6 of the General Clauses Act of 1897 renders the new Limitation Act inapplicable. That section provides that unless a different intention appears, the repeal of an enactment "shall not affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed." Under Act XV of 1877, the applicant had the right of privilege to move the Court to set aside the *ex parte* decree within 30 days from the cessation of minority. It is said that that cannot be effected by the repeal of Act XV of 1877. There are two answers to this contention. *First*, assuming that the right to apply to set aside an *ex parte* decree is a right within the meaning of the section (as to which see *Colonial Sugar Refining Company* v. *Irving* (3), such a right to apply is not acquired under the Limitation Act of 1877 but under the Code of Civil Procedure (Order IX, Rule 13.) The Limitation Act merely limits the period within which the right given by the Procedure Code may be exercised. [*Theodore* (1899) p. 236]. Clause (*c*) of section 6 of the General Clauses Act, therefore, does not save the application.

Hope Mills v. *Vithaldas* (4) to which our attention was drawn by the respondents' Vakil is a case exactly in point. Another answer to the contention is given by the words "unless a different intention appears," see *Moon* v. *Durden* (5). A different intention does appear in section 3 of Act IX of 1908, which expressly makes article 164 of the 1st Schedule to the Act applicable to the case. Moreover, section 30 of the Act which gives a special period of two years in the case of suits for which a shorter period of limitation is provided by the new Act than by the old Act makes no similar provision in the case of applications. *Expressio unius personæ est exclusio alterius.* The intention seems to be abundantly manifest that the new Act applies.

It was pressed upon us that this was a case of hardship. On the date when the new Act came into force the period provided by it having expired the right which the applicant had is practically withdrawn from him. There is, no doubt, some force in the argument. The facts of the Bombay case did not raise this difficulty. See Macleod, J., in *Hope Mills* v. *Vithaldas* (4). But as pointed out in *Kalli Amma* v. *Palappakkara Manakal* (1), the new Limitation Act which was passed in August 1908 and came into force nearly five months later on the 1st of January 1909, gave ample notice to all who would be seriously affected by the change in the law to seek their remedy under the old law before the New Act came into operation. There was a mode of relieving oneself from the hardship created by the change in the law which was available to those who were likely to beaffected by the change [*Fowler* v. *Chatterton* (6). *The Queen* v. *The Leeds and Bradford Railway Co.* (7)]. The plain language of section 3 of the Act must be given effect to. The appeal is dismissed with costs.

Appeal dismissed.

(3) (1905) A. C. 369; 74 L. J. P. C. 77; 92 L. T. 738; 21 T. L. R. 513.

(4) 12 Bom. L. R. 730; 7 Ind. Cas. 982.
(5) 76 R. R. 479; 2 Ex. 22; 12 Jur. 138.
(6) (1827) 6 Bing. 258; at p. 264.
(7) 21 L. J. M. C. 193.

RAGHAVA CHARIAR *v.* RAGHAVA CHARIAR.

(s. c. 20 M. L. J. 726.)

MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 848 OF 1892.

February 3, 1893.

Present:—Sir Muthuswami Aiyar, Judge, and Mr. Justice Handley.

RAGHAVA CHARIAR—DEFENDANT—APPELLANT

versus

RAGHAVA CHAIAR, EXECUTOR TO THE ESTATE OF THE MINOR VEDANTHA CHARIAR—PLAINTIFF—RESPONDENT.

Suits Valuation Act (VII of 1887), s. 11—Civil Procedure Code (Act XIV of 1882), s. 578—Suit by trustee for removal of co-trustee—Misappropriation—Removal—Value of trust property determines jurisdiction—Interpretation of s. 11 of Suits Valuation Act.

Misappropriation of the trust fund by a trustee is sufficient to justify his removal from the office.

In a suit by a trustee for the removal of a co-trustee on the ground of misappropriation by the latter of the trust funds, the value of the whole trust property, and not only the amount alleged to have been misappropriated, ought to be taken as a guide for determining the question of jurisdiction.

The effect of section 11 of the Suits Valuation Act is simply to place over-valuation or under-valuation of suits on the same footing with other irregularities contemplated by section 578, Civil Procedure Code of 1882, except that the objection must be taken either in the Court of first instance or in the lower appellate Court. The mere change of forum consequent on under-valuation cannot of itself be treated as prejudicially affecting the disposal of a suit on the merits within the meaning of the section, for that is the very case premised and provided for by the section.

Reading section 11 of the Suits Valuation Act together with section 578 of the Civil Procedure Code of 1882, the words "prejudicially affected the disposal of the suit on the merits" must be construed in the same way as they would be construed with reference to any error, defect or irregularity contemplated by that section.

Second appeal from the decree of the District Court of Tanjore, in Appeal Suit No. 572 of 1891, presented against the decree of the Court of the District Munsif of Kumbakonam, in Original Suit No. 109 of 1890.

Facts.—A trustee sued for the removal of his co-trustee on the ground that the latter had misappropriated Rs. 1,421 of the trust property. The value of the entire trust property was admittedly over Rs. 20,000 but the suit was tried by the District Munsif. The contention was that the District Munsif had no jurisdiction to try the suit.

Messrs. *C. Ramachandra Row* and *T. Rangaramanujachariar*, for the Appellant.

Messrs. *V. Bhashyam Aiyangar* and *C. R. Tiruvengadachariar*, for the Respondent.

Judgment.—The concurrent finding of both Courts that appellant has misappropriated Rs. 1,421 of the trust property is sufficient to support the decree for his removal from the office of co-trustee with plaintiff. There is evidence to support this finding and we cannot, therefore, interfere with the decision in second appeal.

It is objected on behalf of appellant that the property—the subject of trust—being admittedly over Rs. 20,000 in value, the District Munsif had no jurisdiction to try the suit. The lower appellate Court has treated the case as coming within the class of suits which are incapable of valuation and, therefore, accepted the value put upon the suit by plaintiff with reference to the amount alleged to have been misappropriated by appellant. We are of opinion that the value of the trust property ought to have been taken as a guide to the determination of the question of jurisdiction. The objection was taken both in the Court of first instance and in the lower appellate Court. But under section 11 of the Suits Valuation Act (VII of 1887) we are precluded from entertaining the objection unless we are satisfied that the under-valuation has prejudicially affected the disposal of the suit on the merits. The mere change of forum consequent on the under-valuation cannot of itself be treated as prejudicially affecting the disposal of the suit on the merits within the meaning of the section, for that is the very case premised and provided for by the section. Reading the section together with section 578 of the Code of Civil Procedure, we consider that the words "prejudicially affected the disposal of the suit on the merits" must be construed in the same way as they would be construed with reference to any error, defect or irregularity contemplated by that section. The effect of section 11 of the Suits Valuation Act is simply to place over-valuation or under-valuation of suits on the same footing with other irregularities contemplated by section 578, except that the objection must be taken either in the Court of first instance or in the lower appellate Court. In the present case we do not consider that the under-valuation has prejudicially affected the disposal of the suit on the

merits. We, therefore, refuse to entertain the objection to the jurisdiction.

The appeal fails and is dismissed with costs.

Appeal dismissed.

(s. c. 20 M. L. J. 728.)

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 73 OF 1908.

April 22, 1910.

Present:—Mr. Justice Miller and Mr. Justice Munro.

Sree Rajah VENKATARANGAYYA APPA ROW BAHADUR ZAMINDAR—PLAINTIFF—APPELLANT

versus

PORANKI APPALARAZU AND OTHERS—RESPONDENTS.

Madras Regulation (XXV of 1802), s. 4—Land granted by zamindar *for personal service before Permanent Settlement*—Lakhiraj—*Presumption—Burden of proof.*

There is no presumption that land granted by a *zamindar* before the Permanent Settlement as reward or emoluments for private services is *lakhiraj* land within the meaning of section 4 of Regulation XXV of 1802. The burden is on the Government to show that it was *lakhiraj* land at the Permanent Settlement.

Second appeal from the decree of the District Court of Kristna, in Appeal Suit No. 103 of 1906, presented against the decree of the Court of the District Munsif of Gudivada, in Original Suit No. 177 of 1904.

Mr. *V. Ramesam*, for the Appellant.

The *Government Pleader* (Mr. *C. F. Napier*), Messrs. *J. Satya Nadar* and *Devadoss* for Mr. *T. Prakasam*, for the Respondents.

Judgment.—It is contended by the Government Pleader that on the finding that the *inams* were granted before the settlement, and at the time of the settlement were exempt from the payment of any rent to the *zemindar* and held on condition of doing service for him a presumption arises that the land is *lakhiraj* within the meaning of section 4 of Regulation XXV of 1802. This contention is based on *Forbes* v. *Meer Mahomed Tuquee* (1). There it was held, at page 457, that the land there in question being held rent-free at the date of the settlement could presumably be treated as *lakhiraj*. But the lands in that case were held under *sanads* granted by the Government, and not as here by the *zamindar*. In the case before us the findings are that the *inams* were granted by the *zamindar* Narasimha Apparow before the Permanent Settlement as reward or emoluments for private services rendered to him on condition that they should be held so long as the services continued to be rendered. We are unable to see how from these facts any presumption can arise that the land was at the Permanent Settlement exempt from the payment of public revenue. It was pointed out by the Chief Justice in *Rajah Nilmoney Singh* v. *The Government* (2) that "the Government would not have allowed any portion of their revenue in consideration of private services to be rendered to the *zamindar*." The decision in that case was affirmed by the Privy Council, and the remark I have quoted is quoted also without disapproval in the judgment of that tribunal in another case *Raja Nilmoni Singh* v. *Bakranath Singh* (3) and these *dicta* rather than the observations in *Forbes* v. *Meer Mahomed Tuquee* (1) would seem to be applicable to the present case. The Courts below have, it seems to me, made a mistake by confounding the public revenue and the *zamindar's* income. The District Munsif deals with the question in paragraph 9 of his judgment. The *zamindar* at the time of the grant was not proprietor, therefore, he could not exempt the land from payment of revenue without the concurrence of the Government. The Government can, therefore, re-impose full assessment, when it pleases, on land exempted by the *zamindar* from payment of public revenue. The fallacy lies in the assumption that because the *zamindar* allowed his peons to occupy the land free of money rent in lieu of wages, the land becomes exempt from the payment of public revenue to the Government of the day. There is no evidence that the land in question was not after its grant an *inam* held as security for the payment of the Government revenue by Narasimha Apparow, and there can, we think, be no presumption that the Government gave up its right merely because Narasimha Apparow wanted to provide a supply of hereditary peons for his own benefit. The District Judge holds that the lands were evidently excluded from the assets be-

(1) 13 M. I. A. 438; 5 B. L. R. 529; 14 W. R. (P.C.) 8.

(2) 6 W. R. 121.

(3) 9 I. A. 104 at p. 121; 9 C. 187.

cause they were held free of money rent to the *zamindar* before the Permanent Settlement. He seems to have fallen into the same error, taking "free of money rent to the *zamindar* " and "exempt from the payment of the public revenue" to be synonymous terms. The lands were a source of profit to the *zamindar*; he used them to pay his servants, and it seems to me the burden is on the Government to show that they were *lakhiraj* at the Permanent Settlement.

The question is one of fact with which we cannot deal in second appeal and we must call for fresh findings in the light of these observations and on the evidence on record on the questions: (1) whether the land was *lakhiraj* land at the date of the Permanent Settlement; (2) if not whether the plaintiff is entitled to eject the 1st and 2nd defendants-respondents. The findings should be submitted within one month after the re-opening of the District Court. Seven days will be allowed for filing objections.

(s. c. 99 P. L. R. 1910.)

PUNJAB CHIEF COURT.

CIVIL REVISION No. 2273 OF 1909.

June 21, 1910.

Present:—Mr. Justice Johnstone.

Musammat GURDEVI—PLAINTIFF—PETITIONER

versus

RAMAN MAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act XIV of 1882), ss. 103, 462—Dismissal for default—Costs—Minor—Next friend making default in appearance—Absence of pleader.

The idea that defaults in appearance can always be atoned for by paying costs is an erroneous idea and should not be allowed to gain ground.

A minor's suit is liable to be dismissed for his next friend making default in appearance at the time of hearing of the suit. The fact of the minority of the plaintiff makes no difference, for there is no distinction in the Civil Procedure Code in his favour. The minor may sue again through another next friend or himself on attaining majority.

Petition, under section 70 (1) (*a*) of Act XVIII of 1884, as amended by Act XXV of 1899, for revision of the order of the Divisional Judge, Ferozepore Division, dated the 12th May 1909, confirming that of the District Judge, Ferozepore, dated the 9th February 1909, rejecting the application of the petitioner, for restoration of case dismissed for default.

Rai Sahib Pandit *Sheo Narain*, for the Petitioner.

Mr. *Pestonji Dadabhai*, for the Respondents.

Judgment.—In my opinion the petition for restoration and the appeal against its rejection were rightly dismissed. I also fail to see how initially there is any ground for revision under clause (*a*). The Courts below examined the evidence and refused to believe in the next friend's alleged illness. They also were unable to find any excuse whatever for the pleader's absence. In these circumstances, they were *bound* by law to hold that no sufficient cause for default had been made out and the natural result followed.

No doubt, plaintiff is a minor but I fail to see that in the circumstances this makes any difference. I can find no distinction of this sort drawn in the Code of Civil Procedure. As at present advised, I see no difficulty in her suing again through another next friend, or suing on attaining majority.

The idea that defaults in appearance can always be atoned for by paying costs is an erroneous idea and should not be allowed to gain ground.

Dismissed with costs to be paid by the next friend Sant Ram.

Appeal dismissed.

(s. c. 100 P. L. R. 1910.)

PUNJAB CHIEF COURT.

CIVIL REVISION No. 1773 OF 1908.

April 28, 1910.

Present:—Mr. Justice Ryves.

BHOLA SINGH AND OTHERS—DEFENDANTS—PETITIONERS

versus

Musammat MANO AND OTHERS—PLAINTIFFS—RESPONDENTS.

Custom—Alienation—Gift—Succession—Donee dying without sons—Daughter—Collaterals—Jats of Chhajawal village, Jagraon Tahsil, Ludhiana District.

G. died leaving two widows D. and C. and a daughter M. by C. After his death the land was mutated in favour of D. only—C. having predeceased D.,—the latter made a gift but the collaterals of G. obtained a decree declaring that the gift would not operate against their reversionary interests. M., the daughter of G. by C., was no party to that suit. On the death of D., the collaterals of G. and his daughter M. claimed to succeed to the estate. B. and others also claimed

BHOLA SINGH *v.* MANO.

to inherit on the ground that the land originally belonged to their ancestor G. S. who had gifted it to G. and that on G. dying sonless, the same reverted to them. It was found that the land was not ancestral but was self-acquired land of G:

Held, that B. and others had no right, for no gift by their ancestor G. S. was proved.

Held, also, that the collaterals of G. had failed to prove a custom according to which they inherited self-acquired land of the deceased to the exclusion of M., the daughter of the deceased. The fact that they had obtained a declaratory decree against D. did not operate as *res judicata* against M. who was no party to the suit and did not claim in the present suit through D.

Nidhu v. *Ram Singh*, 2 P. R. 1909; 25 P. W. R. 1909; 1 Ind. Cas. 457; *Rajo* v. *Karam Bakhsh*, 11 P. R. 1908; 92 P. L. R. 1908; 13 P. W. R. 1908; *Waryama* v. *Hira Nand*, 63 P. R. 1908; 126 P. W. R. 1908; *Indar* v. *Asa Singh*, 65 P. R. 1908; 90 P. L. R. 1908; 113 P. W. R. 1908; *Bholi* v. *Man Singh*, 86 P. R. 1908; 146 P. W. R. 1908, referred to.

Application under section 70 (*b*) of Act XVIII of 1884 as amended by Act XXV of 1899, for revision of the order of the Additional Divisional Judge, Ambala Division, dated the 28th January 1908, confirming that of the Additional District Judge, Ludhiana District, dated the 31st July 1907, decreeing plaintiff's claim.

Chaudhri *Ram Bhaj Datta*, for the Petitioners.

Rai Sahib Pandit *Sheo Narain*, for the Respondents.

Judgment.—These three revisions are connected and may be disposed of in one judgment.

The facts are very clearly set out in the judgments of the lower Courts, and it is unnecessary to repeat them here. The contest was for possession of 45 *bighas*, 19 *biswas kham* of land together with a share in the village *shamilat* and a house situated in *mauza* Chhajawal, *Tahsil* Jagraon in the District of Ludhiana. The land in suit admittedly belonged to one Gandhi Singh, who died many years ago, and who was succeeded by one of his widows, *Musammat* Dharmon. She died about a year before the present litigation began. It is unnecessary now to give a history of that litigation.

The three contending parties are, (1) *Musammat* Mano, the daughter of Gandhi Singh and *Musammat* Chandu, his widow, who predeceased *Musammat* Dharmon—she claims to succeed to the property, (2) Bhola Singh and his party, (3) Narain Singh and party.

Bhola Singh's allegation is that the land in suit was given to Gandhi Singh by one Garib Singh, their ancestor, for his maintenance, and after his death his widow *Musammat* Dharmon was allowed to remain in possession of it, and that on her death, according to law and custom, the land should revert to the *khata* out of which it was given. He also relied on the custom alleged to obtain in the village as to the exclusion of daughters from inheritance.

Narain Singh's allegation is that they are collaterals of Gandhi Singh and that according to the custom which obtains among Hindu *Jats*, daughters are absolutely excluded from inheritance, and that they are, therefore, entitled to inherit.

There were originally two suits, but they were consolidated and were disposed of in one judgment. The first Court found:—

(1) That the land in dispute was not ancestral.

(2) That it was not given to Gandhi Singh by Garib Singh, but was self-acquired; and that the custom set out in the *Riwaj-i-am* of the *Tahsil* only applies to ancestral land, and that the collaterals, who are proprietors in another village in another *tahsil*, have no right preferential to that of *Musammat* Mano who is in possession of the property. He, therefore, decreed the suit in favour of *Musammat* Mano.

On appeal, these findings were upheld by the learned Divisional Judge. From his decree three Civil Revisions have been filed.

No. 1773 by Bhola Singh, in which the first ground is to the effect that the lower appellate Court had no jurisdiction to find in its judgment that "the occupancy rights go to whoever would inherit the proprietary land provided it was held by a common ancestor. The person entitled to inherit having been held to be *Musammat* Mano, the occupancy rights go to her."

Revision No. 1774 was also filed by Bhola Singh apparently under section 70 (1) (*b*) of the Punjab Courts Act.

Revision No. 1775 is filed also under section 70 (1) (*b*) by Narain Singh and his party.

The Revision No. 1773 may be disposed of at once.

Musammat Mano, when she sued with reference to 45 odd *bighas* of which she alleged herself to be proprietress in possession,

stated that there were certain other occupancy holdings to which she was entitled and about which she would file a separate suit. The Court of first instance very properly left out of consideration any questions referring to the occupancy holdings and in the decree which it passed in favour of *Musammat* Mano passed a decree in accordance with the prayers contained in her plaint. That decree the lower appellate Court confirmed. It is true that in its judgment the passage to which exception has been taken does occur, but it is obvious that those remarks are merely *obiter*. There is not, and could not, be any adjudications on the right of the parties to the occupancy lands as between *Musammat* Mano and Bhola for the simple reason that *Musammat* Mano was not urging in that suit any claim to such lands and no issue on the subject was raised or decided. As the decree of the lower appellate Court did nothing more than confirm the decree of the first Court, in my opinion, this application in revision was unnecessary, and I dismiss it with costs.

The other two cases in revision may be decided together.

Both lower Courts have concurred in finding (1) that the alleged gift by Garib Singh to Gandhi Singh has not been proved, and (2) that the land in suit was not ancestral.

These findings of fact could not be assailed here. The only question which can be reopened is the question of the custom.

In *Khuda Yar* v. *Sultan*(1) it is laid down that the land not being ancestral and plaintiffs not being owners in the village in which it was situated, the onus rested upon them to prove that they had a superior claim to defendants, who were the original owner's daughter's sons, and that they (plaintiffs) had failed to discharge it.

In this case Narain Singh and his party are not residents in the village where the land in suit is situated and the land has been found by both Courts not to have been ancestral. The onus, therefore, lay on them to prove their right to succeed in preference to *Musammat* Mano, the daughter of the last male proprietor.

Narain Singh rests his claim upon the *Riwaj-i-am* of *Tahsil* Jagraon and also on the *Riwaj-i-am* of the District of Ludhiana.

(1) 103 P. R. 1900.

At page 60 of the Customary Law of Ludhiana the answer to question 43 is stated to be that most of the Hindu Jats will admit the right of the "daughter, virgin or married, to succeed under no circumstances however far back it is necessary to go in order to find a collateral relation of the deceased." The *Riwaj-i-am* of the *Tahsil* is more particular. According to it a daughter in the village, whether she be married or unmarried, adult or minor, does not in any way succeed, but collateral heirs of the father, though they may be very remotely related succeed, and if there be no collateral, then proprietors of the *Thula* and *patti* receive the land.

In neither of these statements is it specifically stated that the custom is confined to ancestral land.

Both the Courts have held that *Riwaj-i-am* refers to ancestral property and the same view was taken in a very similar case, namely, in *Nidhu* v. *Ram Singh* (2), relying on previous decisions of this Court.

Musammat Mano proved six instances.

Three of these, however, may perhaps be disregarded as they were cases merely of gifts of land made by proprietors to a daughter. But three were instances where a daughter succeeded without opposition. It is true that the inference to be drawn from these instances would have been much stronger if the daughters had established their right to succeed after contest, but at the same time, in the absence of a single instance to the contrary cited by either Bhola or Narain Singh, they are of some weight.

Apart from the instances cited by *Musammat* Mano, I see in the Punjab Record for 1908 four similar cases, *viz.*, *Indar* v. *Asa Singh* (3); *Rajo* v. *Karam Bakhsh* (4), *Waryama* v. *Hira Nand* (5), *Bholi* v. *Man Singh* (6). None of these cases, it is true, came from Ludhiana and they refer to neighbouring districts.

I, therefore, agree with the lower Courts in holding that petitioners have not discharged the onus which lay on them to prove that under the custom which they set up they had a preferential title to *Musammat* Mano.

(2) 2 P. R. 1909; 25 P. W. R. 1909; 1 Ind. Cas. 457.

(3) 65 P. R. 1908; 90 P. L. R. 1908; 113 P. W. R. 1908.

(4) 11 P. R. 1908; 92 P. L. R. 1908; 13 P. W. R. 1908.

(5) 63 P. R. 1908; 126 P. W. R. 1908.

(6) 86 P. R. 1908; 146 P. W. R. 1908.

SHEO NARAIN *v.* EMPEROR.

Only one further point remains for consideration. It was urged on behalf of Narain Singh that the judgment of the Extra Assistant Commissioner, exercising the powers of a Subordinate Judge of the 2nd class of Ludhiana, dated 9th May 1893, operated as *res judicata* against *Musammat* Mano.

It appears from that judgment that *Musammat* Dharmon made a gift of the land now in suit to one Ashok Singh and that thereupon several persons, including Narain Singh and others of his party, sued as next reversioners of Gandhi Singh for a declaration that the deed of gift was inoperative as against their reversionary rights and they obtained a decree, which not being appealed against became final. One of the defences set up by *Musammat* Dharmon in that suit was that Narain Singh and his co-plaintiffs were not reversioners of Gandhi Singh. This question was made an issue in the suit, but it does not appear to have been decided, explicitly. But assuming that it was so decided, that judgment, in my opinion, cannot operate in any way against *Musammat* Mano. At that time she was merely a reversioner.

She was no party to the suit and she does not claim through *Musammat* Dharmon, her step mother, but through her father Gandhi Singh.

This ground, therefore, in my opinion, also fails. The result is that cases Nos. 1774 and 1775 are also dismissed with costs.

Applications dismissed.

(s. c. 105 P. L. R. 1910.)

PUNJAB CHIEF COURT.

CRIMINAL APPEAL No. 35 OF 1910.

May 24, 1910.

Present:—Sir Arthur Reid, KT., Chief Judge, and Mr. Justice Ryves.

SHEO NARAIN—CONVICT—APPELLANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 35, proviso (a) 397—Punishment—Accused convicted of several offences—Aggregate term of imprisonment.

An aggregate sentence of 20 years' rigorous imprisonment is contrary to the provisions of proviso (*a*) to section 35 of the Criminal Procedure Code.

The provisions of section 35 only apply to a person convicted at one trial of two or more distinct offences. The section has no application whatever when a person is convicted on two or more separate trials even though in all of them the complainant is the same and the offences are similar and they are concluded on the same date. In the case of separate trials section 397 applies.

Appeal from the order of the Magistrate, 1st Class, Amritsar, exercising enhanced powers under section 30 of the Criminal Procedure Code, dated the 21st December 1909, convicting the appellant.

Mr. *Pestonji Dadabhai*, and Lala *Har Gopal* for Mr. *Grey*, for the Appellant.

The *Government Advocate*, for the Respondent.

Judgment.—The appellant was convicted by a Magistrate of the 1st Class under section 409 of the Indian Penal Code on three charges and sentenced to seven years' rigorous imprisonment each in respect of the first two charges and six years' rigorous imprisonment in respect of the last—the sentences to run consecutively. The first sentence of seven years was to include three months' solitary confinement. At this trial, therefore, the appellant was sentenced to undergo rigorous imprisonment for twenty years. This judgment was dated 21st December 1909. On the same date the appellant was convicted by the same Magistrate in a separate trial under section 409 with reference to the embezzlement of some Rs. 5,000 on or about the 18th October 1906. In this case the appellant was ordered to undergo seven years' rigorous imprisonment to run concurrently with the sentences already passed against him in the previous case.

The third case against the appellant under the same section was also concluded on the 21st December 1909. This referred to embezzlements amounting to about Rs. 8,400 in the year, 1908. In this case also the appellant was sentenced to rigorous imprisonment for seven years to run concurrently with the sentence imposed in the first case.

It has been admitted by the learned counsel who appeared for the appellant that he does not wish to dispute the facts found or to contend that the convictions were wrong. He pleads that the sentences are far too severe, having regard to the age of the appellant, who is said to be about 45, and to the want of proper supervision of the firm whose agent he was, as evidenced by the facts, that one of the charges referred to a criminal misappropriation in 1906, and lastly that but for the negligence of the National Bank of India the frauds which formed the subject-matter

of the first trial could not have been perpetrated

We are not much impressed by these arguments, but we think that on the whole a lighter sentence would meet the ends of justice. We would, however, point out to the learned Magistrate that an aggregate sentence of 20 years is contrary to the provisions of proviso (*a*) to section 35 of the Criminal Procedure Code. We would also point out that the learned Magistrate has overlooked the provisions of section 397 of the Code and misapplied section 35 in passing sentence in the second and third cases. The provisions of section 35 only apply to a person convicted *at one trial* of two or more distinct offences. The section has no application whatever when a person is convicted on two or more separate trials even though in all of them the complainant is the same, and the offences are similar and they are concluded on the same date. In the case of separate trials section 397 applies. That section lays down very distinctly that when a person already undergoing a sentence of imprisonment is sentenced to imprisonment, such imprisonment shall commence at the expiration of the imprisonment to which he has been previously sentenced. The proviso to that section has no application here.

From this it follows that so much of the learned Magistrate's order as directed the terms of imprisonment in the two last cases to run concurrently with the imprisonment ordered in the first case was illegal and *ultra vires*.

On the whole we think an aggregate sentence of 12 years' rigorous imprisonment from the 1st December 1909 will be appropriate.

We allow the Appeal to this extent that in appeal No. 35, we reduce the sentence on each of the charges to one of 4 years' rigorous imprisonment, the sentences to run concurrently. We set aside the term of solitary confinement.

In Criminal Appeal No. 32, we reduce the sentence to one of 4 years' rigorous imprisonment which will take effect on the expiry of the sentence awarded in the first case, as provided in section 397 of the Code.

In Criminal Appeal No. 34, we similarly reduce the sentence to one of 4 years' rigorous imprisonment to take effect at the expiry of the term awarded in the second case.

Appeal accepted.

(s. c. 126 P. L. R. 1910.)

PUNJAB CHIEF COURT.

CRIMINAL REVISION No. 246 OF 1910.

May 21, 1910.

Present:—Sir Arthur Reid, KT., Chief Judge.

ABDULLA KHAN AND OTHERS—CONVICTS —PETITIONERS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 106—Security to keep peace, in what cases may be demanded.

Section 106 of the Criminal Procedure Code is not applicable to a person not convicted of any of the offences specified in the section.

Although intimidation is one of the elements of an unlawful assembly, the criminal intimidation specified in section 106 is the offence specifically defined by section 503, the sentence provided by section 506 being more severe than that provided by section 143, and section 106 cannot be applied to a person convicted under section 143 merely because intimidation by show of criminal force is in the fourth and fifth parts of the definition in section 141 an element of the offence punishable under section 143.

Yar Mohammad v. *The Empress*, 3 P. R. (Cr.) 1890, referred to.

Petition under section 439 of Act V of 1898, for revision of the order of the Sessions Judge, Attock Division, dated 30th November 1909, affirming that of Khan Taj Muhammad Khan, Magistrate, 1st Class, Attock, convicting the petitioners.

Mr. *Pestonji Dadabhai*, for the Petitioners.

Judgment.—I see no reason for interference, except with the sentences and with the order under section 106 of the Code of Criminal Procedure.

The lower appellate Court found, as a fact, that the petitioners assembled to prevent the erection by Nawab Khan of a building on a plot of land owned by him and it is admitted that the petitioners sat at the spot to prevent the opposite party building on the land.

The assembly was, therefore, unlawful within the terms of section 141 of the Penal Code and the petitioners were punishable under section 143.

The sentences of fine passed were, however, in my opinion, excessive, and I reduce the fine payable by Abdulla Khan to fifty rupees and the fine payable by each of the other petitioners to twenty-five rupees. The balance in each case, if realised, will be refunded.

The Magistrate, very properly, took no steps under section 106 of the Code of Criminal Procedure, that section not being applicable to a person not convicted of riot, assault or other offence involving a breach of

the peace, or of abetting the same, or of assembling armed men, or taking other unlawful measures with evident intention of committing the same, or committing criminal intimidation. The latter offence is defined by section 503 of the Penal Code and it is made punishable by section 506 with rigorous imprisonment for two years or fine or both.

Although intimidation is one of the element of an unlawful assembly, the criminal intimidation specified in section 106 is, in my opinion, the offence specifically defined by section 503, the sentence provided by section 506 being more severe than that provided by section 143 and section 106 cannot be applied to a person convicted under section 143 merely because intimidation, by show of criminal force, is in the fourth and fifth parts of the definition in section 141, an element of the offence punishable under section 143. *Yar Mohammad* v. *The Empress* (1) is in point.

For these reasons I set aside the order passed under section 106 of the Code of Criminal Procedure by the learned Sessions Judge against Abdulla Khan, who is hereby discharged from his bail.

Order set aside.

(1) 3 P. R. 1890 Cr.

(s. c. 127 P. L. R. 1910.)

PUNJAB CHIEF COURT.

CIVIL REVISION No. 351 OF 1910.

June 4, 1910.

Present:—Mr. Justice Scott-Smith.

THAKAR DAS—DEFENDANT—PETITIONER

versus

BARKHURDAR—PLAINTIFF—RESPONDENT.

Punjab Courts Act (XVIII of 1884 as amended), s. 70 (1) (a)—Revision—Civil cases—Material irregularity—Assumption by Court against evidence on record.

Where the lower appellate Court reversed the judgment of the original Court merely on assumption and there was no evidence in support of it, the Chief Court, on revision, set aside the judgment of the lower appellate Court and restored that of the original Court.

Petition, under section 70 (*a*) and (*b*) of Act XVIII of 1884 as amended, for revision of the decree of the Divisional Judge, Amballa, dated the 10th August 1909, reversing the decree of the Munsif, 1st Class, Ludhiana, dated the 9th January 1909, dismissing plaintiff's claim,

Bhagat *Gobind Das*, for the Petitioner.

Mr. *Mohamed Din*, for the Respondent.

Judgment.—This revision was admitted with reference to grounds Nos. 3 and 4.

Ground No. 3 has reference to the house in dispute. The first Court found that the house was not included in the gift made by Mukhan to his son-in-law, Hakim. The lower appellate Court says presumably Hakim got the house now in question with it (*i. e.*, the land) and refers to *Nur Hussain* v. *Ali Sher* (1).

The ruling in question does not appear to me to be in point, and I do not think the learned Divisional Judge was justified in the assumption that the house was gifted to Hakim along with the land. There is nothing to show that the house belonged to Mukhan, and it may very well have been built by Hakim after he came to the village. I hold it is not proved that the house was gifted to him.

The other point ignored by the lower appellate Court is the fact that defendant No. 2 is daughter of Hasham, and is an heir to the property gifted to Hakim to the exclusion of the plaintiffs [See *Gurdit Singh* v. *Musammat Prem Kuar* (2)]. It is admitted before me that she has a son and it is, therefore, only a remote possibility that plaintiffs will ever succeed. Their suit appears to me to be a speculative one.

There is, however, no necessity to labour this point. Plaintiff's suit must fail on the ground that the house is not proved to have been gifted to Hakim.

I accept the revision, and setting aside the order of the lower appellate Court, restore the order of the first Court dismissing plaintiff's suit with costs throughout.

Petition accepted.

(1) 33 P. R. 1905; 88 P. L. R. 1905.

(2) 84 P. R. 1909; 76 P. L. R. 1909; 118 P. W. R. 1909; 3 Ind. Cas. 604.

BISHEN SINGH *v.* JAIMAL SINGH.

(s. c. 128 P. L. R. 1910.)

PUNJAB CHIEF COURT.

CIVIL APPEAL NO. 593 OF 1909.

December 15, 1909.

Present:—Mr. Justice Shah Din.

BISHEN SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

JAIMAL SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Mortgage—Redemption—Clog on equity of redemption—Mortgage for 20 years—Condition as to interest for the full period to be paid in lump sum at the time of redemption.

The condition in a mortgage-deed for the term of 20 years, which required the mortgagor to pay interest for the full term of the mortgage along with the principal at the time of redemption and not as he pleased within the term, is a clog on the equity of redemption and should not be enforced.

Sukh Dial v. *Anant Ram*, 131 P. R. 1894; *Gokal Chand* v. *Mohan Lal*, 6 P. R. 1905; 19 P. L. R. 1905, referred to.

Further appeal from the order of the Divisional Judge, Ambala Division, dated the 18th February 1909, varying that of the Munsif, 1st class, Ludhiana, dated the 29th May 1908, decreeing plaintiffs' claim.

Lala *Hukam Chand*, for the Appellants.

Rai Sahib Pandit *Sheo Narain*, for the Respondents.

Judgment.—After hearing arguments on both sides, I think that, under the circumstances disclosed in this case, the view taken by the learned Divisional Judge is sound. The mortgage in question was one for a fixed period of 20 years, and it was expressly stipulated that the mortgagor shall not redeem the mortgage before the expiry of that period. The mortgaged land was to remain in the possession of the mortgagee throughout the period of the mortgage, and he was to receive the rent and profits thereof. Over and above this, it was agreed that the mortgagor was to pay interest on the mortgage-money, Rs. 500, at the rate of Rs. 6 *per cent. per annum*, and that the interest was to be paid, not annually or at such intervals of time as would suit the convenience of the mortgagor, but along with the principal debt after the period of 20 years had expired. If the mortgage was not redeemed in the beginning of the first year after the expiry of the period aforesaid, the mortgage was to be converted into a sale and the mortgage would be foreclosed.

MALUK SINGH *v.* DASAUNDHA SINGH.

It is clear to my mind that the condition as to the payment of the interest by the mortgagor at the above-mentioned rate on the principal debt *after* the expiry of 20 years was meant to clog the equity of redemption, as the amount of the accumulated interest would in that case be Rs. 600, and it must have been thought by the mortgagee at the time of the mortgage that the mortgagor would be unable to pay that amount in one lump sum along with the mortgage-money.

I think that this condition was, under the circumstances, onerous and inequitable, and the Divisional Judge was, I consider, justified in refusing to enforce it [*Sukh Dial* v. *Anant Ram* (1); *Gokal Chand* v. *Mohan Lal* (2)].

I dismiss the appeal with costs.

Appeal dismissed.

(1) 131 P. R. 1894.
(2) 6 P. R. 1905; 19 P. L. R. 1905.

(s. c. 129 P. L. R. 1910.)

PUNJAB CHIEF COURT.

CIVIL REVISION NO. 226 OF 1909.

April 29, 1910.

Present:—Mr. Justice Ryves.

MALUK SINGH AND OTHERS—PLAINTIFFS—PETITIONERS

versus

DASAUNDHA SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Declaratory suit—Plaint, rejection of.

The Court is not competent to reject a plaint in which the plaintiffs sue for a declaration of their right to the land in suit without going into the question of possession of the plaintiffs and other merits of the cause.

Petition, under section 70 (*a*) of Punjab Courts Act, for revision of the order of the Divisional Judge, Ambala Division, dated the 21st December 1908, confirming that of the Sub-Judge, Ambala, dated the 30th November 1908, returning plaint for amendment.

Khwaja *Kamal-ud-Din*, for the Petitioners.

Mr. *Vishnu Singh*, for the Respondents.

Judgment.—In my opinion the plaintiffs are entitled to bring the suit in any form they may be advised. If it is established that they are not in possession of any part of the land concerning which they ask for a declaratory decree, it will be open to the Court to use its discretion under section 42 of the Specific Relief Act. So also if there

are other grounds for dismissing the suit, the Court will be able to decide after hearing the case; but I do not think the plaint should be returned at this stage. I set aside the order of the Court below, and direct the Court of first instance to admit the plaint and dispose of it according to law. Costs here and in the Court below will be costs in the suit.

Appeal accepted.

(s. c. 130 P. L. R. 1910.)

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 907 OF 1909.

May 13, 1910.

Present:—Mr. Justice Johnstone.

GHULAM MURTAZA AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

FATEH SHAH AND OTHERS—DEFENDANTS—RESPONDENTS.

Evidence Act (I of 1872), ss. 93 and 94—Document, construction of—Ambiguity—Oral evidence as to contents of document—Specific Relief Act (I of 1877), s. 31.

The plaintiffs owning two wells, Naiwala and Shahwala, in a single *khata* No. 3, consisting of 814 *kanals* 14 *marlas*, sold land out of the *khata* which they described as half of well Naiwala, area 407 *kanals* 7 *marlas*, *i. e.*, half of the whole *khata*, *khata* No. 3, *jama* Rs. 12-8 (*i. e.*, the *jama* of half well Naiwala alone) and putting the price at Rs. 2,500, they sold, in addition to the land, the rights appurtenant to well Naiwala; well Shahwala was not mentioned. They claimed possession of land, of well Shahwala, on the allegation that the defendants had sued for pre-emption and got a decree for full half of the *khata*, *i. e.*, half of both wells and of the land attached to both and executed the decree and obtained mutation without their being impleaded as parties to the suit while they had not sold any land of well Shahwala. The claim was dismissed on the ground that it amounted to a claim for rectification of a deed which could not be allowed under section 31 of the Specific Relief Act, there being no mutual mistake about the terms of the deed and that the amount of the price was unimportant. Market price of the half *khata* was apprised by a Local Commissioner, appointed by Court, Rs. 4,000:

Held, that the claim was not one for rectification of the deed and that the plaintiffs were entitled to a decree.

Further appeal from the order of the Additional Divisional Judge, Shahpur, dated the 30th April 1909, reversing that of the Munsif, 1st class, Jhang, dated the 4th July 1908, decreeing the claim.

Mirza *Jalal-ud-Din*, for the Appellants.

Mr. *Deri Dayal*, for the Respondents.

Judgment.—In the village of Dara Sakhira there are among others two wells, called Naiwala and Shahwala, both included apparently in a single *Khata* No. 3. The area of the whole *Khata* is 814 *kanals* 14 *marlas*. Present plaintiffs sold out of this *khata* land which they described as half of *Chah* Naiwala, area 407 *kanals* 7 *marlas*, *i. e.*, half of the whole *khata*, *khata* No. 3, *jama* 12-8 (*i. e.*, the *Jama* of half *Chah* Naiwala alone), and putting the price at Rs. 2,500, they sold, in addition to the land, the rights *appurtenant to Chah Naiwala*. *Chah* Shahwala is nowhere mentioned. Defendants sued for pre-emption and got a decree for the full half of the *khatas i. e.*, half of both wells and of the land attached to both; and mutation followed accordingly, but all this appears to have happened in the absence of the plaintiffs, who now sue for half of the Shahwala land which they say they never sold.

The first Court decreed the claim; the learned Divisional Judge, adopting a line of reasoning which does not at all commend itself to me, finds the other way. His reasoning appears to be this, if I understand it aright.

Defendant No. 1 is in possession and the entries are in his favour and so is the deed of sale. What plaintiffs really want is a rectification of the deed, which can only be effected if there has been a mutual mistake of parties, so that the deed does not express their intentions—section 31, Specific Relief Act—but here there is no mutual mistake, defendant No. 1 asserting that the deed is correct, though not happily worded. The original vendee, defendant No. 2, says he bought the land *rakba ko madd-i-nazar rakh kar*, and this proves that share in both wells was sold. No doubt the price Rs. 2,500 may be very low for the area 407 *kanals* odd, but this is not quite clear and in any case is unimportant.

Now in this argument there are more fallacies than one. I can find no foundation for the idea that plaintiffs want a rectification of the instrument. Of course, they could not get this instrument "rectified" at the expense of defendant, who is protected by the saving clause at end of section 31 aforesaid. Suppose the deed had named both wells and plaintiff's case had been that this was the result of mutual mistake or fraud of vendee,

he having only intended to sell Naiwala, then a case might arise for rectification of the deed as against a vendee; but here the deed is ambiguous and the question is not to remove from it something plainly sold by it, which should not be there, but to interpret it and say what was really sold and what it really means. It cannot mean at the same time that an area of 407 *kanals* 7 *marlas* is sold and that only half the well Naiwala is sold: which does it mean? This is all the plaintiffs asked the Court to decide.

Again, it seems to me that the first Court has clearly shown that the statement of the vendee-defendant as to what he intended to buy is by no means altogether in favour of the other defendant. No doubt vendee says he thought he was buying 407 *kanals*, but he also says plainly that he intended to buy only half of *Chah* Naiwala. The case is thus not one of the "omission of the name of one well" being "a small matter," for the vendee says there was no idea of buying any part of *Chah* Shahwala. On the other hand, the price paid appears to me an important factor in the problem stated above.

In passing I may note that there can be no difficulty about admitting evidence to explain the deed. The case is not one of "patent ambiguity"—sections 93 and 94, Indian Evidence Act, but of "latent ambiguity"—section 97. The deed of sale, read by a man unacquainted with the existing facts, would be quite unambiguous; but when an attempt is made to apply it, we are met by the difficulty that, though the land and the rights sold are stated to be appurtenant to *Chah* Naiwala alone, and the *jama* stated as leviable from the land sold is the *jama* of half of that well alone, the area stated as sold is half of the total area attached to both the wells. Thus, the language used can be divided into two parts, one part seeming to indicate the sale of half of *Chah* Naiwala alone and the other part sale of half of both wells.

As regards price fixed, the learned Divisional Judge's argument seems to me unsound and unconvincing. A Local Commissioner was appointed expressly for valuation, and he made an estimate on all available materials. He is quite clear that the area of 407 *kanals* is worth over Rs. 4,000, the Naiwala portion being worth Rs. 2,034 and the Shahwala portion Rs. 2,015, not the other way as the lower appellate Court puts it. The lower appellate Court, without giving any valid reason for holding that the Local Commissioner has erred so enormously as to value at Rs. 4,049, a property worth Rs. 2,500 at most (a mistake of 62 *per cent*), and, without giving a single reason for holding that the 407 *kanals* can possibly be worth only Rs. 2,500, has merely brushed this part of the case aside by remarking that there is "not enough material to go on." As already stated, the point is a most important one, and if the lower appellate Court thought the materials insufficient, he should have made an effort to procure more.

In short, the first Court's decision is the correct one. I accept the appeal and set aside the lower appellate Court's judgment and decree and restore the decree of the first Court except as to costs. In my opinion, it is not easy to apportion between plaintiff and the pre-emptor-defendant the claim for this litigation and I, therefore, direct that the parties do bear their own costs.

Appeal accepted.

(s. c. 134 P. L. R. 1910.)

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL NO. 636 OF 1909.

June 9, 1910.

Present:—Sir Arthur Reid, KT., Chief Judge, and Mr. Justice Johnstone.

Bawa DALIP SINGH AND ANOTHER—DEFENDANTS—APPELLANTS

versus

Bawa JAIMAL SINGH—PLAINTIFF—RESPONDENT.

Regulation (XVII of 1806), ss. 7 and 8—Mortgage by way of conditional sale—Foreclosure proceedings—Notice, defects in—Demand of interest that was not due.

A notice issued under Regulation XVII of 1806 is not defective merely because it was issued by one of the mortgagees, nor does the demand of interest more than the amount due render the notice invalid.

Rameshar Singh v. *Kanahia Sahu*, 3 A. 653, *Imdad Husain* v. *Mann Lal*, 3 A. 509; *Mehra* v. *Suja*, 84 P. R. 1882, *Further Appeal* 880 *of* 1908, referred to.

Further appeal from the order of the Divisional Judge, Amritsar Division, dated the 10th March 1909, varying that of the District Judge, Gurdaspur, dated the 16th November 1908, decreeing plaintiff's claim.

Mr. *Pestonji Dadabhai*, and Lala *Balwant Rai*, for the Appellants.

Chaudhri *Ram Bhaj Datta*, for the Respondent.

Judgment.—In this case the facts and the pleadings are sufficiently set forth in the judgments of the Courts below and need not be repeated here. The first Court held that the foreclosure proceedings were defective on two grounds, *viz.*, that in the notice issued under Regulation XVII of 1806, it is stated that no interest had been paid up to date, and that the whole principal and interest were due; and, *secondly*, because the foreclosure proceedings were instituted by plaintiff alone instead of by plaintiff and his uncle, defendant No. 3. The Court held that these defects were fatal and that, therefore, the suit for possession as owner failed. It then proceeded to consider plaintiff's claim as a mortgage, and after finding that consideration was proved and that the suit was not barred by time, gave plaintiff a decree for possession as mortgagee. Both parties appealed to the Divisional Court. Defendants' appeal was dismissed with costs; but the Divisional Judge, considering that there were no fatal defects, in the foreclosure proceedings, gave plaintiff an amended decree for possession as owner instead of possession as mortgagees. Defendants Nos. 1 and 2 have filed a further appeal in this Court. They repeat the contention that the foreclosure proceedings were materially defective. They also urge that the suit for possession as mortgagee is barred by limitation. But, in our opinion, this appeal must fail although in the Court below the only defects in the foreclosure proceedings that were discussed by the Courts, or apparently argued before them, were the two already noticed above, Mr. Pestonji for the appellants now takes up another point, *viz.*, that the plaintiff has not proved that he made demand for his money before applying for issue of notice under the Regulation. We will take up this point first. There can be no doubt that the evidence regarding demand is open to criticism.

Plaintiff essayed to prove demand in the first Court by calling the two witnesses, Dhanpat Rai and Ralia Ram, and by putting in a letter, Exhibit page 16. In our opinion Exhibit page 16 has a very remote bearing upon the subject, and there can be no doubt that the statements of Dhanpat Rai and Ralia Ram are somewhat vague as to when demand was made in their presence. But nevertheless our opinion is that here in second appeal we ought to take it that demand was proved. Neither in the first Court nor in the lower appellate Court did defendants take any exception to this evidence. The first Court held the foreclosure proceedings defective because of two other defects. The defendants had pleaded in the first Court that demand had not been made and, therefore, as the first Court said nothing about demand in its judgment, we think it may safely be taken that it did consider that demand had been made. In the lower appellate Court, on the other hand, the matter of demand seems nowhere to have been mentioned by anybody, and we think it is too late for the defendants to come up here and ask us to analyse critically the evidence produced by the plaintiff to show that demand was made. As regards the other two defects in the foreclosure proceedings, we are not impressed by Mr. Pestonji's arguments. No doubt several rulings of this Court have laid down very strict principles for the Courts to follow in dealing with irregularities in foreclosure proceedings; but we cannot see any real ground for holding that, because the notice was applied for only by plaintiff, therefore, the proceedings fall to the ground nor do we agree that the application was vitiated by the inclusion in it of a sum of interest which was not due. No direct authorities of this Court dealing with such defects as these have come to our notice, and we do not think that in *Rameshar Singh* v. *Kanahia Sahu* (1) and *Imdad Husain* v. *Manu Lal* (2), have any real bearing on the question before us. In *Mehro* v. *Suja* (3) the defects that proved fatal to the plaintiff's claim were absence of signature of the District Judge and absence of mention of interest which was really claimable. It is obvious that those defects are very different from the ones upon which defendants rely in the present case. Equally the other ruling relied upon by Mr. Pestonji, namely, Further Appeal No. 880 of 1908, deals with a kind of irregularity which is very different from those before us. In that case there were two mortgage-deeds by the same mortgagor in favour of the same mortgagee, in one only of which there was a

(1) 3 A. 653.
(2) 3 A. 509.
(3) 84 P. R. 1882.

condition of sale, but the mortgagee in applying for his notice under the Regulation included the mortgage-money in both deeds as money to be paid within the year of grace. In such a case as that one is not surprised that a notice was held invalid. These things being so it only remains for us to dismiss the appeal with costs. Pleader's fee, according to certificate put in by respondent's pleader.

Appeal dismissed.

(s. c. 135 P. L. R. 1910.)

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 103 OF 1909

(April 23, 1910.

Present:—Mr. Justice Scott-Smith.

AHMAD HUSSAN—DEFENDANT—APPELLANT

versus

MEHDI HUSSAN—PLAINTIFF—RESPONDENT.

Custom—Succession—Husband—Father's sister's son.

On the death of a female, the land to which she had succeeded on her father's death would not go according to custom to her husband if she left surviving her a son of his father's sister.

Further appeal from the order of the Divisional Judge, Ambala Division, dated the 27th October 1909, confirming that of the Munsif, 1st Class, Ambala, dated the 20th February 1909, decreeing the claim.

Rai Sahib Pandit *Sheo Narain*, for the Appellant.

Lala *Dwarka Das*, for the Respondent.

Judgment.—The facts are fully stated in the judgments of the lower Courts and need not be repeated.

In this case the contest is between the husband of *Musammat* Salamti and her father's sister's son. The pedigree-table is as follows:—

BARKAT ALI

Ali Akbar	*Musammat* Jiwani
Musammat Salamti married Ahmad Hussan, defendant.	Mehdi Hussan, plaintiff.

The parties are *Sayads*. Defendant lives at Saranga, where the land is situated, and plaintiff at Bhardi in the Ambala District. The first Court found in accordance with instances and judicial decisions cited by it that these *Sayads* of Saranga do not follow the strict Muhammadan Law in matters of succession, that daughters and their issue succeed in preference to collaterals, and that a husband never succeeds to property in which his wife had the usual limited interest of a female.

Mr. Sheo Narain does not contest these propositions. What he urges is that in the present case the strict Muhammadan Law must be applied, unless plaintiff can prove a special custom under which he inherits. He also urges that if the ordinary Customary Law be applied, then the collaterals (descendants of Haidar Ali, brother of Barkat Ali) would succeed, and in their presence plaintiff has no *locus standi*.

When daughters are allowed to succeed in preference to collaterals, then, if they die without issue, the property will revert, just as if they had been sons, to the last ancestor who has left descendants. In this case the property will go back to Barkat Ali, whose daughter's son is the plaintiff. Since the rights of daughters and their issue are admitted to be inferior to those of collaterals, I can see no reason why the collaterals should be preferred to the plaintiff, a daughter's son of Barkat Ali. Had Barkat Ali left a daughter only, *viz.*, *Musammat* Jiwani, all his property would have gone to her and after her to the plaintiff. His rights have merely been postponed till after the death of Ali Akbar and *Musammat* Salamti.

I would also note that in the first Court it was never pleaded that the plaintiff had no *locus standi* in the presence of collaterals; the question then was merely whether his right was superior to that of the defendant.

The collaterals are no parties to the present suit, and the decision will not affect them. If they think they have any rights, they can sue to establish them.

As at present advised, I am of opinion that plaintiff's right is superior to that of the defendant, and that he has a *locus standi* in the presence of collaterals.

The appeal is dismissed with costs.

Appeal dismissed.

BUTA SINGH *v.* KHUSHAL SINGH.

(s. c. 151 P. L. R. 1910.)

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 28 OF 1909.

July 18, 1910.

Present:—Mr. Justice Ryves and Mr. Justice Scott-Smith.

BUTA SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Sardar KHUSHAL SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Succession—Alienation by sonless proprietor—Widow, alienation by—Partial surrender of estate in favour of reversioners—Suit for possession by reversioner—Locus standi *of reversioner to contest alienation by sonless proprietor in the life-time of his widow—Amendment of plaint—Conversion of suit for possession into suit for declaration that alienation was without necessity.*

After the death of a sonless proprietor, his reversioner sued for possession of land mortgaged by him with the defendants. The latter contended, *inter alia*, that the proprietor having left a widow the reversioners had no right to sue.

It appeared that soon after the death of the proprietor, a woman, who had lived with him for nearly 16 years and bore him a daughter, who was married in the brotherhood, claimed mutation in respect of his estate and the claim was supported by the *Lambardar* and *Patwari* of the village. During the course of the mutation proceedings, she executed an agreement whereby she agreed to accept maintenance in lieu of the lands left by her husband but did not stick to the agreement and pressed her claim to mutation. The reversioners prevailed upon her to allow mutation in their favour of the land mortgaged, keeping with her only a small portion of the remaining land.

The reversioners urged that the woman was not the widow of the deceased, and even if she was, they were entitled to sue for possession, for she had surrendered the land to them, and that in any case they were competent to challenge the mortgage as one made without necessity:

Held, (1) that although evidence on the record was meagre, the fact of the woman being the widow of the deceased was established.

(2) That the plaintiffs were not competent to sue for possession as they had no right to possession during the life-time of the widow and a partial surrender by a widow of her life-estate was not valid and no right was validly conferred on the reversioners by the mutation in their favour.

(3) That the claim for possession, on the allegation of the woman not being the widow of the proprietor, being inconsistent with the claim for a declaration admitting her status of a widow, an amendment of the plaint could not be allowed on appeal.

Further appeal from the decree of the Divisional Judge, Lahore Division, dated the 26th November 1908, reversing that of the Subordinate Judge, 1st Class, Lahore, dated the 21st April 1908, decreeing the claim.

Rai Sahib Pandit *Sheo Narain*, Sardar *Kharak Singh* and Bakshi *Tek Chand*, for the Appellants.

Mr. *Lal Chand* and Lala *Moti Lal*, for the Respondents.

Judgment.—The plaintiffs-appellants brought this suit for possession of some 1,200 *kanals* of land on the allegation that it belonged to one *Musammat* Chandan, widow of Kesar Singh, deceased, and Nihal Singh, who were both sonless.

On the 3rd April 1906, Nihal Singh during the life-time of *Musammat* Chandan mortgaged the land in suit to defendants-respondents Nos. 1 to 7 with possession for Rs. 3,764-11-0, without lawful necessity and without the knowledge and consent of the plaintiffs who claimed to be the reversioners. They joined Baga Singh in the array of defendants, because, although he too was a reversioner, he had colluded with the mortgagees.

Nihal Singh died on the 14th February 1907.

The suit was instituted on the 6th April 1907.

The main defence to the suit put in by the mortgagees was to the effect that Nihal Singh left surviving him a widow, *Musammat* Hukman, and that during her life-time the plaintiff had no right to sue. It was also pleaded that there was legal necessity to justify Nihal Singh's mortgage.

For the purpose of this appeal it is only necessary to consider two of the findings of the Court of first instance. It found:—

(1) That *Musammat* Hukman was the widow of Nihal Singh: and (2) that out of the consideration-money mentioned in the deed of mortgage, Rs. 1,515 only were for lawful necessity.

It accordingly decreed the suit for possession of land on payment of this amount.

The mortgagees appealed from this decree.

The learned Divisional Judge accepted the appeal on the sole ground that the reversioners could not sue for possession during the life-time of *Musammat* Hukman or until she had absolutely divested herself of her late husband's estate and dismissed the suit.

On appeal to this Court it was argued:

(1) That the existence of *Musammat* Hukman is no bar to the suit for possession, because—

(*a*) She is not proved to be the widow of Nihal Singh, and

(*b*) she is proved to have relinquished whatever rights she may have possessed in her alleged husband's estate by accepting maintenance; and

(2) That in any event the lower appellate Court should not have dismissed the suit *in toto*, but should have regarded it as a declaratory suit and decided the other issues raised in the appeal. These are the only points which we need consider.

Nihal Singh died sonless, as we have said, on the 14th February 1907. *Musammat* Hukman, it is admitted, had been living with Nihal Singh for some 16 years and had borne a daughter to him. It appears that *Musammat* Hukman at once claimed mutation of Nihal Singh's land in her own name. However, on the 28th February 1907, she executed a document, which is called an "*iqrarnama*" to the following effect:—

"I, *Musammat* Hukman, widow of Nihal Singh deceased, do hereby declare as follows:—

"My husband, Nihal Singh, died 15 days ago, he left no male issue, but a daughter, who is married. Buta Singh and Baga Singh, sons of Hira Singh, Jiwan Singh, etc., have agreed to give me 15 *maunds* of grain on account of *Hari* and *Sawni* harvests, Rs. 15 cash and 1 *maund* and 20 *seers* cotton annually for my maintenance, and have reduced the above agreement to writing. I, therefore, do hereby agree and give the same in writing that I shall remain faithful to the memory of Nihal Singh, deceased, that I shall not mortgage or sell land, etc., *i. e.*, movable and immovable property, that I shall have nothing to do with *batai*, etc., and that the Government revenue shall also be paid by the above named persons. These few words are, therefore, written in the form of an agreement, so that it may serve as an authority. Dated the 28th February 1907."

This document was not registered.

The present suit was instituted on the 6th April 1907 against the mortgagees. As stated above, no mention was made in the plaint of *Musammat* Hukman, and she was not made a party to it.

On the 26th April 1907, the *Patwari* reported in favour of *Musammat* Hukman's claim for mutation. Before the *Naib Tahsildar* she repeated her claim, but the present plaintiffs (reversioners) denied that she was legally married to Nihal Singh. Consequently, on the 10th May 1907, mutation papers were sent on to the Revenue Assistant.

In the meanwhile, *i. e.*, on the 2nd July 1907, the mortgagees filed their written statements in which they asserted that *Musammat* Hukman as the widow of Nihal Singh, was entitled to a widow's estate and that the suit for possession would not lie during her life-time. Final orders in the mutation proceedings were passed by the Revenue Officer of the Lahore District on the 15th September 1907, and ran as follows:—

"The parties have to-day settled the dispute between them. Mutation entry regarding *khatauni* No. 94, comprising 221 *kanals* and 8 *marlas*, and *khatauni* Nos. 96 to 99, comprising 528 *kanals* and 11 *marlas*, is accordingly sanctioned in favour of *Musammat* Hukman, widow of Nihal Singh. The mutation in respect of the remaining land of the deceased is sanctioned as follows:—

"Buta Singh and Baga Singh, sons of Hira Singh, in equal shares	one share;
Hardit Singh, Jiwan Singh and Hem Singh, sons of Thakar Singh, in equal shares	one share;
Lal Singh, Teja Singh and Bahadur Singh, sons of Kishan Singh, in equal shares	one share.

As we stated above, the lower appellate Court decided the appeal on the assumption that *Musammat* Hukman was legally a widow of Nihal Singh. It appears very probable that there was no serious controversy on this point in the lower appellate Court. Plaintiffs-appellants, however, claim that they are entitled to a finding on this issue and ask us either to remand the issue to the lower Court or to try it ourselves. As the whole record is before us we decided to try the issue before ourselves.

The evidence is, as is only natural, especially having regard to the fact that *Musammat* Hukman herself was neither a party nor a witness in the case, somewhat meagre, but so far as it goes, it all points one way. It is admitted that *Musammat* Hukman lived with Nihal Singh continuously for some 16 years before his death and that she bore him a daughter whom he married into the brotherhood. This conduct on the part of Nihal Singh and the brotherhood raises a presump-

tion in favour of a legal marriage. We have, besides, the evidence of 4 witnesses called by the defendants, who swear that they were present at the marriage. It is true that only one of them is a resident of the village of Mianke Maur, where Nihal Singh lived. The other three witnesses, however, appear to have been residents of neighbouring villages. One witness, Lal Singh, *Lambardar* of the villages who was called by the plaintiffs themselves, admitted that *Musammat* Hukman was the widow of Nihal Singh, although he denied any knowledge of the marriage ceremonies. There is, however, besides this the fact that immediately after Nihal Singh's death *Musammat* Hukman claimed mutation as his widow and the *Patwari* and the *Lambardar* of the village endorsed her claim. And against this evidence, the plaintiffs, who are the reversioners and, no doubt, possess paramount influence in the village and who must know the real facts, offer no evidence in rebuttal.

There remains also the undoubted fact that *Musammat* Hukman obtained mutation of names in respect of a substantial portion of Nihal Singh's estate. We do not think it at all likely that the reversioners would have allowed her to take any unless they knew that her claim was indefeasible. On the whole we have come to the conclusion that the Court of first instance was right in holding that *Musammat* Hukman was entitled to be considered the widow of Nihal Singh.

The evidence adduced in this case as to how *Musammat* Hukman and the plaintiffs (reversioners) dealt with Nihal Singh's property after his death is very meagre. It is contained practically in two documents:—

(1) The agreement executed by *Musammat* Hukman on the 28th February 1907; and

(2) The mutation proceedings.

On the basis of the contents of these papers two altogether different and inconsistent stories have been evolved by the contending parties. It is urged on behalf of the appellants-plaintiffs that what happened on Nihal Singh's death was as follows:—

Musammat Hukman claimed a widow's estate in the property. She was resisted by the reversioners, who asserted that she had not been legally married. She, thereupon recognizing the weakness of her own claim, agreed to accept maintenance and to let the property go, and it was in consequence of this that she executed the agreement of the 28th February 1907. The lower appellate Court held that document being unregistered could not be admitted in evidence as a relinquishment of her interests in the property. Before us it has been ingeniously argued that the document itself does not come within section 17 (*b*) of the Indian Registration Act, and is not to be regarded as in itself creating or extinguishing any right, title or interest in immovable property. It is said that the widow had already (presumably orally) abandoned all claim to Nihal Singh's estate and the fact, as evidenced by this document, that she was willing to accept a given sum for maintenance, proves that she must have relinquished all her rights to a widow's estate, although there is no allegation to this effect, much less any evidence, apart from the agreement. Having been divested herself of all rights as Nihal Singh's widow, the estate immediately vested in the plaintiffs (reversioners). Then it is stated that subsequently, *i.e.*, on the 15th September, the reversioners by an agreement arranged to give the widow some land in lieu of the maintenance in cash and kind, which they had previously agreed to give her under the agreement of the 28th February 1907 and the fact that the land which they gave her had formed part of Nihal Singh's estate was a mere coincidence in no way affecting the case; *i.e.*, instead of giving her other land, they allowed her to retain some of her late husband's land. On behalf of the defendants-respondents quite another version is set up. Nihal Singh had executed this mortgage and his widow could not impugn it. The reversioners desired to set aside this mortgage and, therefore, brought this suit entirely ignoring the existence of the widow. When the written statement was filed on the 2nd July, in which the claim of the widow was set up as a bar to the suit, the reversioners found themselves under the necessity of coming to terms with *Musammat* Hukman. Up to that time, in spite of the execution of the agreement of the 28th February, both parties were asserting their rival claims to Nihal Singh's estate in the mutation proceedings. Both the *Patwari* and the *Naib-Tahsildar* appear by their reports to have favoured the widow's claim. The reversioners, therefore, agreed

with *Musammat* Hukman that she should give up to them the bulk of her husband's property which was almost entirely comprised in the mortgage (with possession) to the defendants-respondents, and which, therefore, would have been of no value to her, so as to enable them to impugn the mortgage, and that she should obtain the rest of the property which alone produced an income.

We have to decide what the real facts are. We have held that *Musammat* Hukman was the widow of Nihal Singh. Consequently on his death she obtained a widow's interest in that estate. We agree with the contention that the document of the 28th February 1907, did not operate so as to divest her of her widow's estate. There is no other evidence to suggest that previous to that date she had by any act of her own abandoned the estate, which had become vested in her on Nihal Singh's death. Although there is no evidence to show how that agreement came to be executed, it is quite clear that it was never acted upon, because we find that all along up till the 15th September 1907, she laid claim to have the whole of Nihal Singh's land entered in her name. It is quite possible that on the 15th of September 1907, she agreed to alienate to the plaintiffs (reversioners) so much of her husband's estate as was mortgaged, and perhaps a little more in order to enable them to attempt to set aside the mortgage and recover possession of the mortgaged property which she herself could never do, except, of course, by redemption.

We find that on the 15th September, 1907 *Musammat* Hukman alienated in favour of the plaintiffs-respondents all the parcels of land which were comprised in her deceased husband's estate, with the exception of what she retained for herself as recorded in the Revenue Officer's order.

We have now to see how far this alienation of the widow affects the rights of the reversioners. In this suit we have come to the conclusion that if the reversioners had no right, apart from this alienation in their favour of the mortgaged land in suit, to set aside the mortgage, they have derived no such right in consequence of the alienation.

It is true that they pleaded that by a special custom they, as reversioners, could sue to set aside the mortgage. The evidence on this point, however, was so slight that this special custom has not now been pressed and the case now put alternatively is as follows :—

(1) That previous to the suit the widow divested herself of the whole of her estate in favour of the plaintiffs (reversioners). If this is held not to be proved, then

(2) That at any rate she gave up the whole of her rights in the land now in suit, and that this alienation, *pro tanto* as it were, wipes out the existence of the widow's estate in the land so alienated by her.

It is obvious that the case of plaintiffs, as now presented in appeal, is very different from the case originally set up. Our attention has been drawn to a number of authorities both in this Court and in the other Chartered High Courts in India, as to the power of a Hindu widow in possession of a widow's estate to validly alienate a portion only of that estate, without legal necessity, but with the consent of the next reversioners. It is argued that the weight of authority affirms the widow's power of alienating part of her estate if the reversioners agree.

It seems to us clear from the authorities that a Hindu widow in possession of a life-estate can validly alienate a portion only of that estate with the consent of the reversioners. The latest case in the Privy Council *Bajrangi Singh* v. *Mano Kamika Bakhsh Singh* (1) seems to settle this point. In that case a widow alienated portions of her estate piecemeal, and it was not until the last alienation that she had exhausted the whole property inherited by her. Nevertheless no point was made of this circumstance in the judgment of the Privy Council, which upheld alienations apparently on two grounds :—

(1) That they had been subsequently ratified by the next reversioners, and that this subsequent ratification was for the purpose equivalent to contemporaneous consent ; and

(2) That the representatives of those reversioners were estopped.

It is noteworthy that in their judgment, which reviews most of the former authorities, no mention is made of the case in *Brhari Lal* v. *Madho Lal* (2), although

(1) 30 A. 1; 3 M. L. T. 1; 12 C. W. N. 74; 9 Bom. L. R. 1345; 6 C. L. J. 766; 5 A. L. J. 1.

(2) 19 C. 236.

that case was cited in the argument, (see page 9), and in this connection it is very significant that, though the judgment quotes with apparent approval the dictum of Subramania Aiyar, J, in *Marudamuthunadan* v. *Srinivasa Pillai*(3), the quotation just stops short of, and, therefore, presumably, does not confirm, the concluding passage of that dictum, which is to the effect that in case of alienation with the consent of the next reversioners, it was equally necessary that the whole estate be alienated by a widow, and that a partial alienation would be invalid. Thus reading this case together with the ruling laid down in *Collector of Masulipatam* v. *Cavaly Vencata Narrainpah*(4). *Viz*:—"For religious or charitable purposes or those which are supposed to conduce to the spiritual welfare of her husband, she has a larger power of disposition than that which she possesses for purely worldly purposes. To support an alienation for the last she must show necessity. On the other hand, it may be taken as established that an alienation by her, which would not otherwise be legitimate, may become so if made with the consent of her husband's kindred," and together with the observations in *Bihari Lal* v. *Madho Lal* (2) :—*i. e.*, "That it may be accepted that, according to Hindu Law, the widow can accelerate the estate of the heir by conveying absolutely and destroying her life-estate;" They added, however, "it was essentially necessary to withdraw her own life-estate, so that the whole estate should get vested at once in the grantee" it seems to be established that generally under ordinary Hindu Law a widow may accelerate the estate of the reversioners by entirely renouncing the whole of her rights in her late husband's property, and she can do this either by refusing to accept any portion of her late husband's property or by alienating the whole of it to the next reversioners. It seems at the same time clear that she may validly alienate portions of such an estate with the consent of the reversioners so as to give a complete title to the alienee, and at the same time retain her life-estate in the remainder of the property. There can be no doubt that a Hindu widow can alienate a portion of her husband's estate in her possession for "necessity," and the portion so alienated goes out of the succession altogether. It seems to follow then that she can similarly alienate a portion without necessity with the consent of the reversioners with much the same result, *i. e.*, if the alienation of her whole estate is made to the reversioners the result is the same as if she had died, and if to a third party with the reversioners' consent, then neither can the reversioners nor persons claiming under them challenge the alienation.

The Customary Law of this Province seems to us to be similar at any rate so far as the parties to this litigation are concerned. In *Wazir Chand* v. *Makhu* (5). it was held that a widow was competent to relinquish her whole estate, and thereby to accelerate the succession of the plaintiffs to the property left by her husband, but that there could not be a valid renunciation of a part of the estate which could give rise to a right of succession to the reversioners to that part. It was there pointed out that—

"It is the fiction of the intermediate heir being non-existent that gives the reversioner the right to step into succession, just as he would do if the heir had died. But it is necessary for this fiction that the widow should step aside altogether and completely efface herself. She does not by her act clothe the reversioner with her rights at all. She takes herself off the line of heirs and puts an end to those rights. It is a case of succession by inheritance owing to the widow's renunciation, not of assignment of her rights. It appears to me to follow necessarily from the above that there cannot be a valid renunciation of a *part of the estate* which can give rise to a right of *succession* to the reversioners to that part. Two heirs belonging to different classes, one of whom excludes the other, cannot succeed to the estate at the same time."

This rule in no way conflicts with the other decisions which we have been quoting. It does not decide that a widow cannot validly alienate a portion of her estate, but what it does decide is that there cannot be valid renunciation of a part of the estate *which can give rise to a right of succession* in the reversioners to that part. It was argued that this ruling, which is the ruling of a Single Judge,

(3) 21 M. 128.
(4) 8 M. I. A. 539 at p. 551 ; 2 W. R. (P. C.) 61.
(5) 17 P. R. 1902 ; 16 P. L. R. 1902.

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is in conflict with *Sher Muhammad* v. *Ghula*(6), a decision of a Division Bench. There it was held that "under the Customary Law it is open to a widow, who is entitled to a life-interest in her husband's property for her maintenance, to elect not to take possession of such property but to take maintenance from her husband's male heir, and that in such an event the latter at once becomes invested with the right of ownership over such property, the same result following if the widow, after taking possession, elects to surrender and to take maintenance in lieu thereof from the latter."

Here again there is no conflict at all. In *Wazir Chand* v. *Makhu* (5), the facts of which are very similar to the present case, the widow who succeeded to her husband's estate relinquished her rights in so much of that estate as was mortgaged in favour of the next reversioners who, as here, brought a suit for possession of the mortgaged property, on the ground that it had been made without consideration or necessity, and that their title to possession had accrued in consequence of the relinquishment of the widow in their favour, and it was decided not that such an alienation by the widow was invalid and gave no title to the reversioners, but that the alienation being only of a part of her whole estate they did not even *succeed* to that portion of her late husband's estate.

For these reasons and also following the rule in *Wazir Chand* v. *Makhu* (5), we agree with the lower Court in holding that the plaintiffs-appellants have no right to bring the suit for possession during the life-time of *Mussamat* Hukman.

There remains the further question whether we should allow an amendment of the plaint so as to enable the plaintiffs to obtain a declaration that they are entitled to possession on the death of *Musammat* Hukman, if it is proved that the mortgage was made without consideration or necessity. If we acceded to this request, it would be necessary to remand the case to the lower appellate Court for a decision of some other issues. It is argued that we should do so because all the evidence of the parties is already on the record. On further consideration, we think that, having regard to the ruling of the Privy Council in *Walihan* v. *Jogeshwar* (7), we should not be justified at this stage in sending the case back. The plaintiffs have all along even in this Court strenuously urged that *Musammat* Hukman was not legally married to Nihal Singh. Their contention now that they are entitled to possession after her death, is wholly inconsistent with their case even in this Court. They say *Musammat* Hukman was not the widow of Nihal Singh, and at the same time assert that she surrendered her whole widow's estate to them, and, now having failed to establish either of these statements, they wish to entirely alter the nature of their claim.

We hold, therefore, that plaintiff's claim has been rightly dismissed and we dismiss the appeal with costs.

Appeal dismissed.

(6) 9 P. R. 1899.

(7) 35 C. 189; 12 C. W. N. 227; 7 C. L. J. 44 (P. C.); 10 Bom. L. R. 9; 17 M. L. J. 226; 2 M. L. T. 509; 14 Bur. L. R. 101.

(s. c. 1 M. W. N. 676.)

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1157 OF 1909.

September 26, 1910.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Krishnaswami Aiyar.

N. K. SANKUNNI MENON *karnavan* AND MANAGER—DEFENDANT—APPELLANT

versus

N. K. CHEETHAMMA *alias* AMMU AMMA AND OTHERS—PLAINTIFFS AND DEFENDANTS—RESPONDENTS.

Maintenance, rate of.

The High Court is ordinarily not disposed to interfere in a matter as to the rate of maintenance when both the lower Courts are agreed in fixing a certain rate. A *karnavan* is not in the possession of an equal share with the rest and a payment to each member of a sum little short of what is reserved to the *karnavan* himself cannot be justified, and on this principle the High Court reduced the maintenance awarded from Rs. 62-8 to Rs. 40 a month to each plaintiff.

Second appeal against the decree of the District Court of South Malabar, in Appeal Suit No. 13 of 1909, presented against the decree of the Court of the District Munsif of Ottapalam, in Original Suit No. 321 of 1907.

Mr. *J. L. Rosario*, for the Appellant.

Mr. *C. V. Anantakrishna Iyer*, for the Respondents.

Judgment.—The question in this case is as to the right of maintenance. The

tarwad consists of the plaintiff and her three adult sons. The first defendant is the *karnavan*. The suit is brought by the mother and one of her sons. The Courts below have concurred in awarding Rs. 62-8 to each of the plaintiffs. The first defendant appeals against this as exorbitant. We should ordinarily not be disposed to interfere in a matter as to the rate of maintenance especially when both the Courts below are agreed in fixing a certain rate. But in this case the District Judge has failed to take into account the fact that the *karnavan* is not in the position of an equal sharer with the rest. He has the responsibility and the labour of management. He represents the *tarwad* to the rest of the community to which it belongs. He has to maintain a certain position in the public estimation and before the authorities. He is responsible for the family worship and has to disburse the family charities. It is true that in the present case there is no likelihood of any addition to the *tarwad* except by adoption and that may be a reason for giving each plaintiff more than in the case of a growing *tarwad*. But that cannot justify a payment to each member of a sum little short of what is reserved to the *karnavan* himself. We do not agree with Mr. Rosario that each member is only entitled to a reasonable subsistence if that word is to be confined to food and raiment. Taking all the circumstances of the case into consideration and having regard to the further fact that the Munsif and the District Judge have allowed Rs. 62-8 a month, we would fix Rs. 40 to each plaintiff as satisfying all possible requirements. We modify the decree accordingly. The respondents will have their costs out of the *tarwad* property.

Decree modified.

(s. c. 1 M. W. N. 684.)

MADRAS HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 196 OF 1909.

August 4, 1910.

Present:—Mr. Justice Wallis and Mr. Justice Krishnaswami Aiyar.

I. P. PIR MOHAMAD ROWTHER AND OTHERS—PETITIONERS—APPELLANTS

versus

A. R. A. R. S. M. MAYANDI CHETTIAR—RESPONDENT.

Civil Procedure Code Act (V of 1908), *Order XXI, Rr.* 9 *and* 90—*Auction sale—Adjournment—Illegality or irregularity—Civil Rules of Practice, Rule* 152.

A sale in execution, conducted from day to day for a period longer than seven days, is neither illegal nor irregular. To keep open the sale for such a long time is a very common practice and having regard to local conditions, it cannot be said to be not a beneficial one. Rule 152 of the Civil Rules of Practice is not opposed to such a practice.

Miscellaneous appeal against the order of the Subordinate Judge of Tinnevelly, in M. P. No. 1596 of 1908, in Original Suit No. 33 of 1903.

Facts.—The respondent in this miscellaneous appeal was the mortgagee who sued for the recovery from the petitioners and defendants, the sum of Rs. 7,0000 being the mortgage amount due on a mortgage executed by the latter, or for the sale of the mortgaged properties. The subordinate Court granted him a decree which was confirmed by the High Court.

Plaintiff decree-holder sought to execute the decree. The sale of all the properties was ordered by the subordinate Court. The judgment-debtors prayed for stay till their application to the High Court for leave to sue to the Privy Council as against the decree was disposed of. That petition was dismissed. And the sale began on the appointed day.

An appeal between the judgment-debtor's mother and sister, on the one hand, and the decree-holder, on the other, was pending in the District Court, with regard to certain claims which the former alleged that they had in the mortgaged lands. The appellants prayed for an *interim* stay of the sale by the subordinate Court and this was granted by the District Judge. It was, then, more than a week since this sale had commenced. On the very same day, however, the decree-holder got the *ex parte* order of the District Judge set aside. The District Judge, thereupon, ordered that the sale was to go on till ten days after the final disposal of the petition for stay. The Subordinate Judge according to this order instructed that the sale should go on from day to day. The sale was thus kept open for more than six weeks when the properties were knocked down to the highest bidder.

The judgment-debtor objected to the confirmation of the sale on the following grounds:

(1) There was no fresh proclamation after the order for the stoppage of the sale by the District Judge.

(2) No evidence was allowed to be let in with regard to the loss resulting from the irregularity.

The Subordinate Judge dismissed this petition holding that there was no irregularity as, according to the evidence of the *nazir*, the sale was not in fact stopped. And he also held that they were not prepared to let in any further evidence then.

Against this the judgment-debtor preferred an appeal to the High Court.

Messrs. *C. R. Tiruvenkatacharriar* and *K. R. Krishnasawmy Iyengar*, for the Appellants.

Messrs. *P. S. Sivaswamy Iyer*, *T. Natesa Iyer* and *P. R. Narayanaswamy Iyer*, for the Respondents.

Judgment.—Assuming that the original order of the District Judge to stop the sale was irregular, the evidence of the *nazir* is that the sale was not in fact stopped. The District and Subordinate Courts at Tinnevelly are in adjoining buildings, and the District Judge revoked his order to stop the sale on the same day. It was made on the 25th of March. When the application to set aside the sale came on, the *nazir* was called first, apparently at the suggestion of the Subordinate Judge, to depose as to what was done on the order of the District Judge to stop the sale, and no other evidence was called on that day in support of their application to set aside the sale. The case was adjourned until the 30th April when arguments were heard, but again no evidence was tendered on behalf of the petitioners and we have come to the conclusion that the petitioners were not prepared to produce any evidence on that day. The vacation began in 2 or 3 days, and the Subordinate Judge gave judgment dismissing the application shortly after the Court re-opened. It now appears that on the first of May, the day after the argument, the petitioner's Vakil filed in Court a "memorandum" of the points on which they desired to tender further evidence. It was not in form a petition for further evidence to be heard and was not treated as such. It is not even shown that it was ever brought to the notice of the Subordinate Judge. On the whole we think the attitude of the petitioners is only to be explained by supposing that they had no further evidence on 25th March and 30th April, and that the so-called memorandum was an after-thought consequent on the fact that the Subordinate Judge had appeared to be against them on the argument of the 30th April. There is no evidence on record that the petitioners were ever prevented from tendering any evidence on the question if irregularity; and we are not prepared to accept the affidavits tendered for the appellants in preference to that filed by the respondent. We find, therefore, that the sale was never stopped by the order of the District Judge, nor was it ever, in our opinion, adjourned within the meaning of section 291, Civil Procedure Code.

The sale was continued in accordance with the order of the District Judge which was acted on by the Subordinate Judge until ten days, after the disposal of the District Judge's order in Civil Miscellaneous Appeal No. 37 of 1908, that is to say, for about six weeks when the property was knocked down to the highest bidder.

It is a very common practice for Courts in the Mofussil to continue sales from day to day and having regard to local conditions we are not prepared to say that the practice is not a beneficial one. Rule 152, Civil Rules of Practice, which was referred to, is not opposed to it, though, no doubt, it contemplates that, ordinarily the sale will be completed within the period specified in the rule.

In this state of things, we cannot say that the continuance of the sale by the Subordinate Judge in the manner already mentioned is an irregularity still less that it is a material irregularity. The appeal is dismissed with costs.

Appeal dismissed.

(s. c. 1 M. W. N. 686).

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 807 OF 1909.

October 11, 1910.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Ayling.

T. V. RAJARAM RAO—PLAINTIFF—APPELLANT

versus

THE DISTRICT BOARD OF TANJORE—DEFENDANT—RESPONDENT.

Contract Act (IX of 1872), ss. 56, 74—Meaning of 'Impossible'—Exception—Penalty.

RAJARAM RAO *v.* DISTRICT BOARD OF TANJORE.

For the purpose of section 56, *impossible* may include what has become impracticable.

Where a person enters into a bond with a District Board under article 498 of the Local Fund Code, which provides for forfeiture of the amount deposited as earnest money or security for the due fulfilment of the contract, the contract falls within the exception to section 74 of the Contract Act and the whole sum mentioned as penalty is payable.

Second appeal against the decree of the District Court of Tanjore, in Appeal Suit No 425 of 1908, presented against the decree of the Court of the District Munsif of Tanjore, in Original Suit No. 293 of 1907.

Mr. *T. R. Venkatarama Sastri*, for the Appellant.

Mr. *N. Rajagopala Chariar*, for the Respondent.

Judgment.—In this case, the plaintiff, who agreed to supply a certain quantity of gravel within a fixed time to the District Board of Tanjore and failed to perform his contract, sues to recover the sum of rupees three hundred with interest which he had deposited as earnest money or security for the due fulfilment of the contract. It is argued on behalf of the plaintiff that there is no provision for forfeiture of the amount in the contract between him and the District Board and that argument is based on the supposition that the contract is embodied entirely in Exhibit VI. But the case was tried in both the lower Courts on the basis that the contract between the parties did contain a stipulation for forfeiture, and, in fact, the notice inviting tender, the tender and the letter accepting the tender must be read with Exhibit VI in order to ascertain the terms of contract between the parties. Besides, a question of this nature cannot be raised for the first time in second appeal.

The next question we are asked to consider is whether, under section 56 of the Indian Contract Act, the contract did not become void because of the inability of the Railway Company to supply trucks for conveyance of gravel as and when required by the plaintiff. The learned District Judge has found on consideration of the evidence that as a matter of fact the performance of the contract did not become impossible by reason of what happened. We may take it that, for the purpose of section 56, 'impossible' includes what has become impracticable. But all that can be said here is that the performance of the contract became more onerous and burdensome to the plaintiff than he had anticipated at the time of entering into the bargain. All that appears is that there was pressure of traffic and the Railway Company were unable to supply trucks on the particular dates on which the plaintiff wanted them. The plaintiff knew, as the evidence shows, that there would be difficulty in getting trucks at certain times of the year and it was his business to adapt himself to the convenience of the Railway Company or to induce the Railway Company to suit his convenience.

It has also been argued that the readiness of the Railway Company to supply waggons, whenever application was made for them, must be deemed to be a term of the contract between the parties. That is a pure question of construction and does not appear to have been raised in that form in either of the lower Courts. The whole strength of the contention, moreover, is based really on the single fact that the rates fixed contemplate the conveyance of the gravel by the Railway. But that fact alone is quite insufficient in the circumstances of this case to enable us to hold that the parties intended that the plaintiff was to supply gravel only if the Railway Company was able to supply means of conveyance whenever it suited the plaintiff's convenience to ask for trucks. The documents, from which the contract is to be gathered, show, on the other hand, that the contract was not intended to be conditional.

The last question which we must consider is the application of the exception to section 74 of the Indian Contract Act. Article 498 of the Local Fund Code contemplates and authorizes the taking of a bond such as this and that article is apparently framed under the orders of the Local Government referred to in the note to the article. That objection also fails. The second appeal is, therefore, dismissed with costs.

The respondent has filed a memorandum of objections against the order of the District Judge refusing costs to the respondent when dismissing the memorandum of objections filed before the District Judge by the present appellant against so much of the decree of the District Munsif as was against him. The only reason given for disallowing costs is that the memorandum of objections was not stamped, and, therefore, could not "be dealt with." But notice had been served on the respondent and the latter thereupon instruct-

ed pleaders to oppose the memorandum of objections. Under the circumstances the memorandum of objections not being stamped, the proper order was that it should be dismissed and the failure of the respondent in the lower appellate Court (the present appellant) to pay stamp thereon could not be good ground for depriving the other side of its costs.

The memorandum of objections is, therefore, allowed with costs.

Appeal dismissed and Memorandum of objections allowed.

(s. c. 1 M. W. N. 693.)

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 932 OF 1894.

September 27, 1894.

Present:—Sir Arthur Collins, KT., Chief Judge, and Mr. Justice Parker.

KUNHALIKANDEAGATH PUDIYAPURAYIL BIVI UMAH—PLAINTIFF—APPELLANT

versus

KELOTH CHERIYATH KUTTI AND OTHERS—RESPONDENTS.

Marumakattayam *Law—Gift to females—Exclusion of males*—Stri Sothu.

Where an instrument limited the descent of property to the female line and excluded males and also forbade partition: *Held* that the gift was of the class known as "*stri sothu*," that the intention was that the property should be held by the female class jointly as a *Tavazhi* with *marumakattayam* incidents, and that the estate given was one known to *marumakattayam* usage and, therefore, not invalid.

Second appeal against the decree of the District Court of North Malabar, in Appeal Suit No. 290 of 1893, confirming the decree of the District Munsif of Quilandy, in Original Suit No. 293 of 1892.

Judgment.—The Courts below have dismissed the suit on the ground that plaintiff is not the sole owner and is not entitled to sue without including her co-owners.

The real question is as to the construction of Exhibit B. The language of the document indicates that it was the intention of Pakki to leave the property to his sisters and to their daughters already in existence or born thereafter. He also intended that it should devolve in females only without power of partition or alienation. There is also a provision that the sisters are to

enjoy the income (after payment of the Government revenue) in equal shares.

Seeing that the instrument limits the descent of property to the female line and excludes males at the same time forbidding partition we think the gift was of the class known as "*stri sothu*" or *Henummula* and that the intention was that the property should be held by the class of females jointly as a *Tavazhi* with *marumakattayam* incidents. Such a gift is valid for the estate given is one known to *marumakattayam* usage with reference to which it appears to have been made; see *Kunhacha Umma* v. *Kutti Mammi Hajee* (1).

The direction to divide the income in equal shares may seem to create a difficulty in accepting this view, but taking the instrument as a whole, the passage is open to the interpretation that it was intended to emphasize the exclusion of males from joint participation in the income. This view is also favoured by the mode in which the parties themselves have dealt with the property since 1846. Upon the whole, we are of opinion that the gift was intended to be in favour of Pakki's two sisters and their female descendants—not as tenants in common but as constituting a *Tavazhi*, and the conduct of the family for nearly 50 years seems to have been in accordance with this construction of the instrument.

In this view the decision of the Courts below was right. We dismiss the second appeal with costs.

Appeal dismissed.

(1) 16 M. 201.

(s. c. 1 M. W. N. 694.)

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 229 OF 1909.

September 22, 1910.

Present:—Mr. Justice Munro and Mr. Justice Sankaran Nair.

KATALA KELATH MUNIKOTH RAIRU NAMBIAR AND OTHERS—PLAINTIFFS—APPELLANTS

versus

KATALA KAROTH THANICHERI APPA *alias* RYRAPPAN NAMBIAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Declaratory suit—Decree declaring defendant's right, not proper.

UMAN SHANKER *v.* BHAGWAN DIN.

Where a plaintiff sues for a declaration of his right, it is not proper to declare the right of the defendant. The inquiry into defendant's right is only necessary to ascertain the rights of the plaintiff

Second appeal against the decree of the District Court of North Malabar, in Appeal Suit No. 397 of 1907, presented against the decree of the Court of the District Munsif of Cannanore in Original Suit No. 167 of 1906.

Facts.—Plaintiffs brought the suit against defendants Nos. 1 to 3 for a perpetual injunction prohibiting them from entering into the management of the affairs of the said *Devaswom* and for other consequent reliefs. The fifth and sixth defendants were joined as supplemental defendants on their own petitions and the fifth defendant contended that the *urallars* of the plaint *devaswom* are the first, second, fourth, fifth and sixth plaintiffs and that first, fourth and fifth defendants and that the third plaintiff, who has no *uraima* right to the *devaswom*, has no right to the *urallar*-ship. The issue framed was: "Have plaintiff No. 3 and defendants Nos. 1 and 5 separate *uraimas* as alleged by them". The District Munsif held that defendants Nos. 1 and 5 have no separate *uraimas*, that the second plaintiff and first defendant have only one *uraima*, that 2nd plaintiff is the proper person to represent at present that *uraima*, that 3rd plaintiff and 5th defendant have only one *uraima* and that 3rd plaintiff is the proper person to represent that *uraima*. On appeal the District Judge set aside the District Munsif's finding and found that first defendant has a separate *uraima* right as well as a joint one with the second plaintiff and that fifth defendant and not third plaintiff is entitled to be *urallar* and accordingly declared in the decree. The third plaintiff appealed to the High Court among other grounds for the reason that the decree of the lower appellate Court as to the *uraima* claimed by the 5th defendant is against law.

Mr. *J. L. Rosario*, for the Appellants.

Mr. *M. Kunjunni Nair*, for the Respondents.

Judgment.—We must modify the decree of the District Judge by striking out the declaration that the fifth defendant is an *urallar* of the plaint *devaswom* as no such declaration could properly be made in the suit, the enquiry as to whether or not the 5th defendant was an *urallan* being only necessary in order to show that the third plaintiff was not an *urallan*. There is evidence to support the finding that the third plaintiff is not an *urallar*. The decree so far as it declares that the third plaintiff is not an *urallar* must stand. The appellant will pay the costs of this second appeal.

Decree modified.

(s. c. 7 A. L. J. 1064.)

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 760 OF 1909.

July 25, 1910.

Present:—Mr. Justice Banerji.

UMAN SHANKER—PLAINTIFF—APPELLANT

versus

BHAGWAN DIN AND OTHERS—DEFENDANTS—RESPONDENTS.

Suit for declaration that a decree of Revenue Court is void for irregularity—Jurisdiction of Civil or Revenue Court.

A suit cannot be maintained in a Civil Court for a declaration that a decree of the Revenue Court is void and ineffectual on the ground that the proceedings of that Court were contrary to law.

Rai Krishen Chand v. *Mahadeo*, A. W. N. (1901) 49, followed.

Second appeal from a decree of the District Judge of Banda, reversing a decree of the Munsif of Hamirpur.

Mr. *S. C. Choudhri* (for Mr. *J. N. Chouduri*), for the Appellant.

Mr. *M. L. Agarwala*, for the Respondents.

Judgment.—This was a suit for a declaration that an *ex parte* decree for arrears of rent obtained by the defendant against the plaintiff is void and ineffectual on the ground that a guardian for the suit was not properly appointed for the plaintiff who is a minor. It appears that the plaintiffs to that suit made an application praying that one Kedarnath might be appointed guardian *ad litem* of the minor defendant. Notice was issued to Kedarnath, but he refused to act as guardian. Another person was then named but upon issue of notice he also refused to act. The plaintiff then made an application supported by affidavit stating that Kedarnath was a proper person to be appointed guardian of the minor. Kedarnath again refused to act, but in spite of his refusal, the Court appointed him guardian *ad litem*, and, as no appearance was made, decreed the claim *ex parte*. It is urged that the appointment of Kedarnath

without his consent was illegal and that the plaintiff in this suit was not properly represented in the former suit, and the decree in that suit was, therefore, void. The Court of first instance decreed the claim, but the lower appellate Court has dismissed it. The question is whether such a suit is maintainable in the Civil Court. This question is concluded by the ruling of this Court in *Rai Krishen Chand* v. *Mahadeo* (1). In that case the plaintiff sought a declaration that the decree of a Revenue Court passed against him was void, ineffectual and not binding on him. It was held that a Civil Court has "no power to entertain a suit for a declaration that a decree or order of a Revenue Court, passed in a matter in which the Revenue Court had exclusive jurisdiction was void upon any ground" other than the ground of fraud.

The suit in the present case was one exclusively within the jurisdiction of the Revenue Court and whether that Court acted rightly or wrongly, it had jurisdiction to make a decree. On the principle of the ruling above referred to, a suit cannot be maintained in the Civil Court for a declaration that the decree of the Revenue Court is void and ineffectual on the ground that the proceedings of that Court, were contrary to law. The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

(1) A. W. N. (1901) 49.

(s. c. 7 A. L. J. 1075.)

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 350 OF 1910.

August 1, 1910.

Present:—Mr. Justice Chamier.

RAM DAYAL—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

United Provinces Municipalities Act (I of 1900), ss. 87 (5), 149, 152—*Illegal notice—Conviction.*

Section 87 of the Municipalities Act of 1900 is not intended to empower a Board to require a man to pull down his house, though the house may have been standing for 50 years or more. If the Board have no power to issue a notice under section 87, it cannot be considered a notice under that section and the provisions of section 152 do not apply. For disobeying a notice of the above kind, a conviction under section 149 of the Act is illegal.

Alopi Din v. *The Municipal Board of Allahabad*, A. W. N. (1907) 2; 4 A. L. J. 8; *Hyam* v. *The Calcutta Corporation*, 10 C. W. N. 1004; 3 C. L. J. 571; 3 Cr. L. J. 465; 33 C. 646, referred to.

Criminal revision from an order of the Sessions Judge of Mainpuri.

Mr. *M. Ishaq Khan*, for the Appellant.

Mr. *R. Malcomson*, for the Respondent.

Judgment.—This is an application for revision of an order passed by a Magistrate in the Etawah District convicting the applicant of an offence under section 147 of the North Western Provinces and Oudh Municipalities Act (I of 1900) and sentencing him to pay a fine of rupees ten. The facts are stated as follows by the Sessions Judge who refused to interfere with the Magistrate's order. In 1865 certain shopkeepers at Etawah entered into an agreement with the Municipal Commissioners of the town for the construction of a *ganj* now known as Hume Ganj. The agreement provided that if the buildings were erected in contravention of the plans, the Municipal Commissioners would be entitled to interfere and would also be entitled to forbid the making of additions or changes in the buildings. On January 18th, 1909, the Municipal Board of Etawah issued a notice to the applicant under sub-section (5) of section 87 of the Municipalities Act requiring him to remove a wall in the upper story of his shop in the Ganj on the ground that it had been erected without permission and contrary to the original plans. Similar notices were issued to Daya Ram and Kashi Ram who are the applicants in Criminal Revisions Nos. 351 and 352. Prosecutions were instituted on the applicants failing to comply with the notices. It has been contended throughout that the Board had no power to issue the notices.

Both the Courts below have declined to consider this plea holding that if the applicants wished to challenge the legality of the notices they should have appealed under section 152 of the Act. That section provides, *inter alia*, that any person aggrieved by notice from a Board under sub-section (5) of section 87 or sub-section (2) of section 88 requiring the alteration or demolition of a building may within a certain time appeal to a certain authority and "no such notice shall be liable to be called in question otherwise than by such appeal."

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In the case of *Alopi Din* v. *The Municipal Board of Allahabad* (1), where a Board had by a notice purporting to be issued under section 88 of the Act required a person to remove a wall which the Court found did not overhang, project into, or encroach on any street or into on or over any drain, sewer or aqueduct therein, the notice was challenged by suit and the Court gave the plaintiff a declaration that the order was not within the competence of the Board and was invalid. Relying partly upon this decision I held in a case that came before me as Judicial Commissioner of Oudh that a conviction under section 147 of the Act for disobeying a notice issued under sub-section (2) of section 88 could be challenged in revision on the ground that the notice was *ultra vires* of the Board.

It appears to me that precisely the same consideration arises in the case of a notice purporting to have been issued under sub-section (5) of section 87 of the Act. If the Board have no power whatever to issue the notice, it cannot be considered to be a notice under that section and the provisions of section 152 do not apply. In the cases now before me it is abundantly clear that the Board had no power to issue the notices in question. The section applies to new buildings. Sub-section (1) provides that every person who intends to erect or re-erect any building of the kinds specified shall give notice to the Board. Under sub-section (2) the Board may require a person who has given such notice [*i. e.*, notice under sub-section (1)] to submit plans etc. Sub-section (3) applies only to valid notices given under sub-section (1). Sub-section (4) determines the period for which sanction given by the Board is to remain in force and lastly sub-section (5) provides that should any such building be begun or erected without sanction or in contravention of the directions of the Board under sub-section (1) or after the sanction has elapsed the Board may by notice require the bulidings to be altered or demolished. It is quite clear that the words "such building" in sub-section (5) apply only to buildings of the kind referred to in the preceding sub-sections, *i. e*, new buildings in respect of which notice should have been given under sub-section (1). It has been found that the walls referred to in the notices now in question were built many years ago. It is not suggested that they were built after the passing of the Act of 1900 or at a time when there was any rule or bye-law in force requiring the sanction of the Board to the building of the walls. That the walls were built in contravention of the agreement of 1865 is immaterial, for the Board cannot enforce the agreement by proceedings taken under the Act of 1900. Nor are the persons who built the walls liable to be punished under section 147 of the Act for breaches of that agreement. It seems to me quite clear that section 87 was not intended to empower a Board to require a man to pull down his house, though the house may have been standing for 50 years or more. In the connection I may refer to the case of *Hyam* v. *The Calcutta Corporation* (2) in which a similar question arose under the Calcutta Municipal Act. The Magistrate who tried these cases saw the absurdity of applying section 87 to such cases as these for he declined to order the demolition of the walls saying that the Board would have to go to the Civil Court to enforce the agreement of 1865. I allow this and the connected applications, set aside the orders of the Magistrate and direct that the fines, if paid, be refunded.

Application allowed.

(1) A. W. N. (1907) 2; 4 A. L. J. 8.

(2) 10 C. W. N. 1004; 3 C. L. J. 571; 3 Cr. L. J. 465; 33 C. 646.

(s. c. 7 A. L. J. 1087.)

ALLAHABAD HIGH COURT,

SECOND CIVIL APPEAL No. 1294 OF 1910.

July 28, 1910.

Present:—Sir John Stanley, KT., Chief Justice, and Mr. Justice Banerji.

CHINTAMAN AND ANOTHER—DEFENDANTS—APPELLANTS

versus

DULARI—PLAINTIFF—RESPONDENT.

Mortgage—Usufructuary—Deficiency of interest—Mortgaged property security for deficiency—Personal liability.

A usufructuary mortgage provided that if the rents and profits were found insufficient to cover the whole amount payable as interest, the deficiency would be made good by the mortgagor:

Held, that the mortgaged property was security not only for the principal but also for the deficiency of interest which remained to be paid.

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Held, further, that the mere fact that the mortgagor undertook a personal liability for the stipulated interest did not relieve the mortgaged property from liablility to satisfy the deficiency.

Muhammad Husain v. *Sheodarshan Das*, 4 A. L. J. 176 ; A. W. N. (1907) 71, followed.

Ganga Sahai v. *Lochan Singh*, A. W. N. (1886) 50, distinguished.

Second appeal from the decree of the District Judge of Farrukhabad, modifying the decree of the Subordinate Judge of Farrukhabad.

Dr. *Satish Chandra Banerji*, for the Appellants.

The Hon'ble Mr. *Sunder Lal*, for the Respondent.

Judgment.—This appeal arises out of a suit for the redemption of two mortgages dated respectively the 13th of December, 1870, and the 24th of June 1871, made by one Ganjan Ram. The first mortgage secured a sum of Rs. 1,600 and in it a four *biswa* share was mortgaged. Under the second mortgage Rs. 400 was borrowed and an additional one *biswa* share was mortgaged. The plaintiff has acquired mortgagor's rights in a portion of the mortgaged property and he brought the suit which has given rise to this appeal to redeem the two mortgages offering to pay the principal amounts secured thereby. The mortgagees claimed a further sum of Rs. 14,867-10-9 on account of deficiency of interest.

The first mortgage-deed provides that the mortgagees should take possession of the mortgaged property and out of the rents and profits pay the Government Revenue and appropriate Rs. 132 per annum on account of interest at the rate of 11 annas per cent. per mensem. It further provides that should the amount of profits, calculated on the basis of the *Patwari's* accounts, be found to be insufficient to cover the whole amount payable for interest, the deficiency would be made good by the mortgagor together with interest at the rate of Rs. 2 per cent. per mensem. There is a similar clause in the second mortgage-deed also. The defendants alleged that the rents and profits of the mortgaged property were insufficient for the realisation of the full amount of interest at the stipulated rate of 11 annas per cent. per mensem and that under the terms of the mortgage deeds, a large amount was due to them on account of deficiency of interest. The Court of first instance found in their favour and made a decree for redemption upon payment of Rs. 14,634-2-3. The plaintiff appealed against this decree to the lower appellate Court. The learned Judge of that Court was of opinion that for the amount of deficiency in interest-there was no charge on the mortgaged property ; that the mortgagors undertook only a personal liability for the payment thereof and that the defendants were only entitled to get the amount of deficiency due for the six years preceding the date of the suit. The learned Judge accordingly made a decree for redemption upon payment of the principal amounts of the mortgages and of the amount which he found to be due on account of deficiency in interest for six years preceding the date of the suit. If the view taken by the learned Judge, *viz.*, that there was no charge on the mortgaged property for deficiency of interest is correct, the decree made by him for payment of the deficiency which arose during the six years preceding the date of the suit is clearly erroneous. It was the mortgagor who according to the learned Judge incurred a personal liability for the payment of the amount of deficiency. If it was not a charge on the property the plaintiff who is the purchaser of the property, could not be saddled with the payment of that amount and such payment could not be declared to be a condition precedent to the redemption of the property. We are of opinion that the learned Judge is in error in holding that the mortgaged property was not security for deficiency of interest. The mortgage-deeds provide for payment of interest at the rate of 11 annas per cent. per mensem. The mortgaged property, therefore, was security not only for the principal amounts of the mortgages but also for the interest stipulated to be paid. The whole amount of stipulated interest being thus chargeable on the mortgaged property, that property was security for any portion of such interest which remained unrealized out of the rents and profits. It is thus manifest that the mortgaged property was security for the amount of deficiency. It is deficiency in the stipulated amount of interest which was recoverable by the mortgagee, under the terms of the mortgages, in the event of the rents and profits being found to be insufficient to cover the whole amount of interest. It is true that the mortgagor undertook a personal liability also for the amount of deficiency, but this

he did not only for the amount of deficiency but also for interest thereon at the rate of Rs. 2 per cent. per mensem. The fact of his undertaking a personal liability for the stipulated interest did not relieve the mortgaged property from liability to satisfy the deficiency. This amount of deficiency the mortgagees are, in our opinion, entitled to get for the whole period of the mortgage and not for six years only. This case cannot be distinguished in principle from that of *Muhammad Husain* v. *Sheodarshan Das* (1). In that case the mortgagor was entitled to a *malikana* allowance from the mortgagee. This allowance was not paid and it was held that the amount of the *malikana* allowance should be deducted from the mortgage money for the full period of the mortgage, although the mortgagor might have sued and recovered the arrears of *malikana* separately. The principle of this case clearly applies to the present case and the mortgagees are entitled to obtain the deficiency of interest for the full period during which the mortgage money remained unsatisfied. The case of *Ganga Sahai* v. *Lochan Singh* (2), relied upon by the learned Judge, is not in point. There it was held that additional interest was not payable as the mortgagee waived his right to it but the mortgagor was declared to be liable for the interest originally agreed to be paid. As to the additional interest claimed in the present case at the rate of Rs. 2 per cent. per mensem on the amount of deficiency, it is not according to the terms of the mortgages a charge on the mortgaged property. Therefore, the defendants, in our opinion, are not entitled to obtain further interest on the amount of deficiency in interest. It is stated by the defendants that the amount of deficiency in interest for 39 years during which the mortgage remained undischarged is Rs. 2,100 7-9. They have claimed further interest on that amount but in view of the opinion expressed above they are not entitled to it. As to Rs. 2,100-7-9 the account produced by them was found by the Court of first instance to be in accordance with the *patwari's* account and the learned Judge accepted this finding and held the account to be correct. There can be no objection, therefore, to the correctness of the principal amount claimed as deficiency in interest. This amount we hold the defendants are entitled to get from the plaintiff in addition to the principal amounts of the two mortgages; that is to say, the plaintiff can obtain redemption upon payment of Rs. 4,100-7-9. The result is that we allow the appeal, vary the decree of the Courts below and make a decree for redemption upon payment. within six months from this date, of Rs. 2,000 for principal and Rs. 2,100-7-9 for deficiency of interest, in all Rs. 4,100-7-9, together with interest at the rate of 11 annas per cent. per mensem on Rs. 2,000 the principal amount secured by the mortgage, from the date of the suit to the date fixed for payment and further interest on the amount decreed at the rate of 6 per cent. per annum from such date to the date of actual payment; as also, of the costs of the suit as hereinafter provided. The respective parties will pay costs in all Courts in proportion to failure and success and the costs in this Court will include fees on the higher scale. The objections taken by the respondent under Order XLI, Rule 22 of the Code of Civil Procedure fail and are dismissed with costs.

Decree modified.

(1) 4 A. L. J. 176; A. W. N. (1907) 71.

(2) A. W. N. (1886) 50.

(s. c. 33 M. 371.)

MADRAS HIGH COURT.

CRIMINAL CASE NO. 7 OF 1910.

August 18, 1910.

Present:—Mr. Justice Abdur Rahim.

EMPEROR

versus

ANTONY—ACCUSED.

Penal Code (Act XLV of 1860), s. 494—Bigamy—Hindu convert to Christianity marrying a Christian wife—Reversion to Hinduism—Subsequent marriage with a Hindu woman during the life-time of Christian wife.

The accused, a Hindu convert to Christianity, married a Christian woman according to the rights of the Roman Catholic religion. He subsequently renounced Christianity and again became a Hindu. He then married a Hindu woman according to Hindu rites, his Christian wife being at the time alive:

Held, that the accused was not guilty of the offence of bigamy.

Proceedings 8th November 1866, 3 M. H. C. R. App. vii, followed.

Facts.—The accused was married to a Christian woman by a Roman Catholic Priest according to the rites of the Roman Catholic religion. Whether he was a Hindu or a

Christian at the time of his marriage was doubtful but what evidence there was went to show that he was probably a Christian convert. He was subsequently married according to Hindu rites, his Christian wife then being alive. There was no evidence to show that he still professed Christianity at the time of the Hindu marriage.

The *Crown Prosecutor*, for the Crown.

Mr. *V. Chakkrai Chetti*, for the Accused.

Before a jury was empanelled, his Lordship Abdur Rahim, J., directed the question of law to be argued with special reference to a case reported in *Proceedings 8th November* 1866 (1). He asked whether, in view of that decision, there was any case to go to a jury.

The *Crown Prosecutor* referred to the case of *Emperor* v. *Lazar* (2), which apparently overruled *Proceedings 8th November* 1866 (1), but admitted that the former decision was based on different facts and that that part of the judgment which referred to the remarriages of Native Christians who had renounced Christianity was *obiter*.

Mr. *V. Chakkarai Chetti*:—*Proceedings 8th November* 1866 (1) is followed in *Proceedings of 18th February* 1868 (3) and has always been held to be good law until the decision of *Emperor* v. *Lazar* (2). The decision in *Reg.* v. *Allen* (4) and other English cases, which is contrary to the principle laid down in *Proceedings 8th November* 1866 (1), has no application as in India a Hindu Christian re-acquires his right to be a polygamist on ceasing to be a Christian and becoming a Hindu again. There being no evidence to show that the accused was a Christian at the time of the second marriage,—a marriage according to Hindu rites, he cannot be presumed to be a Christian. In *Emperor* v. *Lazar* (2), the accused was unrepresented.

The *Crown Prosecutor* in reply to His Lordship stated that he had no positive evidence to adduce that the accused still professed Christianity at the time of the second marriage. He was aware of no ceremony for renouncing Christianity.

Abdur Rahim, J., stating that he would follow the decision in *Proceedings 8th November* 1866 (1), ordered the jury to be empanelled.

(1) 3 M. H. C. R. App. vii.

(2) 30 M. 550; 2 M. L. T. 345; 17 M. L. J. 476; 6 Cr. L. J. 338.

(3) 4 M. H. C. R. App. iii. (4) L. R. 1 C. C. R. 367.

The *Crown Prosecutor* stated the facts to the jury.

His Lordship then charged the jury that, the case of the Crown as stated by the Crown Prosecutor being that the accused had renounced Christianity at the time of or some time before the second marriage, which was contracted not according to Christian rites but according to the rites prevalent among Hindus of the class to which the accused, a Pariah, belonged, the offence of bigamy could not in law be established on the evidence and directed them to return a verdict of not guilty.

The jury returned a verdict of not guilty in accordance with such direction and the accused was acquitted.

Accused acquitted.

(s. c. 8 M. L. T. 372.)

MADRAS HIGH COURT.

CRIMINAL APPEAL No. 244 OF 1910.

September 12, 1910.

Present:—Mr. Justice Munro and Mr. Justice Krishnaswami Aiyar.

THE PUBLIC PROSECUTOR—APPELLANT

versus

PAPAKKA—ACCUSED.

Criminal Procedure Code (*Act V of* 1898), *s.* 298—*Misdirection to jury.*

It is a material misdirection to the jury to tell them to leave out of consideration the evidence of a witness and the retracted confession of the accused.

It should be left to the jury to act upon the evidence or not as they think right.

As regards the retracted confession, the jury should have been told that they should consider in view of all the circumstances in the case, whether the confession, or the statement retracting it, was true and act accordingly.

Appeal, under section 417 of the Code of Criminal Procedure, against the judgment of acquittal passed on the 1st accused in Sessions Case No. 49 of 1909, by the Sessions Judge of Kurnool.

Judgment.—We think the Sessions Judge materially misdirected the jury when he told them to leave out of consideration the evidence of Ballagadu and the retracted confession of the 1st accused. The Sessions Judge after commenting upon the evidence of Ballagadu should have left it to the jury to act upon that evidence or not as they thought right. As to the retracted confession he should have told them that they should consider in view of all the circumstances in

the case whether the confession or the statement retracting it, was true and to act accordingly. We set aside the acquittal of the 1st accused and direct a re-trial.

Acquittal set aside.

(s. c. 8 M. L. T. 373.)

MADRAS HIGH COURT.

CRIMINAL REVISION CASE NO. 691 OF 1909.

REFERRED CASE NO. 141 OF 1909.

March 15, 1910.

Present :—Mr. Justice Miller and Mr. Justice Munro.

NYNA MAHOMED SAIB—ACCUSED

versus

E S. LLYOD, THE PRESIDENT OF THE CORPORATION OF MADRAS—COMPLAINANT.

Madras City Municipal Act (III of 1904), s. 322—License for using place for dangerous or offensive trade or dangerous purposes—Fee leviable.

When a place is used for more purposes than one, mentioned in section 322 of the Madras City Municipal Act, the action of the President, in charging a license fee equal to the total of the fees, which would be leviable if a separate license were taken for the use of a separate place for each of the said purposes, is not *ultra vires*, provided that it is levied with the approval of the Corporation and the sanction of the Government.

Case referred for the orders of the High Court, under section 432, of the Criminal Procedure Code, by the 3rd Presidency Magistrate, George Town, Madras, in his letter dated 26th November 1909.

Order.—We assume that the question referred to us for decision in the case before the Magistrate is under section 322. The license is for the use of a place for a given purpose and for the issue of such a license a fee may be charged. If the license is required for more purposes than one, there is apparently nothing to prevent its issue but there is also nothing to restrict the amount of the fee which may be charged for its issue provided that it is levied with the approval of the Corporation and the sanction of Government. If the President with such approval and sanction prescribed in such a case a fee equal to the total of the fees which would be leviable if a separate license were taken for the use of a separate place for each of the purposes, for which the license is required, we are unable to say that his action is *ultra vires*.

We reply accordingly.

In the matter of A HIGH COURT VAKIL.

(s. c. 8 M. L. T. 375.)

MADRAS HIGH COURT.

FULL BENCH.

November 1, 1910.

Present:—Mr. Justice Wallis, Mr. Justice Krishnaswami Aiyar and Mr. Justice Ayling.

In the matter of A HIGH COURT VAKIL.

Letters Patent (Mad.) cl. 10—Reasonable cause—Professional misconduct, what amounts to.

A Vakil of the High Court, practising in the *mofussil*, appeared on behalf of the accused in a certain Sessions case tried with assessors. After the case was over and before the judgment was delivered, the Vakil filed a petition on behalf of the accused containing allegations that the Judge had written a draft-judgment before the address of the defence Vakil was over and that he had summed up for conviction, and caused the said petition to be brought to the notice of the Judge when the Judge was writing the judgment. It was found that the allegations against the Judge were unfounded: *Held*, that the making of the said allegations was professional misconduct. The Vakil was reprimanded and ordered to pay the costs of the proceedings against him.

Case referred for the orders of the High Court by Mr. J. T. Gillespie, I. C. S., Sessions Judge of Tanjore, regarding the conduct of Mr. ————a High Court Vakil.

Order.—In this case a Vakil of the High Court presented a petition to the Sessions Judge, (Tanjore), a day after the summing up of the case to the Assessors and before judgment was delivered, in which he alleged in para. 4 that the Judge, before the arguments in the case were over, came to the Court with a draft judgment and in para. 5 added not only that but that the draft judgment was *the judgment for conviction*. We are of opinion that these allegations were quite unfounded and there was no justification for making them. It has not been seriously contested by Mr. Govindaraghava Iyer; and we think that in making unfounded allegations of this kind, which involve a reflection on the conduct of the Judge in the exercise of his office and seeking to have certain documents put on record, the Vakil was guilty of professional misconduct for which he must be reprimanded and made to pay the costs of this proceeding.

Vakil reprimanded.

BHOLA RAM *v.* NANAK CHAND.

(s. c. 135 P. W. R. 1910.)

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 365 OF 1909.

March 12, 1910.

Present:—Mr. Justice Rattigan.

BHOLA RAM—DEFENDANT—APPELLANT

versus

NANAK CHAND AND OTHERS—PLAINTIFFS—DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), s. 25 (3)—Balance—Promise to pay interest—Bond—Limitation.

A balance of account struck by a debtor in his creditor's books, which contains a distinct promise to pay interest thereon, is more than a mere acknowledgment of a pre-existing debt and amounts to a bond, and consequently is a good contract under section 25 (3) of the Contract Act, even if it consists of time-barred items.

Second appeal from the order of the Additional Divisional Judge, Jhelum, dated the 21st December, 1908, modifying that of the District Judge, Jhelum, dated the 31st October, 1907, decreeing claim in part.

Mr. *Nanak Chand*, for the Appellant.

Mr. *Nand Lal*, for the Respondents.

Judgment.—In this case the judgment of the Additional Divisional Judge is not as clear and satisfactory as it might have been but I gather from it that he agrees with the Court of first instance that the consideration for the "balance", which was struck by defendant Bhola Ram on the 23rd May 1902, was the debt due by the latter on the *hundi*, dated the 16th October, 1893. I quite agree with the Courts below that the so-called "balance" really amounts to a "bond," inasmuch as it is much more than a mere acknowledgment of a pre-existing debt. There is a distinct promise to pay interest on the amount of the debt and from this promise to pay interest, the Courts are justified in inferring a promise to pay the principal sum as well.

Mr. Nanak Chand argues that plaintiffs have not been quite consistent in their allegations as to how this sum came to be due. This may be admitted, but it must be remembered that they themselves have no personal knowledge of the transaction, which was one between Bhola Ram and Diwan Chand, (defendant No. 2) acting as agent of plaintiffs' father. Ram Chand. The latter is dead and Diwan Chand is obviously in collusion with Bhola Ram and doing his best to help him in this case. But even Diwan Chand has had to admit that the consideration for the entry was a sum of Rs. 1,250 due from Bhola Ram on the *hundi* above referred to. Bhola Ram admits that he executed a *hundi* on the 2nd *Katak Sambat* 1950, for Rs. 1,250 but he says that he paid off the whole of this amount. He is unable to produce any receipt in support of this statement. He further explains the entry upon which the suit is based and which he admits by saying that Ram Chand had promised to advance him and Diwan Chand Rs. 1,000 in order to enable them to start a certain business. He says that in point of fact, no such business was eventually started and that in consequence the said sum of Rs. 1,000 was never paid to either him or Diwan Chand. This is one of the most imprudent falsehoods that has ever been deposed to in a Court of law. In the first place, it would be a most unusual procedure to strike a balance when there had been no previous accounts between the parties and the entry was intended merely to represent *future* loan to be made to the person making this extraordinary acknowledgment of an already existing liability. *Per se* this objection would appear to be fatal to Bhola Ram's story. But in addition there is much more to be said against its truth. Bhola Ram distinctly deposes that this curious loan was to be made to him and to Diwan Chand. If so, how came it that the balance was struck in Ram Chand's books and *in favour of Diwan Chand*, one of the very persons to whom the money was to be advanced? It is admitted that Diwan Chand acted as the *gumashta* of Ram Chand and consequently if the entry represented merely an acknowledgment of a debt due to Ram Chand, it would not be surprising to find the entry made in favour of Diwan Chand, as representative of the principal. But upon Bhola Ram's astounding explanation, it would be absurd to find the entry made in favour of the person to whom, jointly with Bhola Ram, the money was to be advanced. Diwan Chand and his brother, Ganga Ram, who deposed in Bhola Ram's favour, have admittedly had disputes with plaintiffs and their evidence must, therefore, be regarded as not altogether impartial. As regards Diwan Chand, I may go further and say that he has undoubtedly perjured himself. He asserts that he was not present when the entry was made and that he has nothing whatever to do with this amount of Rs. 1,000. Hazari Mal, on the other hand, swears that Diwan Chand was present

and if Bhola Ram's story is true, it cannot be believed that Diwan Chand was absent at the time. Furthermore, if Diwan Chand was not present and knows nothing about this amount, how came the entry to be made in his favour and how can he explain his written agreement of the 26th June 1906 in favour of plaintiff. Bhola Ram has had to admit that he at one time owed Ram Chand a sum of Rs. 1,250 on a *hundi* and he has entirely failed to prove that he paid off that debt. It seems to me that the debt on the *hundi* was novated by the striking of this balance for Rs. 1,000. It is possible that the balance of Rs. 250 was paid off by Bhola Ram or that Ram Chand remitted that amount in consideration of Bhola Ram striking the balance. But be the explanation of this difference what it may, I have no doubt that the Courts below are right in holding that Bhola Ram was actually indebted to the deceased Ram Chand to the extent of Rs. 1,000 at least and that he agreed to re-pay that amount with interest. It is argued that at the time when the balance was struck (the 23rd May 1902), the debt on the *hundi* was time-barred. But we do not know when that sum was payable, and in any case, even it the debt was time-barred, a promise to pay it would not be void as being without consideration, (section 25 (*iii*) of the Indian Contract Act). After full consideration of the case and of the arguments addressed to me at some length by Mr. Nanak Chand, I see no reason to interfere with the findings of the lower Courts and I, therefore, dismiss this appeal with costs.

Appeal dismissed.

(s. c. 137 P. W. R. 1910.)

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 639 OF 1908.

May 13, 1910.

Present:—Mr. Justice Shah Din and Mr. Justice Chevis.

NANAK (MANAK) CHAND—PLAINTIFF—APPELLANT

versus

MEHR JAWAYA—DEFENDANT—RESPONDENT.

Premature suit—Mortgage—Different conditions of payment in several mortgage-deeds—When last supersedes the previous ones—Conditional sale—Right of suit by mortgagee—Punjab Alienation of Land Act (I 1900) s. 9 (2)—Cause of action—Transfer of Property Act (IV of 1882), s. 68.

A plaintiff, whose right to sue had not accrued at the date of institution of suit, cannot claim a decree simply on the ground that his right to sue has become complete during the pendency of the suit.

A recital in the last mortgage-deed that the mortgagor shall pay the amount due under the previous mortgage-deeds at the time of redemption, supersedes the stipulations made in the previous deeds fixing the time of payment by the mortgagor of the mortgage-money.

A mortgagee's suit to recover the mortgage-money due on a mortgage-deed, in which the mortgagor agrees to pay it within a certain number of years, is not maintainable before the expiry of those years.

A mortgagee of revenue paying land with conditional sale is not entitled to get its possession in case of mortgagor's default. The only remedy left for him now is the one provided under section 9 (2) of Act I of 1900; the last proviso of section 68 of the Transfer of Property Act cannot help him in the least.

Dula Singh v. *Dial Singh*, 22 P. R. 1910; 29 P. W. R. 1910; 5 Ind. Cas. 902, followed.

First appeal from the order of the Sub-Judge, 1st Class, Lahore, dated the 19th March, 1908, dismissing plaintiff's claim.

Rai Sahib Lala *Sukh Dial*, for the Appellant.

Sheikh *Taj-ud-din*, for the Respondent.

Judgment.—The plaintiff in this case sues for possession of land as mortgagee.

Three mortgage-deeds were executed in succession by the defendant. By the deed, dated the 23rd October 1884, defendant mortgaged certain land in favour of Rattan Chand and Nanak Chand, sons of Ram Chand, for Rs. 400. The conditions of this mortgage-deed are to be found on page 5 of the paper-book. On the 9th December 1890 the defendant executed a fresh deed in favour of the same parties placing a further incumbrance of Rs. 1,000 on the same land. The conditions of this deed are to be found on pages 7 and 8 of the paper book. On the 28th October 1891, Rattan Chand executed a deed of relinquishment in favour of his brother Nanak Chand. This deed covers the above-mentioned mortgage-deeds. On the 4th August 1897, defendant executed a mortgage-deed in favour of Nanak Chand alone mortgaging the same property as before with a little additional land. By this deed a further incumbrance of Rs. 1,200 was created. The conditions of this deed are to be found on page 14 of the paper-book. The plaintiff now sues for possession and the defendant pleads *inter alia* that the suit is premature. The first of the

issues framed in the case is whether the claim has been instituted before time and the Subordinate Judge having decided this issue in favour of the defendant has dismissed suit. The plaintiff appeals.

As will be seen from a perusal of the deeds, all the three mortgage-deeds are without possession. The first deed states that the defendant will redeem the land on payment of the mortgage-money after the expiry of ten years. The same condition is to be found in the second deed in which there is a further condition that if the land is not redeemed after the expiry of ten years, it shall be considered as sold outright in lieu of the mortgage-debt. In the third deed, the defendant agrees as before to pay the mortgage money with interest and redeem the property within ten years, in default the mortgagee to be at liberty to recover his debt from the mortgaged land and other property of the mortgagor or in the alternative to enforce the condition of *Bai-bil-wafa* recited in the former deed. In this third deed it is also recited that the mortgagor shall pay the amount due under both of the previous mortgage-deeds at the time of redemption.

Having regard to the terms of the deed as above set forth, it seems clear to us that the parties intended that the conditions of the former deeds should be superseded by those of the last deed. The present suit was instituted on the 8th January 1907, *i.e.*, less than ten years after the last mortgage-deed; and as this deed gives the defendant ten years' grace within which to pay off the mortgage-debt and redeem the property, the suit for possession certainly seems to be premature. On the 26th June, 1907, an amended plaint was filed. Even this date is within ten years from the date of execution of the last mortgage-deed. It is true that the period of ten years expired while the suit was still pending, but what we have to look to is the date of institution. A plaintiff, whose right to sue had not accrued at the date of institution of suit, cannot claim a decree simply on the ground that his right to sue has become complete during the pendency of the suit.

It will be noted that in the two last deeds, there is a condition intended to operate by way of conditional sale. But the plaintiff makes no claim to possession as owner. What he claims is possession as mortgagee or a money-decree. The claim for a money-decree is not clearly set forth in the plaint, in which he merely asks for possession or for any other relief to which he may be entitled. As regards the claim to possession, the only condition in the deed entitling the plaintiff to take possession is the one which states that in case of default, the mortgaged property shall be considered as sold out right; and this particular remedy is now barred by the Punjab Alienation of Land Act. The deed does not provide for the plaintiff's taking possession as mortgagee, and such a provision cannot be substituted for one entitling him to take possession as owner. See *Dula Singh* v. *Dial Singh* (1). In view of this ruling the learned counsel for the plaintiff-appellant states that he does not press the claim for possession, but only asks for a money decree. Still we are of opinion that as under the deed, a period of ten years is allowed to the mortgagor for redemption, and it is only in the case of default to redeem within the same period that the mortgagee is empowered to recover his principal and interest, this suit, brought before the period of ten years had expired, is premature. For the plaintiff it is argued that the security having been reduced by reason of the condition of *Bai-bil-wafa* having become unenforcible, the plaintiff is entitled to recover his money even within the period of ten years and we are referred to section 68 of the Transfer of Property Act. The last paragraph of this section is stated to be applicable to the case; but it is admitted that the mortgagee in this case has not required the mortgagor to give him "another sufficient security for the debt," so that the mortgagee cannot take advantage of this paragraph. And, as is pointed out in *Dula Singh* v. *Dial Singh* (1), though the particular and special remedy given in the mortgage-deed no longer exists, there is in substitution thereof another special remedy, that is, the remedy given by section 9 (2) of the Punjab Alienation of Land Act.

We hold, therefore, that even a claim for a money-decree is premature. The appeal fails and is dismissed with costs.

Appeal dismissed.

(1) 22 P. R. 1910; 29 P. W. R. 1910; 5 Ind. Cas. 902.

FAKHR-UD-DIN v. KIFAYAT-UL-LAH.

(s. c. 7 A. L. J. 1095).

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL No. 54 OF 1909.

February 5, 1910.

Present:—Sir John Stanley, KT., Chief Judge, and Mr. Justice Banerji.

FAKHR-UD-DIN SHAH—DEFENDANT—APPELLANT

versus

KIFAYAT-UL-LAH—PLAINTIFF—RESPONDENT.

Muhammadan Law—Hanafi *School*—Waqf—*Oral dedication*—*Inference from finding*—*Management of* Waqf *property*—*Adverse possession.*

An oral dedication may be inferred from repute and from facts which lead necessarily to the inference that there was such a dedication.

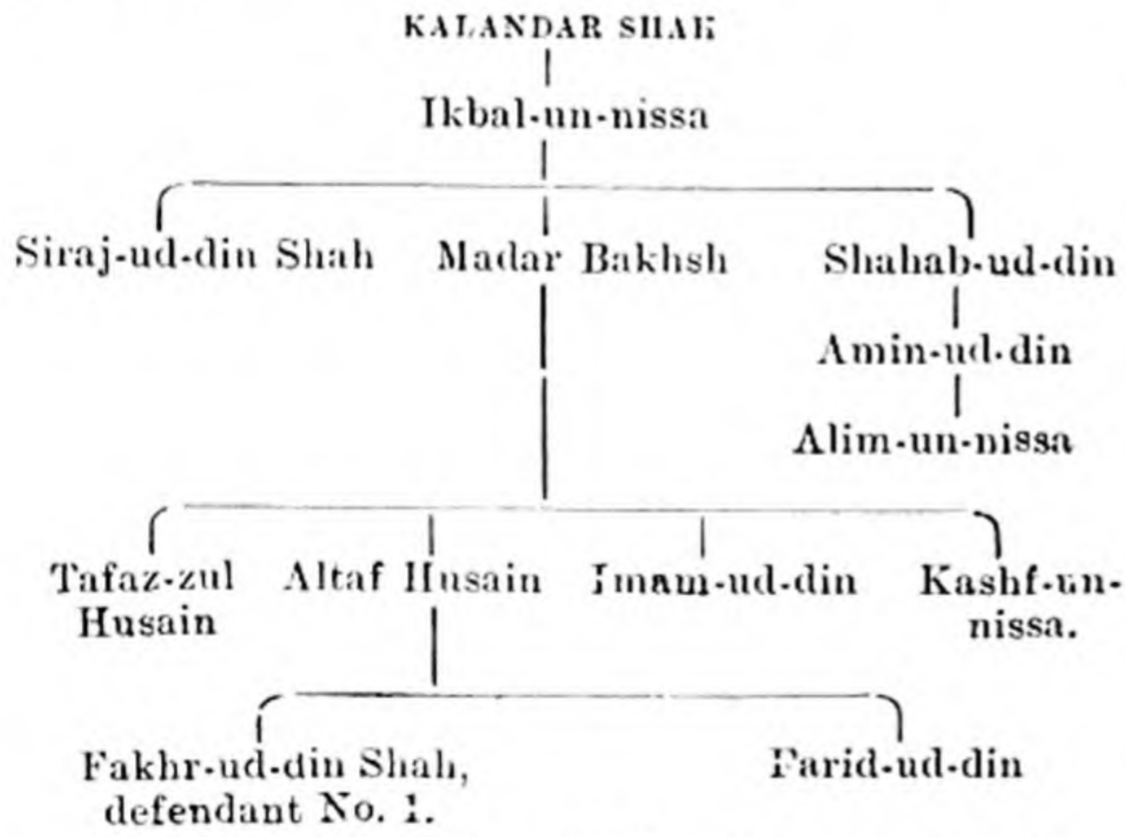
The finding of the lower appellate Court was that by a family arrangement certain landed property was to be applied to defray the expenses of *urs* and *fateha* of its owner. The property was placed under the management of the family and the income thereof was applied according to the arrangement:

Held, on the above finding, that no inference could be drawn that there was an oral dedication of the property as *waqf*.

The members of a family, under whose management a *waqf* property is placed, cannot acquire title to such property by adverse possession.

Appeal under section 10 of the Letters Patent against a decree of Mr. Justice Karamat Husain, reversing a decree of the District Judge of Bareilly by the following

Judgment.—The following pedigree which is admitted by the parties will help in understanding the relation of the parties to the case:—



The facts out of which this appeal arises are as follows:—

Alim-un-nissa, daughter of Amin-ud-din Shah, under a sale-deed, dated the 5th August 1904, sold $\frac{1}{3}$ share of a timber yard in Shahamat Ganj, forming part of property which belonged to Kalandar Shah, to the plaintiff who on the basis of that sale-deed brought an action against Fakhr-ud-din and others for the recovery of possession of that share purchased by him. One of the pleas in defence was that the property was *waqf*.

The learned Munsif found that the members of the family other than the *gaddi nashin* for the time being had never been given their shares, that Siraj-ud-din Shah had acquired an exclusive title to the property by adverse possession for more than 12 years, that after him Imam-ud-din Shah had acquired a similar title, that Amin-ud-din had not been long enough on the *gaddi* before his death to acquire a similar title and, therefore, Fakhr-ud-din Shah and Farid-ud-din as the heirs of the last absolute owner, Imam-ud-din Shah, were entitled to the property and that Alim-un-nissa, who was merely a niece of Imam-ud-din, had no share in the property and could, therefore, convey no interest in it. He also held that the property was *waqf* and inalienable and on these grounds he dismissed the suit.

The plaintiff appealed. The learned District Judge found that Alim-un-nissa was also an heiress to Amin-ud-din Shah. He says:—

"It follows that Fakhr-ud-din must be considered to derive his title from the last holder Amin-ud-din Shah, whose heiress is also Alim-un-nissa." He, however, coming to the conclusion that the property was *waqf*, upheld the decree of the Court of first instance and dismissed the appeal. The material portion of his judgment is:—

"However, I think, this appeal must be dismissed on the ground that the property is *waqf* and, therefore, inalienable. There is no direct evidence as to the original arrangement by which the endowment was made but it is clear from the evidence that for many years the property managed by the *gaddi nashin* for the time being, *i. e.*, the land in Maheshpur and the shops in Shahamat Ganj, has been treated as endowed property and the income of the property spent not only in *urs* and *fateha* for Kalandar Shah and his deceased descendants but also in feeding *fakirs*." The portion of the judgment dealing with the arrangement whereby the *waqf* has been held to be made is in these terms:—"It is common ground that after Kalandar Shah's death an arrangement was come to in the

family (consisting of Ikbal-un-nissa, daughter and heir of Kalandar Shah and her three sons) by which certain landed property was to be applied to defray the expenses of *urs* and *fateha* at the tomb of Kalandar Shah and his descendants. The manager of the property was called *gaddi nashin*, the first *gaddi nashin* being Siraj-ud-din Shah, then next Imam-ud-din Shah, then Amin-ud-din Shah and after him Fakhr-ud-din Shah (defendant) the present incumbent."

The plaintiff has preferred a second appeal to this Court and his learned counsel has attacked the decree of the lower appellate Court on two grounds. The *first* is that the *waqf* being one for the *urs* and *fateha* of Kalandar Shah and his deceased descendants, is illusory. The *second* is that the property in dispute is not *waqf* because for the constitution of a *waqf* an oral declaration is essential and there is no finding that Ikbal-un-nissa made an oral declaration.

The objection as to the illusory character of the *waqf*, made for the *fateha* or *urs* ceremonies of Kalandar Shah and his descendants is under the *Hanafi* School of the Muhammadan Law, as now understood, perfectly right. It has been settled by the case law in British India that a *waqf* by a *Hanafi* is valid only when the property has been substantially dedicated for a religious or charitable purpose in the sense of being a charity to the poor. If well-to-do people are to be benefited, the purpose will not be deemed as charitable [see *Mahomed Ahsanulla Chowdhury* v. *Amar Chand Kundu* (1), *Rasamayi Dhur Chowdhuri* v. *Abul Fata Mahomed* (2), *Bikani Mia* v. *Shuk Lal Poddar* (3) and *Abul Fata Mahomed Ishak* v. *Rasamoya Dhur Chowdhri* (4)].

The *fateha* and *urs* ceremonies in their popular sense are neither religious nor charitable in the sense of a charity for the benefit of the poor which they may claim as a matter of right. It, therefore, follows that a *waqf* for the *fateha* or *urs* ceremonies in their popular sense cannot be a valid *waqf*. In order to show that *fateha* or *urs* ceremonies in their popular sense are neither religious nor charitable, I have to explain their nature. The term *fateha* is an Arabic word and literally means the opening of a book or any other thing. The *Surat Alhamd* being the first *Surat* of the Quran or its beginning is, therefore, called *Al Fateha*. *Al Fateha* is held in great veneration by all the Muhammadans and its recital according to a tradition is tantamount to the recital of the entire *Quran* (1). Under the Ecclesiastical Law of Muhammadans the reading of the Quran or any portion thereof entitles the reader to a definite reward in the next world of which the reader under the same law may make a gift to a deceased person (2). In consequence of the above Ecclesiastical rules, a practice has grown up that when a Muhammadan dies, his friends and relatives read the whole of the Quran or portions of it and make a gift of the reward they so earn for the benefit of the soul of the deceased. As the reading of the *surat fatehat* is deemed equal to the reading of the entire Quran, practical convenience has led the Muhammadans to adopt the reading of the *fateha* for the benefit of the soul of a departed friend. This is the orthodox *fateha* ceremony and can be done any time for the benefit of

(1) 17 C. 498.
(2) 18 C. 399.
(3) 20 C. 116.
(4) 22 C. 619.

(1) In Arabic *Al Fatihat*. This Chapter is a prayer and held in great veneration by the Muhammadans, who give it several other honourable titles, as the chapter of *prayer*, of *praise*, of *thanksgiving*, of *treasure*, etc. They esteem it as the quintessence of the whole Quran and often repeat it in their devotions both public and private as the Christians do the Lord's Prayer. Sale's Quran, page 1, Note (*a*).

(2) *Fateha*....The offering up of prayers to the Almighty for the remission of the sins and the acceptance into Heaven of the individual in whose name it is desired, be he a saint or sinner, rich or poor, old or young. It consists in saying "For such or such a one I offer this prayer"; then repeating the first chapter of the Quran which comprises the following short prayer: "Praise be to God, the Lord of all creatures, the most merciful, the King of the day of judgment. Thee do we worship and of Thee do we beg assistance. Direct us in the right way, in the way of those to whom Thou hast been gracious, not of those against whom Thou art incensed nor of those who go astray". It is called also the *fateha* chapter, followed, when praying for the souls of the dead, by the hundred and eleventh Chapter termed *Coolhoo-vallah*, which latter, if read thrice over, is considered equivalent to having read the whole Quran for all the blessings will be derived from the one as from the other. Sometimes merely these prayers are offered, at other times oblations are also made at the same time. Reading or performing *fateha* over any kind of food previous to distribution, which is so commonly done, is not enjoined in the Quran and is consequently an innovation. *Fatehas* are of various kinds (*vide* index). *Qanoon Islam* by Jaffar Shurreef composed under the direction of and translated by G. A. Herklots, M. D. pp. XXIX to XXXI.

the soul of a dead Muhammadan. The superstitious tendency of human mind has added to it innovations which are not sanctioned by the Muhammadan Law and seem to have been borrowed from non-Muslim communities and cannot possibly be regarded as part and parcel of Islam. They, in fact, are stains on the purity of Islam. One of them with which I am concerned is that during the first year of a Muhammadan's death his *fatehat* ceremony is performed on the third day of his death (sometimes the second day), tenth day, twentieth day, fortieth day and so on. After the first year it is performed, if performed at all, annually. There is, however, nothing in the Muhammadan Law to sanction such a periodical *fatehat*. Another innovation is that instead of reading the *Surat Fatehat* and offering the reward to the deceased on the *fatehat* day, some food is prepared, a priest or a *Maulvi* is asked to repeat the *Surat Fatehat* on the food which is distributed among the relatives and friends of the person who spent the money for the preparation of the food. Some of it sometimes, as a matter of usage, is given to the poor also; but they have no claim to it as a matter of right. Occasionally sweets are substituted for the food and the priest recites the *fatehat* on them. The fact that reading the *fatehat* over any kind of food is an innovation, has been noticed in the *Qanoon Islam* [see Note 2 page (2) (579 of this report) and Note A. page (11) (580 of this report)]. It is also noticed in that book that ceremonies on the "*Tija*, &c., are not agreeable to the laws of Muhammad," see page 7 note (1), (page 580 of this report). From what has been said it follows that the *fatehat* ceremony

(1) On the third day after the burial of the dead, they perform what is called *teeja*, *zeearut*, or *phool-charhana*. That is they take all sorts of fruits, *choorway* and *pan sapari*, with its accompaniments, some *nan halwa*, others merely *nuqul* and *pan sapari* together with a sheet made of flowers *urgujja*, and *Ood Batian* and place them the day previous to the *Ziarat* on the spot where the individual died. On the *Ziarat* morning at dawn of day, the male relatives alone of the deceased and *Mullas*, etc., accompany the above article to the grave, and there make *Khatam i.e.*, *Quran* (*) *i. e.*, have the whole of the *Quran* read over by the *Mullas*, once, twice, or oftener. This is done by distributing four or five *jooz* (sections, of which there are thirty) to each of the readers who get through them very rapidly. Among the rich, fifty or one hundred *Mullas* sit down and reading it through bestow its benefits on the deceased. Some have the greater part read the night before and get it only concluded at the grave on the morning following. This done, they spread on the tomb a white, red, or any other coloured cover, lay over it the *Phul-ki-chadar* (sheet formed of flowers), and burning *benjamen* or aloes wood pastiles, they offer *fateha* and each one throws a few flowers into the *Urgujju* and, offering supplications for the remission of his sins, applies some of the above *Urgujja* together with the flowers to the grave, nearly over the position of the head or chest. *Fateha* being offered, they distribute the eatables among the *Hafizins*, *Mullas*, poor *fakirs* etc., and to all others. Or men merely take the above articles to the grave, offer *fateha* and distribute them there; and as at the funeral, so now, they give away in charity wheat, rice, salt, and pice (coppers), or only a few pice. Then having offered the *daeera kee fatiha*, they depart.

These ceremonies are not agreeable to the laws of Muhammad; but merely customs current in Hindustan. *Qanoon-i-Islam* by Jaffar Sharreef, composed under the direction of and translated by G. A. Herklots, M. D. page 285.

Chapter XL. Concerning the *fatiha* or offerings to the dead, on the tenth, twentieth, thirtieth and fortieth day after the demise; and the quarterly, half yearly, nine-monthly and annual *fatiha*.

The tenth day *Ziarat*. For nine days after the death of a person, most people neither go to eat or drink anything in the house of the family of the deceased; nor invite any of its members to any entertainment at theirs. Moreover, none of the family eat flesh or fish for nine days; nay, they refrain from all food which is seasoned. This is likewise not agreeably to books, but merely a custom in Hindh (India).

On the ninth at noon, they prepare *nan* and *halwa* or *halwa* and *chapatian* and having delivered *fatiha* over them in the name of the deceased, all the members of the household partake of them and distribute a little to the neighbours around.

In the evening they dress *Polao* and curries and having invited their relatives, friends and neighbours, beggars and *fakirs* to partake of them, they eat and distribute and send to the burying ground *fakir* his portion. It is, however, customary among the vulgar never to eat any food cooked at their own houses after having partaken of the above tenth-day food and when they receive such shares of the food, they never allow it to be brought within doors; but go and eat it outside in the area in front of the house. Some foolish people, conceiving the tenth-day food bad, do not partake of it all, believing that by so doing they would be deprived of the very useful faculty of speech. All this is nothing but mere fancy and imagination.

On the morning of the tenth, they perform the *Ziarat*, as detailed for the third day in the preceding chapter. On the nineteenth they prepare *nan*, *chapatian* and *halwa*, offer *fatiha* over them

(*) Or the transferring the benefits of the reading of the *Quran* to the person deceased.

in this popular sense means the preparation of food or sweets at the death anniversary of a deceased Muhammadan which after the recital of the *Fatehat* is distributed among the friends and the relations of the person who spent the money over it without any regard to the poverty of the recipients. No one who is familiar with the Hanafi law can say that a *waqf* for spending the income of the endowed property in preparing food, which, after the reading of the *Surat Fatehat* over it, is given to people without any regard to their poverty is a *waqf* for a religious or charitable purpose. The preparation of food and the reading of the *Surat Fatehat* over it cannot possibly be a religious act and the giving of such a food to persons, who are not poor and who cannot claim it as a matter of right, is no 'charity' in the sense in which that term is used in the case law of *waqf*.

The illusory character of a *waqf* for the annual *fateha* ceremony of an ordinary Muhammadan in its popular sense is not a merely conclusion from the premises that a valid *waqf* may only be created for a religious or charitable purpose and that the *fatehat* ceremony of an ordinary deceased Muhamadan in its popular sense is neither religious nor charitable. It has been expressly held in *Kaleloola Sahib* v. *Nusser-ud-deen* (5), that a *waqf* for the annual *fatihat* ceremonies of an ordinary deceased Muhamadan, although those ceremonies necessarily involve the distribution of charity, is illusory and void.

(5) 18 M. 201.

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in the name of the deceased and distribute them. At the time of the *fatiha* such flower sheet, *sandal*, etc., as were deposited near the food, they convey to the grave, and spread the former on, and apply the latter to it. But there is no *Ziarat* on the morning of the twentieth day.

A few also dress some food on the thirteenth, offer *fatiha*, eat and distribute.

On the thirty-ninth during the day, they cook *polao* as on the tenth; but at night they prepare plenty of curries, *talan* (or fried food), *polao* etc., (*i.e.*, such dishes as the deceased was in the habit of eating during his life), arrange them on plates, together with *Urgujja Soorma*, *Kajal*, *Ubeer*, *pan supari*, some of the clothes and *jewels* of the deceased which they deposit on the spot where the individual gave up the ghost, and over them suspend to the ceiling a flower garland. This ceremony is denominated *luhudhbhurna* or filling the grave.

Some foolish women believe that on the fortieth day the soul of the dead leaves the house, if it has not done so previously and if it has, it returns to it on that day, takes a survey of the above articles, partakes of such as he takes fancy to, swings by the flower wreath, takes a smell of the *Sandal* and departs *These non-sensical sayings and doings, however, are all innovations and consequently unlawful.*

They sit up all that night and if there be any *Quran* or *Maulood* reciters present, they continue repeating them.

The following is another custom, *viz.*, that for forty days they place daily on the spot where the man departed his life, a new *abkhora* (earthen tumbler) filled with water, with or without a *roti* (Wheaten cake). The water is left there all night and next morning poured on any green tree, and the bread and *abkhora* are given away to some *fakir* or other.

They generally light a lamp on the spot where the person died, where the body was washed, and some also on the tomb for three, ten, or forty nights, and until the fortieth day. They send every evening to the *Masjid* a new *abkhora* of water, *roti* with *ghee* spread on it, or without *ghee* but sugared, or *dahi*, boiled rice etc., and any one there offers *fatiha* over them in the name of the defunct and eats them. On the morning of forteith, they perform *Ziarat* as before detailed.

On the third, sixth, ninth, and twelveth month after the death of a person (women generally observing these ceremonies a few days before the expiration of the above periods), they in like manner prepare *polao*, etc., and having had *fatiha* offered over them, eat and distribute.

They whom God has blessed with means, give away in charity on the above mentioned days for the sake of the deceased clothes and money; and on the evening of the above *fatiha* day, they spread a *phul-ki-chadar* (flower sheet) on the grave.

Many women go without fail to the grave on the fortieth day and Annual *Ziarat*. On the other days, they are prohibited from repairing thither and it is, moreover, not customary for them to do so.

It is meritorious for men to go and offer *fatiha* on the grave every Friday; but the generality of people do it on Thursday.

After the first year the deceased is numbered with deceased ancestors, and *fateha* offered in their names conjointly, by some at the *fatiha* of *Shub-e-Birat* (page 166) and by others at the *arfa* or the *Baqrid* feast (page 176).

Those who can afford it dress victuals of some kinds or other, more or less on the anniversary day of the individual's death, and have *Fatiha* offered in his name.*

Those who have performed *arfa* on this day bring *shir* or *mitha polao* and offer *fateha* over it in the name of his holiness Muhammad Mustafa (†) the peacelete).

**Qanoon Islam* by Jaffar Shurreef composed under the direction of and translated by G. A. Herklots, M. D., pages 286, 288.

(†) Learned men never offer *fatiha* over food; probably because the Prophet never did. *Qanoon Islam*, page 167, by G. A. Herklots.

The case of *Kaleloola Saheb*(5) was followed in *Zooleka Bibi* v. *Syed Zenul Abedin* (6). Tyabji, J., in that case made the following remarks:—"I will first deal with the *Dargah* of Saiyid Badar ud-din near Jail Road—what is the character of that property? It is alleged that it is a *waqf*: and that it is a religious *shrine*, which cannot be treated as private property and that any dedication of property for the purpose of maintaining it and keeping it up would be a valid dedication and ought to be construed as *waqf* by this Court. Undoubtedly there are shrines and tombs of great religious teachers which are regarded with very considerable feeling of reverence and sanctity by various Musalman communities in the various parts of the world. But it does not follow that you can convert every tomb into a shrine and tie up property for the purpose of maintaining that shrine or for the purpose of performing ceremonies at that shrine. The distinction between private tombs of ordinary individuals and the shrines of great religious teachers entitled to reverence by the Muhammadan community is clearly shown in the case of *Kaleeloola Sahib* v. *Naseeruddeen Sahib* (5). There, a Muhammadan lady by an instrument in writing dedicated certain movable and immovable properties for the up-keep of her husband's tomb and for the daily, monthly and annual expenses of the aforesaid Mausoleum, such as lighting frankincense, flowers, and the salaries of repeaters of *Qoran* and readers of benediction, etc., as well as for the annual *fateha* ceremonies of the deceased and 'after my death for my annual *fateha* ceremony.''

It was held on appeal, reversing Mr. Justice Davies' judgment, that the instrument was not a valid *waqfnama* and was void as contravening the rule against perpetuities. The judgments of the Court in that case are very elaborate and they refer to many original authorities; therefore, I do not think it necessary to refer to it (them) more in detail. At page 213 of the judgment in appeal, however, it is observed as follows:—

'In the absence of any express authority showing that a dedication for ceremonies at a private tomb and for that purpose only is valid under Muhammadan Law, we do not think we ought to uphold the deed. It creates a perpetuity of the most useless description which would certainly be invalid under English Law (page 213).....Had it been shown that such perpetuities were recognized as valid under Muhammadan Law we should have felt constrained to uphold the deed, but in the absence of such proof, we think the general rule of public policy should prevail.' (page 214.)

"I entirely agree with the principles laid down in the judgment I have just referred to and I do not think that there is anything in the Muhammadan law to justify the tying up of property for the purpose of maintaining the tombs of ordinary individuals. The question, therefore, arises; what is the nature and character of the particular tombs with which I have to deal in this case? Are they the tombs of such high religious teachers, that the dedication of property may be considered *waqfs* or are they the tombs of ordinary persons?

"There is nothing in the evidence in the case to show that, beyond the fact that Saiyid Badar-ud-din was a member of the Rafai family, he was entitled to or possessed of any peculiar distinction. It is not shown that he was a particularly learned member of the society or that he was looked upon with reverence by the Musalman community or that he was considered a *Pir* According to the evidence before me, he was an ordinary member of the Rafai family. The tomb came into existence a comparatively short time ago as is shown by Exhibit 2, which is dated the 16th May, 1812. and it was executed by a lady named Baji Bibi" pages 1063—64.

Blair and Burkitt, JJ., referred to *Kalelloola Sahib* v. *Nuseeruddin Sahib* (5) in *Muhammad Munawar Ali* v. *Rasulan Bibi* (7), and Stanley, C. J., quoted it approvingly in *Sayed Mustafa* v. *Amina Begam* (8). Banerji, J., in *Saiyid Mustafa's case* (8), with reference to the ruling in *Kaleloolah Sahib* (5), remarked: "I am, with great deference, unable to agree with Collins, C. J., and Parker, J., that the *waqf* was not for pious and charitable uses and my opinion coincides with that of Davies, J., page 560". With great respect due to Banerji, J., I am of opinion that the view taken by Collins, C. J., Parker J., and accepted by Tyabji, J., Blair, J., Burkitt, J., and Stanley, C. J., is in accordance with the rule of the *Hanafi* School of Muhammadan Law as it has been settled by the case law

(6) 6 Bom. L. R.1058.

(7) 21 A. 329.

(8) 2 A. L. J. 519 at p. 530.

in British India. The 'word charitable' has, no doubt, a wider signification in *Musalman* Law [see *Muhammad Israil Khan* v. *Sashti Churn Ghose* (9).] But now under the rulings of the Privy Council, "charity" means charity to the poor.

So far as the death anniversaries of dead persons are concerned, I am, however, bound by a recent ruling of a Division Bench of this Court in *Bibba Jan* v. *Kalab Husain* (10). The material portion of the ruling is in these terms: "The remaining Rs. 200 is appropriated to the death anniversaries (*barsi amwat*) and to the repairs of the *Imambara*. The latter is admittedly a legitimate object of *waqf*. The contention of the respondents is that the death anniversaries (*barsi amwat*) should be understood as meaning the death anniversaries of the members of Najiban's family and we think that this is a reasonable interpretation to be put on the words. We have cometo the conclusion, after considering the evidence and the arguments, that the *waqfnama* was not illusory and there was an intention of creating a substantial *waqf* for pious and charitable purposes and we hold that the objects for which the *waqf* was created were valid." Page 128.

Having dealt with the *fatehat* I now deal with *urs*. *Urs* literally means the union of husband and wife for the first time and as it is desirable under the Muhammadan Law to give a dinner to friends after the union, the marriage feast (*valima*) is also called *urs* (1 and 2). According to the Sufis, the death of a saint brings about his union with God (3) and they, therefore, call the anniversary of his death *urs* (the union day of the saint with God) and by the analogy of the marriage feast, make, on the anniversary of his death, illuminations at his shrine, prepare food and distribute it among the people irrespective of their poverty. Some of the food may be given to the poor but they cannot claim it as a matter of right.

Such being the nature of the *urs* ceremonies, they form no part of the religion of Islam nor do they necessarily involve any charity to the poor and a *waqf* for the *urs* ceremonies of an ordinary Muhammadan or even a saint cannot be a *waqf* for a religious or charitable purpose. The illusory character of a *waqf* for the *urs* ceremonies of an ordinary Hanafi, so far as I am aware, has not been decided in any reported case. There can, however, be no doubt that according to the rules of the Hanafi Law a *waqf* for the *Urs* ceremonies of an ordinary *Hanafi* cannot be a *waqf* for a religious or charitable purpose. Maulvi Aslami in his work called the *Safinatul Najat* says:—

"One of the abominable acts is the *urs* ceremony of holy men and of wealthy person-

(9) 19 C. 410.
(10) 6 A. L. J. 115; 31 A. 136; 1 Ind. Cas. 763.

(1) *urs* (Az. S Msb K.) and *urs* (Az. S. K.) subsists from *ahrasa* as signifying "he had his wife conducted to him on the occasion of his marriage, and he went unto her." (Az T. A.) The ceremony of conducting a bride to her husband; (Mash:—) or the ministration or performance of a marriage, and of the ceremony of conducting the bride to her husband: (T. A.) or (simply) marriage; wyn, *Nikah* (K. T. A.) because this is the real thing intended by *alahras* (T. A.); in the first of these senses it is masc. and fem. only. As masc. its pl. is *u'sat* and as fem. its pl. is *ahras* (Msb). Hence (the trad.)....."when any one of you is invited to a marriage feast, or a feast given on the occasion of the conducting of a bride to her husband, let him consent" (Mgh). and hence (Az. T. A.) a marriage feast (A., Obeyd, Az, O. K:) or feast made on the occasion of conducting a bride to her husband (Msh) in this sense it is masc: (S. O.) or fem. and sometimes masc. *Lane's Arabic English Lexicon Book* 1, Part V, page 1899.

(2) *Urs* (1) Marriage festivities as distinguished from *Nikah*, "the marriage ceremony" [marriage].

(2*a*) A term also used for the ceremonies observed at the anniversary of the death of any celebrated Saint or *Murshid*. *Dictionary of Islam*, page 655, by Hughes.

(3) *Sufism* as it has developed in the course of time is, according to learned Orientalists, mainly borrowed from the Indian philosophers of the Vedenta School. Its chief doctrines are that the souls of men differ in degree, but not kind from the Divine Spirit of which they are emanation and to which they will ultimately return and the spirit of God is in all, as He made and (is) in Him; that He alone is perfect love and beauty, and that hence love to Him is the only real thing and all besides is mere illusion; that this present life is one of separation from the Beloved, that the beauties of nature, music and art revive in man the divine idea and re-call his affections wandering from God to other objects. They, therefore, taught that man must cherish these sublime affections and obstractions, concentrate his thoughts on God and so approximate to his essence and thus reach the highest state of bliss, *i. e.* absorption into the eternal. They hold that the true end and object of human life is to lose all consciousness of individual existence, to sink in the Ocean of divine life "as a breaking bubble is merged into the stream on the surface of which it has for a moment risen". The *Religion of Islam* by F. A. Kalein, pp. 233-34.

ages in the manner in which it is done now-a-days (which consists of grand illuminations, beating of large kettle drums and playing on flutes and tambour *des basque* at the time of devotion, and dancing and using *sandal* paste and taking it round in a cover with great pomp and singing poems and bowing and paying respect to tombs and kissing them and prostration before them which acts are done by vulgar people ; and of other acts of this kind). Such acts are shameful iniquities and abominable innovations some of which are deadly sins or apostacy." Portions from *Safinatul Najat* printed with *Charagh-i-Hidayat*, Mohammadia Press, Bangalore, p. 385.

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Maulana Azizul Rahman of Deoband, who is a learned *Hanafi* of great piety and reputation, in answer to the following two questions put to him answered to the effect that *urs* in its popular sense is unlawful and that a *waqf* for it, unless it be for the benefit of the poor, is void.

* * * * *

Question :— Is the *urs* of holy men in religion, be they *sufis* or learned, lawful or unlawful ? What is the authority for holding *urs* ? Since what time has this usage come into existence?

Question:—Is the dedication of property or land for the *urs* of any holy person lawful or unlawful? You will please answer the questions referring to authoriative books.

Answer (1):— An *urs* in its popular sense is not lawful inasmuch as gathering together on a tomb is against the holy tradition or the saying of the Prophet (may peace be upon him.) "Do not make my tomb a place for festivities." The *urs* in its popular sense includes many things which are unlawful innovations. It is for this reason that the ceremony of *urs* becomes unlawful and ought to be avoided.

The Porphet (may peace be upon him) has said "Every innovation is going astray (from Islam)."

Answer (2) :— If the object of the *waqf* is to feed the poor and to pay their travelling expenses, *i. e.*, the poor of the locality, the *waqf* is lawful. If it is for the ceremonies of the *urs* and for unlawful extravagances in illumination etc., the *waqf* is unlawful. There is no distinction between a holy person and an ordinary individual in this ; and the rule for all is the one and the same.

Maulvi Abdul Haq of Lucknow answers the question put to him as follows:—

Question :—Is the fixing of the *urs* day after a year lawful or unlawful?

Answer :—In the *Tafsir of Mazhari* this is stated to be unlawful. Shaikh Abdul Haq Dehlavi has reported from his *Pir* that there used to be no *urs* in olden times and that it is one of the innovations praised by people of recent time. This is stated in the book called *Ma sbut Fissanah*. Shah Abdul Aziz Dehlavi in some of his letters writes :—"The fixing of the *urs* day is due to the fact that the deceased person on that day passes away from the world of deed to the world of reward ; but any day that an *urs* is done is meritorious. Son of Jurair has reported from Muhammad, son of Ibrahim, that the Prophet (may peace be upon him) used to visit the graves of the martyrs at the beginning of every year and used to say "May safety be for you in consequence of your patience. The next world is good for you." Abu Bakar Omar and Osman used to do the same.

Question:—Is the eating of the food cooked at an *urs* and given to guests lawful?

Answer:—The eating of what is prepared with the intention of entertaining people is lawful both to a poor or to a well-to-do person: and the eating of what is prepared with the intention of giving in charity to the poor for the benefit of the soul of the deceased is unlawful save to those who are poor, because charity (*tassaddaq*) is for the poor only and a gift may be for a well-to-do person. So stated in the *Jama-'ul-Barakat*.

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The passages quoted from the *Safina-tul-Najat* and the *fatwa* of Maulana Azizul Rahaman clearly show that a *waqf* for the *urs* ceremony in its popular sense is void. The *fatwa* of Maulvi Abdul Haq shows that according to the *Tafsir of Mazhari*, *urs* is unlawful, that what is lawful according to Shah Abdul Aziz is the visit of the tomb of a deceased Muhammadan and following the example of the Prophet and the three *Khalifas* to recite some Quran for the benefit of the soul of the deceased. This does not in an way involve any expenditure of money. The *fatwa* also shows that on the *urs* day food can be prepared for entertaining well-to-do people. This, of course, will not be charity. It also shows that if food is prepared for the poor, it is unlawful for any one who is not poor

to eat it. A *waqf* for giving food to the poor on the *Urs* day in such a way that they may claim it as a matter of right will, no doubt, be valid. Any how as there is no specification in the finding of the lower appellate Court how much of the income of the property was to be spent on the *fatehat* ceremony and how much on the *Urs*, as there is also no finding that Qulandar Shah or any of his deceased descendants was a saint of recognized sanctity and as I am going to hold on another ground that the property in suit is not *waqf*, I refrain from holding that this particular *waqf* is illusory because the property is dedicated to the *Urs* ceremony of Qalandar Shah and his deceased descendants.

In support of the second plea, the learned counsel relies on *Banubee* v. *Narsingrao* (11). The learned Judges who decided that case remark: "It has been strenuously contended on behalf of the respondent that a mere intention to set apart property for charitable purposes followed by actual appropriation (as in the case of definite sum of money by applying the interest to the intended purpose) is quite sufficient to create a *waqf*. No authority as far as we know goes that length. The passages most strongly relied on by the respondents are taken out of Amir Ali's Text Book; but even supposing this is good authority, we do not find the learned writer anywhere saying that a mere mental act unaccompanied by any form of explanatory words, will do; all that he says is that it is not necessary while stating the object of the dedication to say explicitly that it is "*waqf*". Some statement apparently there must be and this is quite consistent with the objectivity of archaic systems and the prominence given in them to ceremonial formulæ and illustrative acts or words. It may be difficult to discover any good reason why saying in the market place or in the presence of one or more hearers 'I set apart Rs. 7,000 for the endowment of my new school and will henceforth apply the income to that purpose' even although the *waqif* should never in fact set apart the corpus or apply a penny of the income, does, while actually setting apart the corpus and applying the income to the contemplated charity, because unaccompanied by a verbal statement, does not create a valid *waqf*. But in trying to administer branches of law, which have come to us from remote times and primitive societies, it does not do to insist too much on a modern reason for every rule. We must, we feel, keep as close as we can to such authorities as are available for our guidance; and not one of these supports the proposition that a mental act although afterwards sufficiently expressed in conduct, will, unless clothed in appropriate words, create a *waqf*." Pp. 254—55.

The learned Judges have correctly stated the rule of the *Hanafi* School of Muhammadan Law. According to that school, an oral declaration is the essential element on which the constitution of *waqf* depends and in the absence of which no *waqf* can be formed. The oral declaration according to the Hanafi jurists is a *Rukun* of *waqf*, *i.e.*, an essential element without which no *waqf* can take place. To establish the above proposition I cite here a few original authorities.

"The constitution of *waqf* depends upon an oral declaration of the pillar (*Rukun*) of *waqf* by one who is capable of making *waqf* in connection with a property which is a fit subject of *waqf*: for it is (well known) that the disposing power may only be exercised by one who has the capacity of exercising it and that the juristic result of such a disposition may follow only with respect to a fit subject of disposition. Now the pillar (*Rukun*) of *waqf* is the term '*waqf*' or any other expression which conveys the same meaning such as 'It is a prohibited *Sadaqah*' or 'a tied up *Sadaqah*', a perpetual *Sadaqah* or a *Sadaqah* which may not be sold, 'given away or inherited,' or 'an endowed *Sadaqah*.'" *Issaf*, page 10, Egypt Edition.

The pillar (*Rukun*) of a thing literally means its strongest side. In the language of the jurists, the *Rukun* of a thing (*i. e.*, of a juristic deed) is such an essential element of that deed as it can have no existence without that element. *Kashfulasrar*, Volume III, page 344, Constantinople Edition.

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The author of the *Bihar* not only says that an oral declaration is a '*Rukn*' of *waqf* but enumerates 27 expressions each of which when used orally is or is not sufficient to create a *waqf*. As the various forms of oral declarations which may be used for creating a *waqf* are not collected in any of the books on Muhammadan Law in English, I translate

(11) 31 B. 250; 9 Bom. L. R. 91.

the passages from the *Bahr* dealing with those forms.

"The Pillar (*Rukun*) of *waqf* is one of the specific formulae which convey the meaning of *waqf*. They are twenty six to which one more is added. (1) 'This land of mine is a perpetually endowed charity for the benefit of the poor.' All are agreed that a declaration made in this form will create a *waqf*. (2) 'My land is an endowed charity.' This according to Hilal, Abu Yusuf and others is sufficient to create a *waqf* inasmuch as the term 'charity' denotes the objects in which the income is to be spent and the term 'endowed' denotes that a *nazar* is not intended. (3) 'This land of mine is a detained charity.' (4) 'This land of mine is an interdicted charity.' The third and fourth are like the second. (5) 'This land of mine is endowed.' This is not sufficient to create a *waqf* save according to Abu Yusuf who deems it sufficient to create a *waqf* for the benefit of the poor. His argument is that the term 'endowed' implies that the income of the land is to be given to the poor and as they never fail, the endowment becomes of a perpetual nature. Sadr Shahid has stated that the elders of Balkh give *fatwa* according to the opinion of Abu Yusuf and that we also do the same, for the use of the expression has become customary for creating a *waqf*. Hilal objects that as a *waqf* may be created for the wealthy as well as for the poor and as in the declaration in question, there is no express statement of perpetuity, the *waqf* is invalid; but the answer is that a custom has grown up to the effect that when a person says 'This land of mine is endowed' the income of it is given to the poor and perpetuity is deemed to have been expressly declared. (6) 'This land of mine is endowed for the poor.' Such a declaration will even according to Hilal create a valid *waqf* inasmuch as the mention of the poor denotes perpetuity. (7) 'This land of mine is detained.' (8) 'This land of mine is *habs*.' Neither the seventh nor the eighth is sufficient to create a *waqf*. Of course, if they become customary they, like the fifth, will be sufficient to create a *waqf*. (9) 'This land of mine is for the way of God.' If the use of such an expression becomes customary for the creation of a *waqf* for the poor, a *waqf* will be created. In the absence of a custom, the owner of the land will be asked if he intended a *waqf*. If he answers in the affirmative, a *waqf* will be created for the expression is capable of conveying that meaning. If he says that he intended *Sadaqah*, it will be deemed to be a *nazar* and the land or its price will be applied in charity. If he says that he intended neither, the land will go to his heirs. This is stated in the *Nawazil*. (10) 'I gave this land of mine to the poor.' The expression will create a *waqf* if it has become customary to use it for the creation of a *waqf*. In the absence of a custom the owner will be asked as to his intention. Should he say that he intended to create a *waqf*, a *waqf* would be created. Should he say that he intended a charity, the property would be a *nazar*. This would be the result when the intention to create a *waqf* is absent; for in such a case a *nazar* is the least which he is deemed to have intended. It is stated in the *Fatwa Khasi* that there is no difference between the 9th and the 10th.

Regarding the 10th, it is stated in the *Fatwa* that in case the intention to create a *waqf* is absent, the property would go to the heirs, but there is no inconsistency between being a *nazar* and going to the heirs, inasmuch as if the maker of a *nazar* dies and the subject-matter of *nazar* has not already been applied to the purposes for which the *nazar* was made, the property goes to the heirs. The author of the *Fatwa Khasi* has made this statement with reference to one of the two formulae, but there is no doubt that in both cases if the intention to create a *waqf* is absent, a *nazar* is created and if the owner dies without applying the property or its price to the purposes of the *nazar*, the property goes to his heirs. (11) 'This land of mine is forbidden.' (12) 'This land of mine is *waqf*.' Both create a valid *waqf* and both formulae are well-known to the inhabitants of Hijaz. (13) 'This land of mine is endowed its.' This formula is similar to the 5th. (14) 'I made the fruit of this vineyard of mine *waqf*.' The declaration makes the fruit *waqf* whether exists or not. 'I made the produce of this land of mine *waqf*' has the same effect. (15) 'This land of mine is endowed for God' is similar. 'This land mine is an endowed charity.' All these fomulae are mentioned in the *Fathul Qadir* and the author of the *Bizzaziah* is of opinion that the declaration *i.e.*, 'It is *waqf*" or 'It is made *waqf*' certainly creates a *waqf*.

(16) 'This land of mine is a *Sadaqah*.' If he dies without applying the property to the charitable purposes it, goes to the heir. This is stated in the *The Khassaf*. (17) 'This land of mine is endowed for good purposes' or 'for meritorious purposes.' The declaration creates a *waqf* for the benefit of the poor. (18) 'This land of mine is an endowed charity so that *Haj* or *Omra* on my behalf may be performed.' The expression creates no *waqf* if he does not say 'on my behalf'. (19) 'This land of mine is a charity and shall not be sold.' The expression constitutes a vow for charity and not a *waqf*. If he adds 'it shall neither be given away nor sold', a *waqf* for the benefit of the poor is created. These three (*i.e.*, the 17th, 18th and 19th) are mentioned in the *Isaaf*. (20) 'Ye should purchase from the rent of this house of mine every month ten *Dirhams* worth of bread and distribute it among the poor.' The expression makes the house *waqf*. (21) 'This house of mine will be a *Sadaqah*; on my death it shall be given in charity or shall be sold and the price of it shall be given in charity.' The expression will make the house *waqf*. Both (*i.e.*, 20th and 21st.) are mentioned in the *Zakhirah*. (22) If a person makes a Will that one-third of his property should be made *waqf*, according to Abu Yusuf it becomes *waqf*. According to Abu Hanifa and Mohammed, it does not become *waqf* save when he adds 'for God for ever.' This is stated in the *Tatar Khaniah*. (23) 'This shop of mine will be *waqf* and free on my death.' The expression does not create a *waqf* as it does not specify the purpose for which the *waqf* is made. (24) 'This house of mine is free for the mosque on my death.'' The expression creates a *waqf* provided the house does not exceed one-third of his assets and that the mosque is specified. (25) 'I made this house of mine free for the leader (*Imam*) of such a mosque that he may pray and keep fasts on my behalf.' The expression makes the house *waqf* although its income is not sufficient for his prayers and fasts. The three (*i.e.*, 23rd, 24th and 25th) are stated in the *Qaniyah*. (26) 'I devoted this room of mine for the oil of the mosque.' The expression makes the room *waqf* though he says no more and the *mutawalli* will have no power to spend the income in any thing else except the oil. This is stated in the *Muhit Kazi Khan* stated in the Book on Bequests. (27) 'If a person says that one-third of the property is *waqf*' and says no more, according to Abu Nasr the expression creates no *waqf* if the property is cash and amounts to the expression 'These *Darhams* are *waqf*.' If the property is land, it becomes *waqf* for the poor. *Bahr. Book on Waqf*, p. 205, Vol. V, Egypt edition.

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For those who are familiar with the phraseology of the *Hanafi* jurists, the statement that an oral declaration is a pillar (*Rukun*) of *waqf* is conclusive to establish that an oral declaration is indispensable for the formation of a *waqf* and that in its absence no *waqf* can take place, but those who are not familiar with their ways, may not be satisfied that such is the case. I, for their satisfaction cite the following authorities which in express terms lay down the necessity of an oral declaration for the creation of a *waqf*:—

"In the language of the law according to the *Imam* (Abu Hanifah) *waqf* means the detention of the substance and the interdiction of the corpus by using an *oral declaration* so that no one else may exercise any proprietary right over it. The corpus of the property continues to be in the ownership of the settler as long as he lives and passes to his heirs when he dies and can be sold or given away. The result of the oral declaration is the same as that of a vow in respect of the usufruct of the property. The definition does not cover the *waqf* of a mosque which according to all is the detention of it in the ownership of God. The reply is that the definition aims at defining the *waqf* about which there is a difference of opinion as has been stated in the *Qahistani*. The reply, however, is not free from difficulty and you should judge for yourself. In the definition, we have added 'by using an oral declaration' because if a settler executes a deed in the form of a *waqfnama* fulfilling all the conditions without making an oral declaration, the property does not become *waqf*." *Majma-ul-Anhar*, Vol, 1, p., 139, Constantinople Edition.

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"In the language of the law *waqf* means the detention of the substance and the interdiction of the corpus which is in the private ownership of the settler by making an *oral declaration* so that no one else may exercise

any proprietary right over it. It (the corpus) continues in the ownership of the settler during his life and passes to his heirs after his death and can be sold or given away. Of course, the result of the oral declaration is the same as that of a vow in respect of its usufruct. The definition does not cover the *waqf* of a mosque which, by a consensus of opinion, is a detention of it in the ownership of God. It may be said that the definition is the definition of a *waqf* about which there is a difference of opinion. We have added "by making an oral (declaration)," because if he executes a deed in the form of a *waqf-nama* fulfilling all the conditions but without making an oral declaration, the property will not become *waqf*." *Durr-ul-Muntaqa*, Vol. I, p. 379, on the margin of *Majmaul Anhar*, Constantinople Edition.

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"It is stated in the *Quhistani* that '*waqf*' in the language of the law means the *detention* of the substance and the *interdiction* of the corpus which is in the private ownership of the settler, *by using an oral declaration* so that no one else may exercise any proprietary right over it. It (the corpus) continues in the ownership of the settler during his life and passes to his heir on his death and can be sold or given away. After this it is stated that the definition does not cover the *waqf* of a mosque which is a detention of it in the ownership of God according to all. It may be said that the definition is the definition of a *waqf* about which there is a difference of opinion. *Raddul Muhtar*, Vol. III, Book on *Waqf*, p. 386. Egypt Edition.

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An oral declaration is not only essential for the creation of a *waqf* under the *Hanifi* School. The *Shia* School also deems it indispensable although *waqf* under the *Hanafi* School is a unilateral declaration while under the *Shia* School it is a bilateral contract as was pointed out in *Agha Ali Khan* v. *Altaf Husain Khan* (12). "A *waqf* is not validly formed save by making an oral declaration, for it is either a transfer of the ownership of the usufruct or of the substance and usufruct both and is, therefore, like other transfers (which cannot take place without an oral declaration.) Further:—as an emancipation notwithstanding its immediate result cannot be effected save by an oral declaration, a *waqf a fortiori* cannot be effected without it. Again the presumption is that the ownership of an owner continues until a divestive event happens (and without an oral declaration no such divestive event happens and no *waqf* is, therefore, created). If a person, therefore, constructs a building of the shape of a mosqe or of some other shape and gives permission that prayers be said therein, the building, in the absence of the oral declaration, does not become a mosque. Similarly if he gives permission for the burial of the dead in his land, it does not become a burial ground; although prayers may have been said in the building and the dead may have been buried in the land. *Shafai* is of the same opinion, the reason being the absence of the condition precedent which is the oral declaration. Abu Hanifah holds that when one man says his prayers in the building or one dead body is buried in the land, the former becomes a mosque and the latter a burial ground, and the *waqf* becomes complete even when no oral declaration has been made (*). This is not sound for the reasons we have already given. If the settler makes an oral declaration but the delivery of possession does not take place which may be effected by one prayer, one burial or by the ruler taking possession, no *waqf* will be constituted according to us (*i. e. Shias*)". *Tazkira* Book on *Waqf*, Tehran Edition, leaf 205.

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"*Question*:—Is the formula (*Sigha*) a condition precedent to the creation of *waqf*? Is it a contract requiring offer and acceptance or a unilateral declaration? Is or is not the mention of a desire to draw near to God a condition?

Answer.—Yes, the formula is a condition precedent and without it a *waqf* is not created. The expressed words which create a *waqf* are "I made a *waqf*," The jurists hold that the expresion "I made it *waqf* or a peramanent charity" is also sufficient to create a *waqf*. The expressions "I gave it in charity," "I made it perpetual," "I made it free," and "I made it *interdicted*" in order to create a *waqf*, stand in need of circumstantial evidence. For instance if he says "I gave it in charity to such a one: it should neither be sold nor given away," no *waqf* in the

(12) 14 A. 429 at p. 447.

(*) This opinion of Abu Hanifah is limited to the *waqf* of a mosque or of a burial ground.

absence of circumstantial evidence is created. Of course from a religious point of view an intention to create a *waqf* is the chief thing and if there is an intention, the use of any of the above expressions will create a *waqf* according to religion but not for legal purposes. You should know that there is a difference of opinion among the jurists regarding the necessity of orally using the formula in making a mosque a *waqf*. A majority hold that the oral use of the formulae in that case also is indispensable. If, therefore, a person constructs a building in the form of a mosque with the intention of its being a mosque and prayers are said therein with his permission but he does not use the formula orally, the building does not become *waqf*. The same rule applies to aqueducts and burial grounds. If a person sets apart a land for burying the dead and they are buried therein with his permission, the burial ground does not become *waqf* in the absence of the oral use of the formulæ. This is stated in the *Tazkirah* in the following terms:—"An act surrounded by circumstances is not, as we have already stated, sufficient for the creation of a *waqf*. For example if a person builds a mosque and gives permissions for prayers in it, that building does not become *waqf*. Abu Hanifah and Ahmed hold that it becomes *waqf*. Similarly if he sets apart a plot of land as a burial ground or makes an aqueduct and gives permission to use them, they do not become *waqf*. All the *Shia* jurists are agreed that an oral use of the formula is essential." Towards the end of the passages after refuting the *Sunni* view which is based on the analogy of the legality of feeding a guest or taking the sweet thrown at marriage gatherings or using the bath (*hammam*) though there are no oral declarations, the author had said:—"That a *waqf* is a contract which stands in need of offer and acceptance and of certain conditions, that circumstances are not enough to create it and that it cannot be created in the absence of an oral use of the formula."

The learned author of the *Shatat* after dealing with the question whether an intention to make a mosque *waqf*, in the absence of an oral use of the formula, is sufficient or not—a part which I need not translate—says towards the end of his answer:—"Anyhow this discussion is confined to the case of a mosque. Regarding other *waqfs* I have not come across any *Shia* Jurist who holds that a mere intention is sufficient oral declaration; and the use of the formula is necessary (according to all)." *Jamaul Shatat*. Book on *waqf*, p. 162.

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The authorities which have been cited are conclusive in making an oral declaration essential for the creation of a *waqf* and the learned Vakil for the respondents admits its necessity under the *Hanafi* School; but he argues that the *waqf* in question being an old one, an oral declaration by the daughter of Qalandar Shah creating *waqf* ought to be inferred from the finding of the lower appellate Court that an arrangement was come to in the family by which certain landed property was to be applied to defray the expenses of *urs* and from the fact that the income of the property has, since the death of Qalandar Shah up to the present time, been applied to meet the expenses of his *urs* and *fateha*. As an oral declaration is essential for the formation of *waqf*, I am unable to infer the happening of such a declaration from the finding as to the arrangement and from the application of the income to the *urs* and *fateha*. An oral declaration has no necessary connection with either. Both of them can take place in the absence of an oral declaration creating a *waqf* and in the absence of an express finding that Iqbal-un Nissa, daughter of Qalandar Shah, made the property in dispute *waqf* by using an oral declaration, I am unable to infer that the declaration was used and to hold that the property in consequence of a presumed oral declaration became *waqf*.

The case of *Juwan Das Sahoo* v. *Shah Khairud-din* (13) was also referred to. That case, however, only lays down that "according to the Muhammadan Law it is not necessary in order to constitute a *waqf* or endowment to religious or charitable uses that the term *waqf* be used in the grant, if from the general nature of the grant such tenure can be inferred." The point that an oral declaration is essential for the constitution of *waqf* and that in its absence no *waqf* can be created, was not raised in that case. For the above reasons, I hold that the property in dispute is not *waqf* and setting aside the decrees of both the Courts decree the plaintiff's claim with costs in all the Courts.

(1) 2 M. I. A. 390.

FAKHR-UD-DIN *v.* KIFAYAT-UL-LAH.

Mr. *Ghulam Mujtaba*, for the Appellant.

Mr. *Ishaq Khan*, for the Respondent.

Judgment.—This appeal has occupied time out of all proportion to its importance in view of the fact that property of the value of Rs. 100 is only involved in it. At the same time if one of the questions, which has been discussed at very great length by the learned Judge of this Court, had been decided by him, the appeal would have deserved grave consideration at our hands. The main and only question which it is necessary for us to determine is whether or not the learned Judge of this Court was wrong in holding that there is no sufficient evidence to justify the finding that the property in dispute is dedicated as *waqf*. It will be convenient here to set forth a pedigree of the family.

QALANDAR SHAH.

Ikbal-un-nissa.

Siraj-ud-din Shah. | Madar Bakhsh | Shohab-ud-din.

Tafazzul Husain. | Altaf Husain. | Imam-ud-din. | Kashf-un-nissa.

Amin-ud-din.

Alim-un-nissa.

Fakhr-ud-din Shah, defendant No. 1. | Farid-ud-din.

It now appears from a perusal of a judgment of the learned Subordinate Judge of Bareilly, dated the 9th of June, 1890, which is upon the record, that the village of Maheshpur and other property, which is said to have been dedicated as *waqf*, was given to Qalandar Shah, the ancestor of the defendant, Fakhr-ud-din Shah, under a *sanad*, not as was then alleged for the purposes of a *waqf* but for his own personal use. The plaintiff in the suit out of which this appeal has arisen is a purchaser of the share of Alim-un-nissa, whose name appears in the pedigree, and his suit is brought to recover possession of that share.

The defence to the suit was mainly that the property in dispute was *waqf* property.

The Court of first instance dismissed the claim and the lower appellate Court affirmed the decree of that Court. In his judgment the learned District Judge in stating the facts said that: "it was common ground that after Qalandar Shah's death an arrangement was come to in the family, (consisting of Iqbal-un-nissa, daughter and heir of Qalandar Shah and her three sons) by which certain landed property in Maheshpur and shops in Shahamat Ganj were put under the management of one of the family and the income of this property was to be applied to defray the expenses of *urs*, *fateha*, *etc.*, at the tomb of Qalandar Shah and his descendants." He then in agreement with the learned Munsif found that it was not proved that any of the members of the family of Qalandar Shah, other than the *gaddinashin* for the time, was ever in possession or receipt of a share of the profits of the property, and that, therefore, it must be considered that Siraj-ud-din Shah acquired by adverse possession for over 12 years an exclusive title as against the other members of the family and that after him the next *gaddinashin*, Imam-ud-din Shah, acquired similarly a title as against the rest of the family." Then later on he says:—"I think this appeal must be dismissed on the ground that the property in suit is *waqf* and, therefore, inalienable." Then he says: "There is no direct evidence as to the original arrangement by which the endowment was made—but it is clear from the evidence that for many years the property managed by the *gaddinashin* for the time being, *i. e.*, the land in Maheshpur and the shops in Shahamat Ganj, has been treated as endowed property and the income of the property spent not only in *urs* and *fateha* for Qalandar Shah and his deceased descendants, but also in feeding *faqirs*." It is hard to understand how the learned District Judge came to hold that Siraj-ud-din Shah and after him Imam-ud-din Shah acquired title by adverse possession. If the property was—as he finds—*waqf*, then it is impossible that these members of the family should have acquired title by adverse possession. We are inclined to think that the learned District Judge intended to convey that these members of the family retained in their own hands exclusively possession of the property for the purposes of the *waqf* and not that they acquired a title by adverse possession for their own benefit.

An appeal was preferred against the decision of the lower appellate Court, and the learned Judge of this Court, before whom it came for disposal, has written a most elaborate judgment upon the subject of *waqf* generally, but he disposed of the appeal upon the

sole ground that there was no evidence to show that there had been any valid dedication of the property. Our brother, Karamat Husain, observes in his judgment. "The authorities which have been cited are conclusive in making an oral declaration essential for the creation of *waqf* and the learned Vakil for the respondents admits its necessity under the *Hanafi* School but he argues that the *waqf* in question being an old one, an oral declaration by the daughter of Qalandar Shah creating a *waqf* ought to be inferred from the finding of the lower appellate Court that an arrangement was come to in the family by which certain landed property was to be applied to defray the expenses of *urs* and from the fact that the income of the property has, since the death of Qalandar Shah up to the present time, been applied to meet the expenses of his *urs* and *fateha*. As an oral declaration is essential for the formation of the *waqf*, I am unable to infer the happening of such a declaration from the finding as to the arrangement and from the application of the income to the *urs* and *fateha*. An oral declaration has no necessary connection with either. Both of them can take place in the absence of an oral declaration creating a *waqf*, and in the absence of an express finding that Iqbal-un-nissa, daughter of Qalandar Shah, made the property in dispute *waqf* by using an oral declaration, I am unable to infer that the declaration was used and to hold that the property in consequence of a presumed oral declaration became *waqf*." The contention on behalf of the learned Vakil for the appellant is that an oral declaration of *waqf* ought reasonably to be inferred from the circumstances proved in evidence in the case, and for the fact that certain members of the family held possession of the property to the exclusion of the other members of the family; and it has been contended by him that it is not absolutely necessary to prove an oral dedication if from the facts and circumstances proved, the Court can reasonably infer that such a dedication was made. An oral dedi cation may, we think, be inferred from repute and from facts which lead necessarily to the inference that there was such a dedication. Mr. Amir Ali in his work on Muhammadan Law, Volume I, Edition III, at page 374, states as follows:—"A *waqf*" says the *Raddul Muhtar* "may be established without any evidence of the *waqif's* declaration. This is the doctrine laid down by Abu Yusuf; and the Jurists of Balkh, such as Abu Jaafar and others, follow this view: *Khassaf* also has adopted it;" and later on "so also in the Kazi Khan a *waqf* may, according to the Jurists of Balkh, be validly established by evidence of reputation. If the dedication is one within the knowledge of the general public as a matter of notoriety, like the *waqf* of Amr-ibn-al-Aas" (the Amru of European history), it can be established by the testimony of witnesses or it may be established by the evidence of user for the purposes of the dedication."

In this case we are unable to say that our learned brother was wrong in refusing upon the finding of the lower appellate Court to draw the inference that there was an oral dedication of the property as *waqf*. The finding of the lower appellate Court that there was an arrangement after Qalandar Shah's death between Ikbal-un-Nissa and her three sons, by which the property in question was placed under the management of a member of the family with a view to the application of the income in the *urs* and *fateha* ceremony at the tomb of Qalandar Shah, is quite consistent with the contention that there was no dedication of the property as *waqf* but that there was merely a family arrangement that the income of the property should be applied in the way mentioned and that the members of the family who succeeded Ikbal-un-Nissa carried out the arrangement and consequently for a number of years the income of the property was applied in the way which has been mentioned. In or about the year 1890, a suit was instituted before the Munsif of Bareilly in which the question was whether Maheshpur was endowed property. The learned Subordinate Judge in his judgment, dated the 19th of June, 1890, above referred to, sets forth the evidence brought forward on either side upon this question and came to the conclusion that the property was not endowed property. This is an important piece of evidence and supports the view which has been taken by our learned brother. Neither he nor the District Judge refer to it in their judgments. It seems to us to be almost conclusive on the question before us. We think that the decision of our brother Karamat Husain upon this question is right and dismiss the appeal with costs. We express no opinion whatever upon the

interesting question whether if any dedication had taken place, as contended for, the *waqf* would have been valid.

Appeal dismissed.

(s. c. 3 Bur. L. T. 2.)

LOWER BURMA CHIEF COURT.

SECOND CIVIL APPEAL No. 282 OF 1908.

August 23, 1909.

Present:—Mr. Justice Parlett.

MAUNG PYE AND ANOTHER—APPELLANTS

versus

MA THAU AND OTHERS—RESPONDENTS.

Transfer of Property Act (IV of 1882), ss. 92, 93—Usufructuary mortgage—Extension of time for payment after decree—Good cause—Foreclosure.

Where a decree is passed for the redemption of lands held in usufructuary mortgage and a date fixed for redemption, and the mortgagors apply for extension of time for payment on the grounds of poverty and the difficulty of raising money during the pendency of an appeal by the mortgagees, they are entitled to an extension of time if they show good cause.

In deciding whether good cause for extension of time has been shown, all the circumstances of the case must be looked at. Thus, where the mortgagor tendered the mortgage-money to the mortgagee prior to suit, which was instituted in consequence of the refusal to accept it on the part of the mortgagee who claimed to have bought it outright and an appeal had been filed by the mortgagee against the decree for redemption, and in asking for extension of time the mortgagor alleged poverty and difficulty of raising money pending the appeal, it was *held* that a good case for extension of time had been made out.

Appeal against the decree of the Divisional Court, Delta, passed on the 12th September 1908, in Civil Miscellaneous Appeal No. 17 of 1908, dismissing the appeal of the appellants (defendants) against the decree of the District Court of Pyapon, in Civil Suit No. 4 of 1906.

Mr. *Villa*, for the Appellants.

Judgment.—Respondents filed a suit in the Sub-Divisional Court on 6th March 1906 for the redemption of certain lands held in usufructuary mortgage by appellants.

On 11th February 1907, they obtained a decree for redemption on payment of Rs. 1,000 before the 12th August 1907. Though the decree did not expressly state so, it is clear that the mortgagee's remedy in case of default of payment was, since the mortgage was a usufructuary one, to apply for an order that the land be sold.

An appeal was preferred to the Divisional Court. While it was pending, on 10th August 1907, *i. e.*, two days before the expiry of the time fixed in the decree for payment of the mortgage-money, respondents applied to the Sub-Divisional Court for an extension of time for three months, on the ground that they were at the time hard up for money, and that until the appeal was decided, no money-lender would advance them the requisite sum.

Notice was issued to the appellants to show cause why the time should not be extended, and on 15th October 1907, they showed cause on the sole ground that they had already had sufficient time. They added an assertion that as the money had not been paid within the time fixed, the right of redemption was foreclosed.

The parties were heard but as the record of the case had not been received back from the appellate Court orders on the application were postponed from time to time till 19th December 1907.

The appeal was dismissed by the Divisional Court on 7th October 1907, and on 2nd November respondents deposited the mortgage-money in the Sub-Divisional Court.

Accordingly, when passing orders on 19th December on the application for time, the Sub-Divisional Judge, though holding that the application was reasonable and no sufficient cause had been shown against it, noted that no formal order extending the time for payment was any longer required, and directed that delivery of the land be made to respondents on 15th March 1908.

The real effect of this order, therefore, was to postpone the day fixed under section 92, Transfer of Property Act, for payment to the defendants up to 2nd November 1907, and further to grant the defendants the extraordinary indulgence of retaining the usufruct of the land for another harvest season.

Nevertheless defendants appealed to the Divisional Court on the ground that the Sub-Divisional Court erred in accepting the redemption money after the time allowed in the decree and that it should have held the right of redemption foreclosed and that the suit stood dismissed.

The appeal was dismissed.

This appeal is brought practically on the same grounds. It is urged that the right of redemption became barred on 12th August 1907 the date fixed for payment in the

original decree; that the Court had no power to receive the money after that date, there being no order to extend the time; and that in any case good cause was not shown for an extension of time.

As regards the first point, decrees under sections 86 and 92, Transfer of Property Act, are of the nature of decrees *nisi* they give the judgment-debtor the right, on non-fulfilment of their conditions, to apply to the Court to pass an order absolute under sections 87 and 93. But there are numerous decisions to the effect that until such order absolute is applied for and obtained, the decree-holder can apply to enlarge the time. This was held as regards under section 87 in *Narayana Peddi* v. *Papnayya* (1) and *Mallipargunta Setti* v. *Linga Murti Pantulu* (2) and as regards section 93 in *Nandram* v. *Babaji* (3) which exactly applies to the present one.

In *Paresh Nath Mojumdar* v. *Ranigadu Mojumdar* (4), *Somesh* v. *Ram Krishna Chowdhry* (5), *Nihali* v. *Mittar Sen* (6) and *Salig Ram* v. *Muradan* (7) it was held that even without obtaining an extension of time, the mortgagor could redeem before an order absolute under section 87 was passed.

The same was held as regards order under section 93 in *Sita Ram* v. *Madho Lal* (8) and *Debi Prasad* v. *Jai Karan Singh* (9).

Some decisions have gone even further than that *viz.*, *Ramunni* v. *Brahma Dottan* (10) and *Kanara Kurup* v. *Govinda Kurup* (11) and have laid down that notwithstanding the passing of an order absolute under section 93, Transfer of Property Act, the mortgagor's right of redemption is not finally extinguished till the sale has actually taken place. No such extreme view need be taken to meet the present case. Admittedly there was no application for an order absolute under section 93, whereas there was an application to extend the time made within the limit fixed by the decree. Hence neither *Jaikishen* v. *Bhola Nath* (12) nor *Ram Lal* v. *Tulso Kuar* (13) which lay down that without an extension of time under section 93 the mortgagor cannot make payment after the date fixed in the decree, nor *Elayadath* v. *Krishna* (14) nor *Vallabha Valiya Rajah* v. *Vedapuratti* (15) which lay down that a mortgagor who has made default of payment within the time fixed in the decree is not entitled to apply for execution of the decree after the time limited would bar the right to redeem in the present instance.

The decree-holder, therefore, was entitled to apply for time and the Court having granted it had power to receive the money. There is no provision of Indian Law whereby upon failure to pay the amount within the time fixed, the plaintiff's suit shall stand dismissed.

The matter resolves itself into whether good cause was shown to extend the time. It is urged that as the mortgagors came into Court professing to have their money ready, the indulgence of an extension should not readily be granted. But the whole circumstances of the case must be looked at.

The plaintiffs are a widow and her young family. They were driven into bringing a suit for redemption owing to an attempt of the mortgagee to repudiate the mortgage and set up a sale of the land They borrowed sufficient money to tender to him the mortgage debt and on his refusal to accept it to bring their suit. The suit was pending for nearly a year, and was followed by the appeal with further uncertainty and expense. Small wonder that their funds were exhausted and that no one was willing to advance them money on the chance of their winning in the end. However their *bona fides* is clearly shown by the fact that within a few weeks of the decision of the appeal in the Divisional Court, the money was borrowed and paid into the Sub-Divisional Court.

I hold that good cause was shown for an extension of time, and that an extension was properly granted, and was in effect granted up to 2nd November 1907.

I dismiss the appeal with costs, anddirect that the mortgage money deposited with the Court be paid to theappellants and therespondents be placed forthwith in possession of the land and all other steps necessary be taken to

(1) 22 M. 133.
(2) 25 M. 244; 12 M. L. J. 279.
(3) 22 B. 771.
(4) 16 C. 246.
(5) 27 C. 705.
(6) 20 A. 446.
(7) 25 A. 231; A. W. N. (1903) 20.
(8) 24 A. 44 (F. B.); A. W. N. (1901) 194.
(9) 24 A. 479; A. W. N. (1902) 125.
(10) 15 M. 366.
(11) 16 M. 214.
(12) 14 A. 529.
(13) 19 A. 180.
(14) 13 M. 267.
(15) 19 M. 40 (F. B.).

fully execute the decree of 11th February 1907.

Appeal dismissed.

(s. c. 3 Bur. L. T. 6.)

LOWER BURMA CHIEF COURT.

SECOND CIVIL APPEAL No. 245 OF 1908.

July 5, 1909.

Present:—Mr. Justice Parlett.

MA THIN AND OTHERS—DEFENDANTS—APPELLANTS

versus

MA NYEIN E AND OTHERS—PLAINTIFFS—RESPONDENTS.

Buddhist Law—Inheritance—Eldest representative of eldest child ranking with surviving uncles and aunts.

In Buddhist law a grand-child, whose parents have predeceased their parents, is entitled to rank with the surviving uncles and aunts only if he is the eldest representative of the eldest child, the other grand-children taking only one-fourth of the share that their parents would have enjoyed, had they survived.

Mah Saw Ngwe v. *Ma Thein Yin*, 1 L. B. R. 198, followed.

Appeal against the decree of the District Court of Prome, passed on 19th August 1908, in Civil Appeal No. 74 of 1908, reversing the decree of the Township Court, Thegon, in Civil Suit No. 329 of 1908.

Mr. *Lambert*, for the Appellants.

Mr. *Brodbent*, for the Respondents.

Judgment.—The only question for decision is the share to which the plaintiffs-respondents are entitled, in the 3.24 acres of land and Rs. 46-8 forming the estate of their deceased grand-mother.

The District Judge gives no authority for fixing their share at four-ninths nor does he state how he arrives at that result.

The Township Judge held that first plaintiff, though the eldest surviving child of the deceased's eldest child, was not entitled to any preferential treatment on partition because she was not the eldest born child of her parents, their first child having died in infancy.

In *Ma Saw Ngwe* v. *Ma Thein Yin* (1), however, it was ruled that:—"Among grand-children whose parents have predeceased their grand-parents the only one who ranks with the surviving uncles and aunts is the eldest representative of the eldest child, the others only take one-fourth of the share that their parents would have enjoyed, had they survived."

(1) 1 L. B. R. 198.

It is not disputed that Ma Nyein E, first plaintiff, is the eldest representative of the eldest child of the intestate, Ma E La Le. She is, therefore, entitled to a share equal to that of her aunts. As Ma E Le had three daughters the share of each aunt is one-third. First plaintiff Ma Nyein E is, therefore, entitled to a one-third share of the estate of her grand-mother.

Her seven brothers and sisters, however, are only entitled, between them, to one-fourth of the share that their mother would have enjoyed had she survived Ma E Le; that as one-fourth of one-third, or one-twelfth.

The second, third, fourth and fifth plaintiffs are entitled, between them to four-sevenths of this one-twelveth share, that is to a one-twenty one share.

I set aside the decree of the lower appellate Court as against the first, third, fourth, fifth and sixth defendants and instead I grant first plaintiff a decree against them for 1.08 acres of the land in suit and $15\frac{1}{2}$ baskets of paddy or their value Rs. 15-8. with costs in all Courts, and I grant second, third, fourth and fifth plaintiffs a decree against them for ·15 acres of the land in suit and two baskets and three *pyis* of paddy or their value Rs. 2-3, with costs in all Courts.

Decree set aside.

(s. c. 3 Bur. L. T. 9.)

LOWER BURMA CHIEF COURT.

CRIMINAL REVISION No. 69B OF 1909.

May , 1909.

Present:—Mr. Justice Moore

HAMDU MEAH—APPLICANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (*Act V of* 1898), *ss.* 423, 435, 437 *Re-trial of accused after conviction—Inapplicability of sections—New trial when properly ordered—Want of jurisdiction—Misjoinder—Superficial enquiry.*

Sections 435 and 437 do not empower a Court in an appeal from a conviction to order a re-trial of the appellant.

The power of ordering a re-trial under section 423 of the Code of Criminal Procedure should be exercised with discretion. A re-trial may properly be ordered where the original trial is void for want of jurisdiction or for misjoinder or when the enquiry has been obviously superficial and material witnesses have not been examined.

SHAKUR *v.* NGA ME GYI.

A re-trial should not be ordered with the object of enabling the prosecution to fill up deficiencies in the evidence of the prosecution.

Appeal against the order of the District Magistrate, Maubin, dated the 16th March 1909, passed in his Criminal Appeal No. 11 of 1909, directing a re-trial of the applicant for an offence under section 9 (*f*), Opium Act.

Mr. *Karaka*, for the Applicant.

Judgment.—Petitioner Hamdu Meah was convicted under section 9 (*f*) of the Opium Act by the Additional Magistrate of Pantanaw. He appealed to the District Magistrate, Maubin, who (without having admitted the appeal) recorded orders to the following effect: "There are many points requiring elucidation before the present conviction can be upheld. The petition of appeal contains most of these points and I at present on the record do not feel justified in confirming the conviction. I, therefore, transfer the case to the Township Magistrate, Pantanaw, for re-trial under section 435 and section 437 of Criminal Procedure Code.

Section 435 empowers the District Magistrate to call for a record of an inferior Court in revision. Section 437 empowers the District Magistrate in revision to order further enquiry into complaints dismissed or into the case of an accused person who has been discharged.

Neither section has any application whatever to the present case and neither section empowers a District Magistrate to order a re-trial of an accused who has been convicted.

The District Magistrate further erred in ordering a re trial without setting aside the conviction and sentence.

Section 423 does empower an appellate Court in an appeal from a conviction to reverse the conviction and sentence and to order a new trial. But the power of ordering a re-trial is one which should be exercised with discretion. A re-trial may properly be ordered where the original trial is void for want of jurisdiction or for misjoinder, or when the enquiry has been obviously superficial and material witnesses have not been examined.

In the present case, however, the Prosecution witnesses have all been examined at considerable length. The petition of appeal sets out various contradictions in the evidence and draws attention to the lack of corroboration of the informer in material points. The re-trial is apparently ordered for the sole object of enabling the prosecution to reconcile these discrepancies and to fill up the deficiencies in the evidence pointed out by appellant. I think it would be unfair to appellant to order a re-trial under such circumstances. I set aside the order of the District Magistrate for a re-trial and remand the case for him for disposal of the appeal upon its merits.

Order set aside; *Case remanded.*

(s. c. 3 Bur. L. T. 10.)

LOWER BURMA CHIEF COURT.

CRIMINAL REVISION NO. 77B OF 1909.

May 7, 1909.

Present:—Mr. Justice Parlett.

M. A. SHAKUR—APPLICANT

versus

NGA ME GYI *alias* MI GYI—RESPONDENT.

Jurisdiction—Criminal breach of trust—Property must be received or retained within jurisdiction of the trying Court.

In order to confer on a Court jurisdiction to try a case of criminal breach of trust it must be shown that either the whole or part of the property, in respect of which the charge is laid, was either received or retained by the accused within the jurisdiction of the trying Court.

An accused cannot be said to retain within the jurisdiction of the trying Court the unaccounted for balance, which he is alleged to have misappropriated, merely because he sent accounts and remittances to the complainant within the jurisdiction of that Court.

ORDER OF REFERENCE

The following reference was made by the District Magistrate, Rangoon, on 1st April 1909, in Criminal Revision No. 75 of 1909.

The amount of goods handed over to the accused in Rangoon, when first starting for Akyab is very small, compared to the total transactions, and the value only Rs. 244-4 (as per Exhibit A I). In his complaint the complainant did not mention these goods and there is nothing I can find on the record to show that these goods are included in those respecting which criminal breach of trust is alleged. In face of the decision of the Hon'ble Mr. Justice Irwin, Chief Court Lower Burma Criminal Miscellaneous No. 128 of 1908, *Hanna* v. *Ban Li* alias *Munia*, disagreeing with the ruling in *Queen-Empress* v. *Obrien* (1), which is on all fours with ours; I forward the record under section 438, Criminal Procedure Code, with the recommendation that the case be transferred to the District Magistrate, Akyab. The amounts misappropriated were received

(1) 19 A. 111.

there and returned there. No portion of the acts constituting the offence were committed in Rangoon, except the wrongful loss to the complainant whose servant the accused was.]

Mr. *Auzam*, for the Applicant.

Judgment.—In order to give the First Additional Magistrate, Rangoon, jurisdiction to try this case, it must appear that part of the property, which is the subject of the offence, was received or retained in Rangoon, for the offence, if any was admittedly committed in Akyab.

The only property which complainant alleges was received by accused in Rangoon was one packing case containing articles of the total net value of Rs. 200, on 7th March 1907. It is admitted that, during the ensuing 15 months, goods to the total value of over Rs. 11,500 were sent by complainant to accused in Akyab; and that accused from time to time sent him accounts and remittances. The present charge is with respect to a balance of something over Rs. 3,000 which accused is alleged to have neither remitted nor accounted for. There is nothing to show that the proceeds of the small case of articles received by accused in Rangoon on 27th March 1907, was included in the sum misappropriated. It would, in fact, have been more than covered by the amount accused was entitled to deduct from his takings as salary. I am unable to agree with the argument that as accused sent accounts and remittances to Rangoon, he, therefore, retained in Rangoon the unaccounted for balance which he is alleged to have misappropriated.

My finding is that the First Additional Magistrate has no jurisdiction to try the case.

(s. c. 3 Bur. L. T. 11.)

LOWER BURMA CHIEF COURT.

CRIMINAL REVISION No. 99B OF 1909.

May 3, 1909.

Present:—Mr. Justice Moore.

EMPEROR—APPLICANT

versus

TAN KEP SI—RESPONDENT.

Opium Act (I of 1878), Direction 71—Obtaining opium by personation in excess of amount allowed by Excise Officer—Fraudulent act.

Where a person licensed to buy opium obtains from the licensed vendor, by personating a real or imaginary person, more opium than he would have got without such personation, he cannot be said to act dishonestly, as there would have been no wrongful gain or loss had the opium been sold to him. He does, however, act fraudulently, as his intention was to deceive the vendor and thereby obtain an advantage or privilege which without such deception could not have been obtained.

Reference made by the District Magistrate Thaton, in his order in Criminal Revision No. 74 of 1909, dated the 23rd April 1909, on review of the judgment of the First Class Sub-Divisional Magistrate Kyaikto, passed in Criminal Regular Trial No. 21 of 1909.

Judgment.—It appears that Tan Kep Si, Chinaman, legally entitled to purchase opium from a licensed vendor bought opium at the Kyaikto opium shop under the name of Kun Kyu. It appears that under direction 71 of the Directions under the Opium Act daily rates of consumption are fixed for opium consumers and that consumers are ordinarily not allowed to buy opium in excess of their average consumption. Tan Kep Si was in the habit of buying opium in his own name at Kyaikkaw where his recorded daily consumption was half a *tola* and he gave the name of Kan Kyu at Kyaikto in order to be able to buy opium there in excess not of the amount which he was legally entitled to possess but of the amount which the Excise Officer thought fit to allow him.

He has, by personating a real or imaginary person Tun Kyu, attempted to induce the opium vendor at Kyaikto to deliver property to him. The question is whether he acted fraudulently or dishonestly, I do not think that it can be argued that he acted dishonestly as there would have been no wrongful gain or loss had the opium been sold to him. The question whether he acted fraudulently is more difficult. The present case is distinguishable from the case of *Emperor* v. *Po Lu* (1), as in the latter case Po Lu apparently was not legally entitled to possess opium at all.

In the case of *Regina* v. *Shoslu Bhastan* (2) a man who presented a false certificate of character in order to obtain admission to a law class was held to have acted fraudulently because in the words of Edge, C. J., he had the intention to

(1) 1 L. B. R. 356.
(2) 15 A. 210.

deceive another person and thereby to obtain an advantage or privilege which without such deception could not have been obtained.

In the present case respondent clearly had the intention to deceive the opium-vendor in order to obtain an advantage or privilege for himself which he would not otherwise have obtained. I am, of opinion, therefore, that he acted fraudulently. The point has, I have found since writing the above, been definitely decided by a Full Bench in the case of *Emperor* v. *Tha Byaw* (3).

I hold, therefore, that respondent was rightly convicted. The District Magistrate considers that the fine was excessive and recommends its reduction. I agree that the fine was unnecessarily severe and reduce it to Rs. 25. The excess paid to be refunded.

(3) 4 L. B. R. 315; 9 Cr. L. J. 15.

(s. c. 3 Bur. L. T. 13.)

LOWER BURMA CHIEF COURT.

FULL BENCH.

CIVIL REFERENCE No. 1 OF 1909.

June 7, 1909.

Present:—Sir Charles Fox, KT., Chief Judge, Mr. Justice Bell and Mr. Justice Moore.

ARNACHELLUM CHETTY—APPELLANT

versus

PERIA CURPEN CHETTY AND OTHERS—RESPONDENTS.

Registered mortgage—Notice of prior oral valid mortgage—Priority.

A registered mortgage does not take priority over an earlier valid oral mortgage of the same property, if the second mortgagee had actual notice of the oral mortgage at the time when the registered mortgage was made to him.

Shreenath Bhuttacharjee v. *Ramcomul Gangopadya*, 10 M.I.A. 220; 3 W. R. (P. C.) 43; *Le Neve* v. *Le Neve*; White and Tudor, L. C. Vol. II, p. 175, 7th Edition; *Lehna* v. *Ganpat*, 115 P. R. 1890; *Shankar Das* v. *Sher Zamn*, 56 P. R. 1900; *Krishnamma* v. *Suranna*, 16 M. 148; *Vohora Remat Rein* v. *Harilal Jekison*, Printed Judgments Bom. H. C. 1896, p. 778; *Abdool Hussein* v. *Ragu Nath Sahu*, 13 C. 70; *Diwan Singh* v. *Jadho Singh*, 19 A. 145, referred to.

Mr. *Dantra*, for the Appellant.

Mr. *N. M. Cowasjee*, for the Respondents.

Judgment.

Moore, J.—The question referred is "Does a registered mortgage of immovable property take effect against an earlier oral mortgage of the same property without possession, made at a time when section 59 of the Transfer of Property Act was not in force at the place where the property is situated if the second mortgagee had notice of the existence of the oral mortgage at the time when the registered mortgage was made."

In the course of the order of reference it is said that the learned Judge (of the lower appellate Court) was "wrong in holding that the deposit of a *pyathaing* and the addition of respondent's name in the revenue register constituted an equitable mortgage. Respondents' mortgage was an oral one and nothing more."

The record of the Court of first instance shows that at the time when the earlier, or oral, mortgage was effected no *pyathaing* or other document was deposited, and the mortgage was, therefore, an oral one and nothing more. I think it desirable to make this clear as the passage in the order of reference which I have quoted appears to me susceptible of being interpreted as laying down that a mortgage by deposit of a *pyathaing* and the addition of the mortgagee's name in the Revenue Register would be an oral mortgage and nothing more— a proposition to which I should not be prepared to assent.

In the present case it is clear that the earlier mortgage was a mortgage by verbal agreement pure and simple. In other words, it was an oral agreement within the perview of section 48 of the Indian Registration Act, 1877, and the question for determination is whether the priority which that section confers upon registered documents as against oral agreements is forfeited in cases where the registered document is taken with notice of a prior oral agreement.

The earliest Act dealing with the registration of deeds in India appear to be Madras Regulation XVII of 1802 and Bombay Regulation IX of 1827. Both these Regulations expressly enact that registration shall not confer priority in cases in which the purchaser transferee or mortgagee by the registered deed has knowledge of a prior unregistered deed of sale, gift or mortgage. And in the Madras Regulation it is explained that the object of registration being to protect persons dealing with property from being defrauded by previous transactions relating to such property of which they have no knowledge, such object is sufficiently attained where they are in fact actually ap-

prized of the previous transaction. These two Regulations were upheld by Act I of 1843 of the Governor-General. This Act recites in the preamble that the provisions regarding knowledge or notice contained in these Regulations had given rise to a complicated system of law and that much perjury had been committed in the investigation of the fact of such notice or knowledge. The provisions as regards notice above referred to were, therefore, repealed and it was enacted that registered instruments should have priority over unregistered instruments, any alleged notice or knowledge of such prior instrument or conveyance notwithstanding.

This Act was itself repealed by Act XIX of 1843, except in so far as it repealed the provisions in the Bengal, Madras and Bombay Regulations regarding notice. And Act XIX of 1843, enacted that registered deeds of sale etc. should take priority over unregistered deeds provided the authenticity of the registered deed be established to the satisfaction of the Court.

This Act was the subject of judicial interpretation by their Lordships of the Privy Council in the case of *Shreenath Bhuttacharjee* v. *Ramcomul Gungopadya* (1). The question of notice did not arise but their Lordships in considering the meaning of the words "authenticity of the deed" remark that "it could not be intended by the Act that a deed which was tainted by fraud, although in other respects genuine, should be placed on the same footing as an honest and *bona fide* deed." This remark seems to me significant in view of the interpretation, in *Le Neve* v. *Le Neve* (2) and subsequent cases of the English Courts of Equity, of fraud as connected with notice. Act XIX of 1843, and previous Acts were repealed by Act XVI of 1864, section 68 of which enacts that every instrument of the description mentioned in clauses 1 and 2 of section 16 of the Act shall have priority, if duly registered, over any other unregistered instrument. This section was reproduced in section 50 of Act XX of 1866, which also provides in section 48 that "all instruments duly registered .....shall take effect against any oral agreement or declaration relating to the same property."

Section 48 of Act VIII of 1871 is the same as section 43 of the Act now in force, III of 1877. It reproduces section 43 of Act XX of 1866 with the addition of the words "unless where the agreement or declaration has been accompanied or followed by delivery of possession.

The interpretation of these successive enactments, and the question whether sections 48 and 50 of the present Act are to be construed subject to the English equitable doctrines of notice, have been the subject of numerous and, one time, conflicting decisions of the Courts in India. All the High Courts and the Chief Court of the Punjab, however, seem now to be in accord in holding that a subsequent purchaser or mortgagee by registered deed is not entitled to priority to a purchaser or mortgagee of earlier date in cases where the former has actual notice of the earlier purchase or mortgage.

The contrary view was as it is true, taken in the case quoted by Irwin, J. *Lehna* v. *Gumpit* (3), by a Full Bench of the Punjab Chief Court. But the ruling in that case has been overruled by a Full Bench of the Punjab Chief Court in the case of *Shankar Das* v. *Sher Zaman* (4).

In Madras the leading case upon the point is that of *Krishnamma* v *Suranna* (5), which deals with the case of a mortgage by bond which was not registered and a subsequent mortgage by registered deed. The subsequent mortgagee took his mortgage with notice of the earlier mortgage but was not found to have acted fraudulently otherwise. The earlier mortgagee obtained possession, but his mortgage not being an oral one but by deed, section 50 of the Registration Act, which contains no exception of cases where possession has been obtained, applied. And it was pointed out that if the doctrine of notice was not applicable, a mortgage by unregistered bond would be in a worse position than a mortgage by mere verbal agreement. The latter, if he obtained possession, would be protected against a subsequent mortgage by registered deed, the former would not. This is an anomaly which can hardly have been intended and which is avoided by giving effect to the doctrine of notice, as possession, if not itself notice, is very cogent evidence of notice.

(1) 10 M. I. A. 220; 3 W. R. (P. C.) 43.
(2) White & Tudor L.C., Vol. II, p. 175, 7th Edition.
(3) 115 P. R. 1890.
(4) 56 P. R. 1900.
(5) 16 M. 148.

In Bombay in the case of *Vohora Rewat Rein* v. *Harilal Jekison* (6), it was ruled that a registered mortgage with notice of a prior valid oral mortgage is not entitled to preference.

In Calcutta, in *Abdool Hussain* v. *Raghu Nath Sahu* (7), it was held that a purchaser, by registered deed, of property which had been mortgaged by an unregistered deed (registration being optional), if he bought with notice of the unregistered mortgage, took the property subject to that mortgage. This ruling was followed by the Allahabad High Court in a similar case, *Divan Singh* v. *Jadho Singh* (8). The Privy Council Ruling under Act XIX of 1843 above referred to affords some ground for supposing that even under that Act, which expressly excluded the doctrine of notice, the Courts would have been justified in refusing to give priority to a subsequent registered deed over a prior oral agreement or unregistered deed if the subsequent registered deed was tainted with fraud. And there is ample authority for the view that taking of legal estate after notice of a prior right is a species of fraud.

Act XIX of 1843 having been repealed, and the subsequent enactments being silent upon the question of notice, I think that the doctrine of notice, though not specifically re-enacted, must be held to have revived being no longer held in abeyance by statutory prohibition. The doctrine depends upon the principle that Courts of Equity will not allow a fraud to be perpetrated under cover of a statute if they can help it.

In the case of successive mortgages the fraud, though not perhaps so obvious, is, I think, as real as in the case of successive sales.—"It is difficult to conceive how it can be anything but fraud for a person, with knowledge that another person has advanced money upon faith of having a security upon certain property, to seek, in collusion with the person who has received the money, to make use of the Registration Act to deprive the lender of his security."

I would, therefore, answer the question referred in the following terms: "A registered mortgage does not take priority over an earlier valid oral mortgage of the same property if the second mortgagee had actual notice of the oral mortgage at the time when the registered mortgage was made."

I have substituted the words actual notice for the word 'notice' in the question as referred, because the notice alleged in the case in which the reference has been made was actual notice, and it is, therefore, unnecessary to go into the question whether a subsequent registered mortgage can be effected by any notice, other than actual notice, of an earlier mortgage by verbal agreement.

Fox, C. J.—I concur.

Bell, J.—I concur.

(6) P. J. Bom. H. C. 1896, p. 778.
(7) 13 C. 70.
(8) 19 A. 145.

(s. c. 3 Bur. L. T. 15.)

LOWER BURMA CHIEF COURT.

SECOND CIVIL APPEAL No. 259 OF 1908.

July 29, 1909.

Present:—Mr. Justice Lowis.

MAUNG NGWE YA—APPELLANT

versus

ALLAGAPPA CHETTY—RESPONDENT.

Fraud—Ex parte *decree*—Bona fide *belief*.

Where it is alleged that an *ex parte* decree was obtained by fraud and it is shown that the defendant did not reside at the place where the summons was served, it is not fraud on the part of the plaintiff if he had a *bona fide* belief that the defendant resided there.

Appeal against the decree of the District Court of Hanthawaddy, passed on the 21st August 1908, in Civil Appeal No. 44 of 1908, setting aside the judgment and decree of the Township Court, Thongwa, and dismissing the appellant's (plaintiff's) suit filed in Civil Regular No. 234 of 1907.

Mr. *N. C. Sen*, for the Appellant.

Mr. *Dantra*, for the Respondent.

Judgment.—Apart from a question of limitation, the only point for decision in this Court has been whether respondent, by alleging that appellant resided at Kyawin, whereas, as a matter of fact, he resided elsewhere, had obtained an *ex parte* decree by fraud. The Court of first instance found that there had been fraud. The District Court found that there had been none. In this appeal to this Court objection has been taken to the District Judge's view that the Judge of the Township Court should not have framed the issue as to the existence or non-existence of

fraud as no allegation or suggestion of fraud had been made by the plaintiff (appellant) in his pleadings. I cannot agree with the District Judge that there was no suggestion of fraud in the plaint. Appellant (complained ?) in the plaint that the fact of the Civil Regular Suits having been brought against him did not come to his knowledge until after the land had been sold. He did not explain how this somewhat singular state of things had come about, but he implied that it was not through any fault of his own and left it to be inferred that the fault lay with those who should have communicated the information to him. On the facts connected with the substituted service coming to light, the Judge was justified, to my mind, in holding that fraud had been suggested. My attention has been drawn by the learned Advocate for the respondent to the principles enunciated in the Commentary on Order VII, Rules 1—6 at page 675 of Woodroffe and Ameer Ali's Code of Civil Procedure to the effect that general allegations, however strong, cannot be looked upon as constituting an averment of fraud. In the present case there were no general allegations. There was, however, a statement which, taken by itself, was such as to imply that a fraud had actually been committed and it is clear from the rulings cited in the Commentary that as a statement of this kind existed, the Judge was not debarred from finding that a particular cause of action (*viz*: fraud on the respondent's part) had been disclosed.

Although I differ from the learned District Judge in thinking that the Township Judge should not have framed an issue as to fraud, I am quite at one with him in his view that, as a matter of fact, fraud had not been proved. There is no doubt that appellant has not resided at Kyawin for many years, but it is clear that he has not severed his connection with the place entirely and that the respondent's belief that he still lived there was a *bona fide* one. The appeal is dismissed with costs.

Appeal dismissed.

(s. c. 3 Bur. L. T. 16.)

LOWER BURMA CHIEF COURT.

SECOND CIVIL APPEAL NO. 315 OF 1909.

December 17, 1909.

Present:—Mr. Justice Parlett.

MAUNG THAN DAING—APPELLANT

versus

U THE AND ANOTHER—RESPONDENTS.

Civil Procedure Code (*Act V of* 1908), *O. VII R.* 17—*Amendment of plaint—Deliberately deferred till decision of another suit—Not* bona fide *mistake.*

Although rule 17 of Order VII is in wider terms than section 53 of the old Code, amendments are still to be made on such terms as may be just, and this cannot mean that they may be allowed so as to defeat the object of limitation and of the rules as to the framing of suits. Thus generally an amendment should not be allowed save when the plaintiff by some mistake or misapprehension has failed to put things properly before the Court.

An amendment will not be allowed where the amendment was deliberately not sought to be made and was deferred till the failure of another suit made it clear to the plaintiff that without amendment he had no chance of obtaining the relief he desired.

Appeal against the decree of the Divisional Court of Prome, dated the 3rd September 1909, passed in Civil Appeal No. 23 of 1909, reversing the finding and decree of the Sub-Divisional Court of Prome, and dismissing the appellant's (plaintiff's) suit filed in Civil Suit No. 5 of 1909.

Mr. *N. C. Sen*, for the Appellant.

Judgment.—The circumstances of the case are fully set out in the judgments of the two lower Courts and need not be repeated here.

Facts of the case which are set out in the judgment of the Divisional Court of Prome are as follows:—

Appellant Maung Than Daing mortgaged the land in dispute to respondent Maung The. On 19th March 1907, Maung The obtained a mortgage decree against appellant on admission. The land was sold in execution of the decree and the sale confirmed, Maung The purchasing the land. The sale was confirmed on 9th September 1907. Maung The sold the land to the 2nd respondent Maung Pyu Tha for Rs. 400 on 15th November 1907, by a registered deed of sale. On the 1st February 1908, Manug Than Daing filed a suit in the Sub-Divisional Court of Prome (No. 5 of 1908) for the cancellation of the deed of sale executed by Maung The in favour of Maung Pyu Tha. Whilst this suit was still pending on 17th August 1908, Maung Than Daing filed another suit in the Township Court, Hmawza

(Civil Regular No. 189) to have the mortgage decree in Civil Regular No. 62 of 1907 set aside on the ground of fraud. Pending the decision of this suit the suit in the Sub-Divisional Court was adjourned *sine die*. The suit to set aside the mortgage-decree was dismissed on 28th January 1909. Having lost this suit appellant applied to amend the plaint in Civil Regular No. 5 of 1908 in the Sub-Divisional Court, Prome, by the addition of a prayer to set aside the sale in execution of the mortgage-decree. The amendment was allowed and the amended plaint filed apparently on May 9th, 1909. On 19th June 1909 appellant obtained a decree for setting aside the sale in Execution Case No. 74 of 1907 of the Township Court, Hmawza.]

It is urged on second appeal that amendment of the plaint was rightly allowed by the Township Court, as it did not change the character of the suit and that as the plaint as originally filed was in time, the amended plaint was not barred by limitation.

I have been referred to several rulings in support of the first point urged.

In *Hunoomanpersaud Panday* v. *Musammat Babooee Munraj Koor* (1) it was laid down that if the recorded issues do not enable the Court to try the whole case on its merits, opportunity should be afforded by amendment for a decision upon the real points in dispute.

In *Narayan* v. *Shankunni* (2) it was held that amendment should be allowed when the plaint was framed under a *bona fide* mistake or erroneous advice and the other party could be adequately compensated by costs.

In *Kasinath Das* v. *Sadasiv Patnaik* (3) it was said that an alteration in the relief does not alter the character of the suit.

In *Saral Chand Mitter* v. *Mohun Bibi* (4) it was laid down that section 53 of the old Civil Procedure Code must be read with sections 42 and 45, and that an alternative case which arises out of and is immediately connected with the same transaction may be introduced in amendment, if not inconsistent with the case first set up.

But none of these cases are parallel with the present. The amendment was not sought and granted because the Court found the issues as originally recorded insufficient for the decision of the whole case, but was deliberately deferred until the failure of the other suit to set aside the mortgage decree made it clear to the plaintiff that without amendment he had no chance of obtaining the relief he desired.

There was no *bona fide* mistake and the erroneous advice appears to have been given after deliberate consideration. Obviously no compensation in costs to the other party could be adequate.

Nor is it a case merely of alteration in the relief sought, nor of an alteration case arising out of the same transaction. The relief was different, based on different causes of action, and against a different person and the two cases arose out of different transactions, in the former the sale by 1st to 2nd defendant, and in the latter, 1st defendant's purchase at the auction sale.

It is true that rule 17 of Order VII is in wider terms than section 53 of the old Code, and the plaintiff induced the Court to postpone the suit until the new Code came into force. But amendments are still to be made on such terms as may be just, and this cannot be taken to mean that they may be allowed so as to defeat the object of limitation and of the rules as to the frame of suit. The general rule was, and, in my opinion, still is, that amendment should not be allowed save when the plaintiff by some mistake or misapprehension has failed to put things properly before the Court. That was certainly not the case here.

I consider the Divisional Court's decision was right that the amendment should not have been allowed, and that the suit, as amended was barred by limitation.

This appeal is, therefore, dismissed.

Appeal dismissed.

(1) 6 M. I. A. 393; 18 W. R. 81 *Note*.
(2) 20 M. 255.
(3) 20 C. 805.
(4) 25 C. 371.

(s. c. 3 Bur. L. T. 17.)

LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL NO. 327 of 1907.

January 17, 1910.

Present:—Mr. Justice Robinson.

HANDANDASS AND OTHERS—PLAINTIFFS

versus

Rani MOHORI BIBI AND OTHERS—DEFENDANTS.

Contract—Offer and acceptance—Statement of lowest

price in answer to enquiry not an offer to sell —Broker prima facie *agent of first employer.*

In answer to a telegram from a broker, "Have likely purchaser your three properties. Telegraph lowest price for each," the owner replied stating his lowest price for each property. The broker accepted earnest money for one property and wired back informing the owner of the receipt thereof and asking for the title deeds. The owner refused to sell one alone:—

Held, that there was no complete contract.

A statement of the lowest price made in answer to an enquiry as to the lowest price for cash is not an offer, but only evidence of a willingness to treat.

Harvey v. *Facey*, (1893) L. R. App. Cas. 552; 1 R. 428; 69 L. T. 504; 42 W. R. 129; 62 L. J. P. C. 127, followed.

A broker is *prima facie* the agent of the party who first employs him. To make him the agent of the other party there must be something more than mere negotiation. There must be some words or conduct by which an authorization to act on behalf of the other party is expressed or is to be affirmatively inferred.

Mr. *B. Cowasjee*, for the Plaintiff.

Messrs. *Giles*, *Higinbotham* and *N. N. Burjorjee*, for the Defendants.

Judgment.—Plaintiffs sue for the specific performance of an alleged contract to sell a house No. 8 in 29th Street which stands on lots 9 and 10 in Block D 1. Plaintiffs went to Messrs. Balthazar and Son and instructed them to try and buy three properties for them from Raja Shew Bux Bogla who is now dead and is represented by defendant No. 1. Mr. Balthazar accordingly wired to the Raja's firm Gulabroy Shew Bux in Calcutta on the 17th September 1907 as follows:—

"Have likely purchaser your three properties. Telegraph lowest price for each."

An answer was sent the same day in the following terms "Pachandaung 55,000, Ahlone 25,000, No. 9, 45,000. Reply by to-morrow." A reply was sent and received in Calcutta on the 18th September. "Sold house 29th Street your limit received earnest money Rs. 5,000 Forward deeds." For plaintiffs it is argued that these telegrams constitute a concluded contract to sell and buy this house.

On the same date Shew Bux wired to Balthazar—"Cannot sell No. 9 alone. Can sell three properties together. See our Agent."

On the 22nd all three properties were sold to defendant No. 2 and an agreement to sell to them was executed. A duly registered deed of sale has since been executed.

In the view that I take it is unnecessary to set forth the other facts in detail.

The following issues were framed.

1. Was there any contract to sell the property in suit?

2. If so, had defendants Nos. 2 (*a*) and No. 2 (*b*) any notice thereof before they purchased the property?

3. If plaintiffs are not entitled to a decree for specific performance are they entitled to any, and if so, what damages?

The answer to the first issue is, I think, finally concluded by the decision of their Lordships of the Privy Council in *Harvey* v. *Facey* (1). The facts of that case are very similar to those of the present suit. There the appellant telegraphed "will you sell us B. H. P.? Telegraph lowest cash price." Respondent telegaphed in reply. "Lowest price for B. H. P. £900." Then the appellants telegraphed, "we agree to buy B. H. P. for £900 asked by you. Please send us your title-deeds in order that we may get early possession." No reply was sent. The judgment concludes as follows—"Their Lordships are of opinion that the mere statement of the price at which the vendor would sell contains no implied contract to sell at that price to the persons making the enquiry." In that case two questions were asked, namely, whether the respondent would sell to the appellants, and the lowest price. The first question was not answered at all and it was held that an answer to it in the affirmative could not be implied as the contract must appear in the telegrams themselves. If the intending purchaser himself asks the lowest price and is told in reply what it is, the case is clearly stronger than when a broker saying he has a likely purchaser merely enquires the price. If no offer to sell at the price quoted is to be held to have been made in that case still less can it be held in the present case and I must hold that in telegraphing the lowest prices a willingness to treat only is to be inferred.

The vendor's telegram, however, in the present case concludes with the words "reply by to-morrow" and I am asked to hold that these additional words take the case out of the rule in *Harvey* v. *Facey* (1). I am unable to hold that they do so. If the preceding words only amount to a willingness to treat then these words merely show that that willingness is to continue only till the next day. Had they amounted to an

(1) (1893) L. R. App. Cas. 552; 1 R. 428; 69 L. 504; 42 W. R. 129; 62 L. J. P. C. 127.

offer to sell the offer was to remain open only till the next day. The additional words only place a limit of time on the effect of the other parts of the telegram and thus cannot make any difference to the meaning to be attached to the other parts. The vendor only says he is willing to consider any offer that may be made, but if one is made it must be made within twenty-four hours.

It has also been argued that Mr. Balthazar became, as the result of the telegram, informing him of the lowest price for each of the three properties, the Agent of the vendor and that he was thereby authorized to sell all or any of them at those prices. The broker is *prima facie* the Agent for the party who first employs him. To make him the Agent for the other party there must be evidence of something more than mere negotiation. There must be some words or conduct by which an authorization to act on behalf of the other party is expressed or is to be affirmatively inferred. He approached Shew Bux as the Agent of plaintiffs and the mere quotation of the lowest price is not enough to create an authority to sell. If it was so the decision in *Harvey* v. *Facey* (1) could not have been passed. He asked for information for an intending purchaser and no more and it is impossible to read into the telegram that which it does not contain. The contract must be contained in the telegrams, and if it is necessary to supplement them in order to complete the contract there is no contract.

It is not thus necessary to decide the other issues, but as they were argued at length I will briefly record my decisions on them. Before defendant two can be deprived of their purchase it would be necessary to show that they had not paid their money in good faith and without notice. That they knew there were or might be other purchasers in the field is not unlikely, but there is no evidence sufficient to show that they knew of any sale to plaintiffs or that they paid otherwise than in good faith. The only evidence of any moment is that Mr. Balthazar who says he told Rambux that the house had been already sold. Even so, however, all that was said was in the course of a casual conversation and he was not told any details. Mr. Balthazar was a broker and may have heard it in any way. There was nothing said as to when or how or to whom it had been sold and Rambux was dealing direct with the vendor who gave him no indication of a sale to any one else. Statements, such as this, are not sufficient to effect a person with notice nor enough to put him on enquiry. Accepting Mr. Balthazar's evidence entirely so far as it goes, I think there was no sufficient notice and the specific performance could not be decreed.

As to damages I disbelieve the evidence of the offer of Rs. 58,000. In the dull state of the market far more proof than that given would be required to show that the purchaser could have made so substantial a profit on his bargain. Mr. Balthazar too says the price given was full value for the property. There is no other proof of what damages was sustained and nothing but nominal damages at most could have been granted.

The suit will, therefore, be dismissed with costs, plaintiffs paying the costs of both sets of defendants.

Suit dismissed.

(s. c. 3 Bur. L. T. 24.)

LOWER BURMA CHIEF COURT.

SECOND CIVIL APPEAL No. 16 OF 1907.

December 20, 1909.

Present:—Sir Charles Fox, KT., Chief Judge, and Mr. Justice Parlett.

U TET TUN AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

MA NI AND OTHERS—DEFENDANTS—RESPONDENTS.

Buddhist Law—Pre-emption—Physical possession, meaning of—Limitation Act (XV of 1877), Sch. II, art. 10.

The expression "physical possession" in article 10 of the second Schedule of the Limitation Act, means a possession that is personal and immediate or, in other words, a possession perceptible to the senses and evident to everybody as much as possession can be perceived and be evident. The expression precludes any sort of formal or constructive possession or even possession by attornment of tenants. The entry of one's name in the Revenue Registers as owner would not constitute a taking of physical possession.

Appeal against the decree of the Divisional Court of Hanthawaddy, passed on the 10th December 1906, in Civil Appeal No. 82 of 1906, dismissing the appeal of the appellants (plaintiffs) against the decree of the District Court of Hanthawaddy, passed in Civil Regular No. 18 of 1905, dismissing the appellant's suit.

U TET TUN v. MA NI.

Mr. *N. N. Burjorjee*, for the Appellants.

Mr. *Ormiston*, for the Respondents.

Judgment.

Fox, C. J.—The suit was to enforce a right of pre-emption of some paddy land. The land belonged to the parents of the plaintiffs. After the death of their father their mother, the 1st defendant, Ma Ni verbally transferred the land for Rs. 1,000 to the 6th defendant Ma Gyi. This was in 1900. The transaction was reported and entered in Revenue Register IV as a sale. The land remained, however, in the occupation of another son of Ma Ni and her deceased husband until, as the plaintiffs assert, the month of May 1904. The suit was filed on the 24th March 1905. Ma Gyi, however, set up that she had been in possession since 1900, the son Ko Tha Dok having occupied the land as her tenant from the time of the sale until the end of the cultivating season of 1903-4. On her behalf it was and is contended that the suit was barred by limitation under article 10 of the 2nd Schedule to the Limitation Act at the time in force. Under that article the period of limitation for a suit to enforce a right of pre-emption is one year and the period begins to run from the time when the purchaser takes, under the sale sought to be impeached physical possession of the whole of the property sold, or where the subject of the sale does not admit of physical possession, when the instrument of sale is registered. The last part of the article does not apply, because there was in the present case no registered instrument of sale, and because whatever "physical possession" means, it is not contended that paddy land does not admit of such possession. The question then is whether Ma Gyi took physical possession of the property more than a year before the institution of the suit. In the present Limitation Act the term "actual possession" was used, and in regard to this term, Stuart, C. J., was of opinion that it meant "visible and tangible" possession. In *Batul Begam* v. *Mansur Ali Khan* (1) their Lordships of the Privy Council point out that the word "physical" is of itself a strong word, highly restrictive of the kind of possession indicated, and when it is found that the Legislature has in successive enactments about the limitation of such suits gone on strengthening the language used, it is evident that the word has been very deliberately chosen and for a restrictive purpose. They considered that the expression "visible and tangible" used by Stuart, C. J., in regard to the words "actual possession" were applicable with still more certainty to the words "physical possession" and that what is meant by the latter words is a "personal and immediate" possession. In other words, I take it, it means a possession perceptible to the senses and evident to every body as much as possession can be perceived and be evident. The construction appears to me to preclude any sort of formal or constructive possession, or even possession through obtaining the attornment of tenants at the time being on the land being included in the expression.

The District Judge found that Ko Tha Dok held the land as tenant of Ma Gyi after the sale. This was disputed and one of the grounds of appeal to the Divisional Court was that the District Court's finding that Ko Dok worked as tenant of Ma Gyi was not borne out by the evidence. The Divisional Judge did not deal with this ground of appeal. If Ma Gyi taking possession by making an arrangement with Ko Tha Dok that he should continue to occupy the land as her tenant could constitute a taking of "physical possession," I think the case would have to go back to the Divisional Judge for a finding on the evidence as to whether such an arrangement had ever been come to. Upon the interpretation, however, which their Lordships of the Privy Council have put on the expression "physical possession." I do not think that such an arrangement would constitute a taking of physical possession. Still less would the entry of Ma Gyi's name in the Revenue Registers as the owner constitute a taking by her of such possession.

I would set aside the decrees of both the lower Courts, and direct that the suit be dealt with on the merits by the District Court.

I would order the respondent Ma Gyi to pay the plaintiff's costs in the Divisional Court and in this Court. The costs in the District Court should abide the result of the case in that Court.

Parlett, J.—I concur.

Order set aside.

(1) 24 A. 17; 3 Bom. L. R. 707; 5 C. W. N. 898.

SULIMAN AHMED *v.* PALANEAPPA CHETTY.

(s. c. 3 Bur. L. T. 29.)

LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL No. 33 OF 1909.

January 24, 1910.

Present:—Sir Charles Fox, KT., Chief Judge, and Mr. Justice Parlett.

SULIMAN AHMED SEDAT—APPELLANT

versus

PALANEAPPA CHETTY AND ANOTHER—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 55 (1)(f)—Mortgagee selling under power of sale—Possession how given—Obstructive conduct of tenants does not affect possession.

A mortgagee of land with an inhabited house thereon sold the property in virtue of his power of sale. The purchaser after paying a certain sum as earnest money refused to pay the balance of the purchase-money and claimed back what he had paid because the tenants of the house refused to recognise either party as their landlord and to pay rent. Under the circumstances the purchaser contended that the vendor could not give him effective possession of the property:

Held, that the vendor could give effective possession of the property.

Appeal against the decree of the Judge on the Original Side passed on the 22nd February 1909, in Civil Regular Suit No. 392 of 1907, giving to the (plaintiffs) respondents decree for the balance of the purchase money with interest thereon.

Mr. *Giles*, for the Appellant.

Mr. *J. R. Dass*, for the Respondents.

Judgment.

Fox, C. J.—The suit was for the balance of purchase money on a sale of land having an inhabited house thereon. It is not disputed that the plaintiff-respondents sold the property which is situate in Rangoon in professed exercise of a power of sale contained in a mortgage of the property to them. The defendant-appellant paid a portion of the purchase-money, and accepted the title offered as good, but he refused to pay the balance of the purchase-money and claimed back what he had paid because the tenants of the house refused to recognize either the plaintiffs or the defendant as their landlords or landlord, and to pay their rents to the defendant Under the circumstances it was contended that the plaintiffs could not give effective possession of the property, and that consequently the defendant was not bound to complete his purchase. In support of this contention section 55 (1) *(f)* of the Transfer of Property Act was relied on. This clause read with the opening clause of the section makes it obligatory on the seller, in the absence of a contract to the contrary, to give the buyer or such person as he directs such possession of the property as its nature admits of.

It appears to me very doubtful whether any part of this section applies to a sale by a mortgagee in professed exercise of a power of sale conferred by a mortgage-deed. Such a sale usually is sale *in invitum*, to which the rules in section 55 do not necessarily or obviously apply. To take an instance of this, clause 2 of the section says that the seller of immovable property shall be deemed to contract with the buyer that the interest which the seller professes to transfer to the buyer subsists, and that he has prower to transfer the same: this applies to every sale between a voluntary seller and buyer but it does not apply to a sale by a Court in execution of a decree. (*See* Gour's Transfer of Property Act paras. 728 and 729.)

But even if the section does apply, the term "possession" is open to a great variety of meanings, and the giving of such possession as the nature of the property admits may be satisfied by the mere handing over of the title deeds when the property is in the occupation of tenants (Gour para. 670.) When the property is occupied by tenants let in by the mortgagor, the mortgagee cannot reasonably be called on to do more than give notice to the tenants that he has sold to the purchaser under his power of sale. The purchaser, undoubtedly, acquires the right to receive the rents by virtue of his purchase, and on the acquistion of such right he also obtains such possession as the nature of the property admits of. Obstructive conduct on the part of the tenants does not affect his rights any more than such conduct towards the mortgagor previous to the sale would have affected the latter's rights. In my opinion the defendant was bound to pay the purchase-money in full.

I would dismiss the appeal with costs.

Parlett, J.—I concur.

Appeal dismissed.

S. N. DAR, B. A. LL. B.,
Vakil High Court,
SRINAGAR (Kashmir)

U PO LON *v.* SOOLIMAN HAJI.

(s. c. 3 Bur. L. T. 30.)

LOWER BURMA CHIEF COURT.

REGULAR CIVIL APPEAL No. 461 OF 1909.

January 26, 1910.

Present:—Mr. Justice Robinson.

U PO LON—PLAINTIFF

versus

SOOLIMAN HAJI BROTHERS AND OTHERS—DEFENDANTS.

Buddhist Law—Presumption of ownership of house built during coverture on land belonging to wife alone—Joint property—Power of one of parties to marriage to deal with joint property—Transfer of Property Act (IV of 1882), s. 41—Bona fide mortgagee without notice for consideration—Acquiescence.

A piece of Government land was in the possession of the wife many years before her marriage and after her marriage she obtained a lease of it from Government. A house was then built on the land and she mortgaged it to a Chetty without the consent of her husband but for the benefit of her son. The mortgage contained a power of sale. It was proved that the husband came to know of the mortgage and took no steps to set it aside until after the Chetty refused to allow his wife further time to pay off the mortgage-money. He then filed this suit:

Held, that in the absence of any evidence to the contrary, the house must be presumed to be the joint property of husband and wife and that a mortgage of the house was under the circumstances, not a *bona fide* mortgage without notice for consideration: that the husband must be held to have acquiesced in the mortgage; but from his consent to the mortgage no presumption could be made that he consented to the power of sale.

Maung Twe v. *Raman Chetty*, 1 L. B. R. 11, followed.

Mr. *Sealy* with Mr. *Harvey*, for the Plaintiff.

Mr. *J. R. Das*, for the Defendants.

Judgment.—Plaintiff sues alleging that a house which is the joint property of himself and the second defendant, who is his wife, was mortgaged by the second defendant and their son, the third defendant, without plaintiff's knowledge and consent; that he first heard of the mortgage when the house was advertised for sale on the 25th November 1909. He claims that the mortgage-deed is void and asks that it may be cancelled. First defendant pleads that the house in question in the sole property of the second defendant in whose name the lease of the land in which it stands was issued. He denies that the second defendant mortgaged the house without plaintiff's knowledge and consent and pleads that she had a perfect right to do so; further, that he being a *bona fide* mortgagee without notice for consideration plaintiff is estopped from putting forward, even if he is entitled to, a claim to the said house. The second and third defendants have put in written statements which I need not refer to in detail. There can be no question I think that the house is the joint property of the husband and the wife. The evidence shows that the land was in possession of second defendant before her marriage to plaintiff—that was some 40 years ago, and that the house was built thereon by her mother. After her marriage that house was burnt down and a new house was built on the site by plaintiff. That house and another house were both destroyed by fire and some two years ago while plaintiff and second defendant were still husband and wife and living together—the house in question was built. The land is squatter land and the lease, thereof, which was issued on the 19th day of June 1903, to second defendant, is a lease for 5 years from the 1st July 1903. The mere fact that there is no title-deed for the house and that plaintiff allowed a lease which was issued after the house was built to issue in the name of second defendant his wife alone cannot, I think, change the character of the property in the house or estop plaintiff from claiming to be a part owner therein. The presumption that must arise as regards the ownership of the house built during their coverture in the total absence of all evidence to show that it was built with separate property of one or other of the parties to the marriage is that the house is joint property of the husband and wife. It has been urged that by reason of section 41 of the Transfer of Property Act plaintiff is not entitled to raise the claim that he does since the transferee of the house had acted in good faith and after taking reasonable care to ascertain that the transferor had power to make the transfer. The first defendant has been in Burma for 20 years and has been engaged in money-lending transactions with Burmans and knows perfectly well that it is at any rate safer in the absence of absolute proof to the contrary to deal with both the husband and the wife and as to lending money on promissory-notes he admits that he requires the signatures of both. The third defendant had been for some years his clerk and for the last 2 years has been acting as a paddy-broker under him. He knew that he had a father and knew that the son lived with his parents. He must have had reason to suppose that this house might be the joint property of the husband

and wife. His plea is that he was told the lease was the only title-deed, and that as the land stood in the name of the wife alone, he was justified in assuming that the house standing on the land also belonged to the wife alone. I cannot allow this. It is further urged that by allowing the lease to issue in the name of the wife alone plaintiff allowed second defendant to be held out as the owner of the property and that he, therefore, cannot now deny that she is not the owner of the whole of it. There is no holding out as to the house however. I, therefore, hold that the house is the joint property of the husband and the wife.

The law as to the power of one or other of the parties to a marriage to deal with joint property is now settled. In the case of *Ma Thu* v. *Ma. Bu* (1), it was laid down that a husband cannot sell or alienate joint property without the wife's consent or against her will. This ruling was approved of in *Ma Shwe U* v. *Ma Kyu* (2). It was held in *Maung Twe* v. *Ramen Chetty* (3), that the fact that there was no open protest was not sufficient to support the dealing by the other party and, further, that because a wife consents to a mortgage no presumption that she also consents to sale of the property arises and that even subsequent acquiescence in the sale would not be proof of her consent to it. In the case of *Ratana* v. *Kumarappa Chetty* (4), a mortgage was executed by a wife to pay off a debt due by her husband which had been embodied in a decree. The plaintiff, the husband, was not aware of the intention to mortgage but he was aware of the loan being given and was aware that a mortgage was executed. He took no steps to have the mortgage set aside and was held to have acquiesced in it. The mortgage was held binding on the whole property. In the present case the mortgage is by the wife alone and the mortgage was not for the benefit of the plaintiff, her husband, but for her son. It is impossible to read the evidence without holding that although the husband may not have been aware of the mortgage at the time it was executed, he became aware of it shortly afterwards on his return to Rangoon. He does not allege that there was any attempt on the part of the wife and the son to mortgage the property contrary to his interests. He does not say that he would not have approved of the mortgage for the benefit of the son if he had known that it was going to be executed, and although aware of it he remained silent and in fact approved of the action of his wife. These being the facts it appears to me that the case falls within the decisions that I have quoted above and that the mortgage is valid and as regards the whole property, that is, it will apply to the share of the husband as well as that of the wife. But while plaintiff may have approved of and acquiesced in a mortgage executed by his wife alone of their joint property, the money borrowed being for the benefit of the son, there is nothing to show that he was aware of the terms of the mortgage deed or that he knew that a power of sale had been given, and as pointed out in *Maung Twe* v. *Ramen Chetty* (3), because he consented to the mortgage there is no presumption that he consented to the power of sale. There is evidence to show that when demand was made for payment the wife, defendant No. 2, went to defendant No. 1 and asked for time. I can see no reason for supposing that she did not do this with the full knowledge of her husband. Had time been granted I think it is reasonably certain that the husband would have raised no objection to the mortgage at all, but when defendant No. 1 declined to give time and advertised the property for sale then, and then only, did the plaintiff file the present suit and urged that the transaction was void as against him. But before it can be presumed that he had consented to the grant of a power of sale to the mortgagee something more must be proved than mere knowledge that a mortgage had been executed. Nothing of that kind has been proved and I must, therefore, hold that he did not acquiesce in or consent to the power of sale and that although the mortgage including the power of sale, was valid as regards the share of the second defendant in this suit, the mortgage only is valid in respect of the plaintiff's share but not the power of sale. There will be a decree accordingly declaring the mortgage valid as regards the whole property and that the power of sale is valid only as regards the second defendant's share. In the circumstances, the parties will bear their own costs.

Suit decreed.

(1) L. B. S. J. 578.
(2) 3 L. B. R. 66 (F. B.)
(3) 1 L. B. R. 11.
(4) 8 Bom. L. R. 319.

PITCHE PILLAY *v.* MAUNG PET.

(s. c. 3 Bur. L. T. 34.)

LOWER BURMA CHIEF COURT.

SECOND CIVIL APPEAL No. 239 OF 1908.

August 5, 1909.

Present:—Mr. Justice Parlelt.

PITCHE PILLAY—APPELLANT

versus

MAUNG PET AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act XIV of 1882), *ss.* 268, 272, 278, 280 *and* 283—*Attachment by prohibitory order—Removal of attachment—Declaratory suit—Discretion of Court, when to be interfered with—Specific Relief Act (I of* 1877), *s.* 42.

Section 272 of the Code of Civil Procedure (1882) applies to the investigation of claims arising out of attachment by prohibitory order under section 268 and, therefore, a party aggrieved by an order passed in the circumstances under section 272 has a remedy under section 283 of the Code.

Chidambara Patter v. *Ramasawmy Patter*, 27 M. 67; 13 M. L. J. 467, approved.

Harilal v. *Ahesang*, 4 B. 323, disapproved.

The only difference between a suit under section 283 of the Code of Civil Procedure and section 42 of the Specific Relief Act is that in the former case the period of limitation is shorter.

Where a Court has exercised its discretion and granted a declaratory decree, the appellate Court errs in interfering with the exercise of that discretion merely on the ground that the plaintiff had a remedy open to him other than the suit for a declaration. The appellate Court should not interfere with the exercise of that discretion unless it is satisfied that the lower Court had not good grounds for exercising it.

Appeal against the decree of the District Court of Toungoo, dated the 17th August 1908, passed in Civil Appeal No. 22 of 1908, setting aside the decree of the Township Court of Pyu and dismissing the claim of the appellant (plaintiff) preferred in Civil Regular Suit No. 30 of 1908.

Mr. *Palit*, for the Appellant.

Mr. *J. R. Das*, for the Respondents.

Judgment.—In execution of a decree against Po Chon and Ma Shu, P. S. P. Piche Pillay on 16th December 1907, obtained an order under section 268 (*a*), Code of Civil Procedure, 1882, prohibiting Maung Pet and Ma Kaya from paying to Maung Po Chon and Ma Shu 500 baskets of paddy, valued at Rs. 500, alleged to be due to them as rent of paddy land.

On 2nd January 1908 Maung Pet and Ma Kaya petitioned the Court saying that they owed nothing to Maung Po Chon and Ma Shu, but that 500 baskets of paddy was due from them to Ma Ngwe Baw and Ma In, as rent and praying for the withdrawal of the prohibitory order. Piche Pillay on the same day petitioned the Court asking that the 500 baskets might be taken possession of by the bailiff and sold by auction. The Township Court, after examining Maung Pet on oath withdrew the prohibitory order passed under section 268.

On 13th January 1908 Piche Pillay filed a suit in the Township Court against Maung Pet and Ma Kaya, Maung Ngwe Baw and Ma In for a declaration that the 500 baskets of paddy was the property of Maung Po Chon and Ma Shu, and on 15th February 1908 he obtained a decree in these terms.

On 13th March 1908 all four defendants appealed to the District Court which, on 17th August 1908, set aside the decree on the ground that the suit was not maintainable.

Against that decision this appeal is filed.

The learned District Judge held that as section 278 does not apply to orders under section 268, the Court had no power to withdraw its prohibitory order, but ought to have continued it in force and allowed the decree-holder to apply for the appointment of a receiver who could, if necessary, have sued Maung Pet and Ma Kaya for the debt alleged to be due from them to Maung Po Chon and Ma Shu. He further held that when the Court improperly withdrew the prohibitory order, Pitche Pillay might have applied to set the order of withdrawal aside as being passed *ex parte* or he might have applied to this Court to revise the order as being passed without jurisdiction. I may remark that though the order of withdrawal may have been passed without hearing the decree-holder yet the latter's pleader presented a petition in Court on that day so that the order may not have been *ex parte* in the sense of being passed in his absence. However, he could apparently have applied to the Court to review its order withdrawing the prohibitory order so that, as the District Judge says, he had a remedy by application in the Township Court or in this Court.

The District Court, therefore, held that this suit is not permitted by section 283, Civil Procedure Code, and being doubtful whether a suit will lie under section 42 of Specific Relief Act, and in view of the fact that even if such a suit does lie, a declaratory decree may be refused at the discretion of the Court, reversed the decree of the Township Court. In my opinion, this last question should not have been treated in this way. The Township Court might have discretion to grant

or refuse a declaratory decree, but the appellate Court could not reverse that decree merely on the ground that the Township Court might have refused to grant it. The appellate Court should have decided whether a suit under section 42, Specific Relief Act, did or did not lie, and if it held that it did, should have considered the merits of the case and determined whether good grounds existed for the Township Court to exercise its discretionary power of granting the declaratory decree.

In *Harilal* v. *Ahesang* (1) it was held that section 278 had no application to an order under section 268, and that if an alleged debtor give notice to the Court that no debt existed, the Court should satisfy itself of the existence, or otherwise, of the debt, and if it came to the conclusion that no debt existed, should abstain from proceeding to sale.

In a later ruling of the same Court, *Toolsa Goolal* v. *John Antone* (2), it was laid down that when a debt alleged to be due by a third party to a judgment-debtor has been attached by the judgment creditor, the Court may, under section 268, make an order upon the third party to the judgment-creditor of so much of the debt as he admits to be due to the judgment-debtor. Where, however, the third party denies the debt, there is no other course open to the judgment-creditor than to have it sold, or to have a receiver appointed under section 503.

Both these cases deal with the matter as between the person from whom the alleged debt is due and the decree-holder, and save for the *dictum* in the earlier one, that section 278 has no application to an order under section 268, there is no reference to what remedy any other persons claiming to be interested in the debt have against the prohibitory order.

In *Chidambara Patter* v. *Ramasawmy Patter* (3), a Full Bench of the Madras High Court overruling a former decision of the same Court [*Basavayya* v. *Syed Abbas Saheb* (4)] held that when a debt is attached under section 268, a claim may be preferred by a third party and may be investigated under section 278, and that an order passed on such claim, disallowing it, is subject to the operation of section 283, Civil Procedure Code.

The reasons on which this decision is based appear to me to be sound and commend it to me in preference to the contrary view, unsupported by arguments, enunciated in the Bombay case of 1880.

It has been argued that even the Madras ruling only authorizes claims preferred by a third party. The head-note, it is true, only refers to such a claim, but the reasoning of the judgment is general and wide, and shows that the view of the Court was that any person who could prefer a claim or objection to the attachment of tangible property under section 278, Civil Procedure Code, could, under the same section, prefer a claim or objection when the attachment was by prohibitory order under section 268, and that sections 279 and 280 would apply to such claims or objections.

If, therefore, this decision is right, it was open, in the present case, to Maung Pet and Ma Kaya to object to the prohibitory order on the ground that their debt was due, not to the judgment-debtors, Maung Po Chon and Ma Shu, but to another person. The order passed on that objection would be an order under section 280 and plaintiff had a right of suit under section 283. But even on the contrary view I consider a suit under section 42, Specific Relief Act, would be maintainable. That section is general in its wording and allows "any person entitled to any right as to any property" to sue for a declaration that he is so entitled. Where, however, an order under section 280, Civil Procedure Code, has been passed regarding the property, the suit for declaration must be brought under section 283 of the Code, for which a special and shorter period of limitation is prescribed; but there appears to be no other restriction upon the right to sue under section 42, Specific Relief Act.

Whether, therefore, the withdrawal of the prohibitory order was an order under section 280, Civil Procedure Code, or not, the plaintiff's suit was maintainable in the one case under section 283, Civil Procedure Code, and in the other under section 42, Specific Relief Act. Nor does the fact that he may have had a more direct and summary remedy, whether by way of review or revision, debar him from exercising his alternative remedy by way of suit.

(1) 4 B. 323.
(2) 11 B. 448.
(3) 27 M. 67; 13 M. L. J. 467.
(4) 24 M. 20.

The decree of the District Court is reversed and the case is remanded back to that Court for disposal of the appeal on its merits.

The costs of this appeal to follow the final result.

Decree reversed; Case remanded.

(s. c. 3 Bur. L. T. 36.)

LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL No. 15 OF 1909.

January 17, 1910.

Present:—Sir Charles Fox, KT., Chief Judge, and Mr. Justice Parlett.

MA KYI—APPELLANT

versus

U MAUNG GYI AND OTHERS—RESPONDENTS.

Ciril Procedure Code (Act XIV of 1882), s. 244—Validity of decree cannot be questioned in execution—Necessity of notice in proclamation as to claim of invalidity.

The validity of a mortgage decree cannot be enquired into in execution proceedings for the sale of the mortgaged premises, but the Court is bound to fully notify in the proclamation of sale that a claim has been put forward based on the invalidity of the decree and that any one purchasing would buy subject to any subsequent decree declaring the decree against the mortgaged premises invalid.

Appeal against the order of the Judge, on the Original Side, dated the 29th January 1909, passed in Civil Regular No. 260 of 1905, dismissing the application of the appellant for an order absolute for sale of the mortgaged property under the Transfer of Property Act.

Mr. *Holkar*, for the Appellant.

Mr. *Higinbotham*, for the Respondents.

Judgment.

Fox, C. J.—The statements by the learned Judge of the previous proceedings are not quite accurate, the inaccuracy being due to incorrect statements in the appellants' petition. The application for Letters of Administration to the estate of Ma Mi was not made by the respondents Ma Chit, Ma Hnit and Ma Hta, but by Ma Tha U. An order was made for the grant of letters to her on her furnishing security but it does not appear from the record (Civil Regular No. 8 of 1906) that she ever furnished the security, or that letters were ever issued to her. The above-named respondents were added to the appeal record as the next-of-kin of Ma Ka U who died on or about the 18th September 1907

The application in which the order appealed from was made was for an order for sale

as directed by the decree in Civil Regular No. 260 of 1905.

It was not strictly for execution of the decree or at any rate for execution to which section 244 of the Code of 1882 would have applied. If it had been, it seems clear on the cases of *Chintaman* bin *Vithoba* v. *Chintaman Bajaji Dev* (1); *Dhani Ram Mahta* v. *Luchmeswar Singh* (2) and *Chhoti Narain Singh* v. *Musammat Rameshwar Koer* (3), that the Court could not, in execution proceedings, enter into any question as to the validity of the decree. If a Court cannot do this in execution of a decree under which property has been attached, it cannot do it in carrying out a sale under a mortgage-decree.

The petitioner was, in my opinion, entitled to have the property sold under the decree, but in selling it the Court will be bound to give full notice that the respondents Ma Chit, Ma Hnit, and Ma Hta claim that the decree as against the estate of Ma Mi was invalid, and to warn purchasers that Maung Gyi has been declared not to have been the husband of Ma Mi, and that consequently the decree may be held to be invalid as against the estate of Ma Mi and if so the sale will confer no rights to a purchaser of the property as against the rightful heirs of Ma Mi.

On these grounds, I would alow the appeal and setting aside the order of dismissal would order that the property be sold under the above conditions.

Parlett, J.—I concur.

Appeal allowed.

(1) 22 B. 475.
(2) 23 C. 639.
(3) 6 C. W. N. 796.

(s. c. 3 Bur. L. T. 37.)

LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL No. 104 OF 1908.

January 17, 1910.

Present:—Sir Charles Fox, KT., Chief Judge, and Mr. Justice Parlett.

MA HNIN U AND OTHERS—PLAINTIFFS—APPELLANTS

versus

MA LE ME AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgagor and mortgagee—Subsequent possession of mortgagee not necessarily evidence of outright sale—Burden of proving subsequent outright transfer on mortgagee—Entry in Register—Possession over 13 years insufficient—Burden of Proof.

S. N. Das
Advocate High Court

LUTCHMAN CHETTY *v.* IRRAWADDY FLOTILLA AND CO. LD.

Where after mortgaging the properties, the mortgagors remained in possession at first and subsequently made over possession to the mortgagees, who alleged that possession was made over outright and not in usufruct, the burden of proving the outright transfer is on the party asserting it.

Maung Po Te v. *Po Kyaw*, 1 L. B. R. 215, approved.

An entry in Register No I showing an outright transfer for consideration coupled with the fact of possession for over 13 years is not sufficient to shift the onus, especially where there is no entry in Register IX of the corresponding year and the possession is as consistent with the transaction being an usufructuary mortgage as with it being an outright transfer.

Appeal against the decree of the District Court of Hanthawaddy, passed on the 8th July 1908 in Civil Suit No. 6 of 1908, dismissing the (plaintiffs') appellants' suit for redemption of land.

Mr. *Rahman*, for the Appellants.

Mr. *Kyaw Din*, for the Respondents.

Judgment.

Fox, C. J.—The land was admittedly mortgaged at first, and the plaintiffs' parents reamined in possession. Subsequently they made over possession to the mortgagees. The survivor of the latter sets up that it was made over outright. According to the ruling in *Maung Po Te* v. *Maung Po Kyaw* (1), the burden lay on the mortgagee of proving the outright transfer. The oral evidence as to it is very weak. The *Taikthugyi* Po Saw to whom the report of the transaction would, in the ordinary course, have been made was alive, but he was not called as a witness. The letter of the Superintendent of Land Records states that the transfer is not traceable in Register IX of 1257, yet Register I contains an entry that the land had been bought outright for Rs. 650. The District Judge considered that this entry with the fact of undisturbed possession by the defendants for thirteen years afforded strong presumptive evidence that the transaction in 1257 was an outright sale. I cannot take this view. The possession by the defendants is as consistent with an usufructuary mortgage as it is with a sale, and as stated by Irwin, J., in *Ma Dun* v. *Lu O* (2), it is notorious that the custom of reporting mortgages as sales existed. Moreover, instances of laxity in compiling Register I in respect of changes of ownership are not unknown.

(1) 1 L. B. R. 215.
(2) 5 L. B. R. 40; 2 Ind. Cas. 535.

In my opinion the defendants did not satisfy the burden which was on them of proving that the land had been made over outright, and the plaintiffs were accordingly entitled to succeed in their suit.

I would allow the appeal, reverse the decree of the District Court, and give the plaintiffs a decree for redemption of the land upon their paying into Court Rs. 250 within six months of the date of the decree of this Court.

The defendants shall pay the plaintiffs' costs in both Courts.

Parlett, J.—I concur.

Appeal allowed.

(s. c. 3 Bur. L. T. 38.)

LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL NO. 116 OF 1908.

November 29, 1909.

Present:—Sir Charles Fox, KT., Chief Judge, and Mr. Justice Parlett.

P. L. S. LUTCHMAN CHETTY AND OTHERS —APPELLANTS

versus

THE IRRAWADDY FLOTILLA AND CO., LD.—RESPONDENTS.

Tort—Rule of speed limit in navigable channels—Contributing negligence—Bad light.

Where a speed limit has been fixed by notification for steam vessels navigating a navigable channel, the speed limit rule must be observed under all conditions of the tide.

Before a vessel can be held in fault for a collision, negligence contributing to the accident, and not negligence merely, must be shown. Thus where a collision occurred and the vessel that was struck had not a proper and good light showing, and the collision would have been less likely if the vessel struck had a proper and good light showing, there is no contributary negligence, if the vessel in fault was not going at a rate within the speed limit and on a course which a cautious man would have taken.

Appeal against the decree of the Judge on the Original Side, dated the 14th September 1908, passed in Civil Regular Suit No. 265 of 1907, dismissing the appellants' (plaintiffs') suit.

Mr. *N. N. Burjorjee*, for the Appellants.

Mr. *Lentaigne*, for the Respondents.

Judgment.

Fox, C. J.—The indisputable facts are that the defendant company's steam launch struck the plaintiffs' cargo boat proceeding in the same direction with such force that nine shell planks and two wooden frames of the boat were broken and the boat sunk. *Prima facie* the running down of the boat was due

to negligence on the part of the navigator of the launch. It is a case of *res ipso loquitur* just as much as if the boat had been stationary when run into, and in such a case the law presumes negligence on the part of the navigator who runs his vessel into another.

In the present case there is much more than a presumption of negligence. The running down took place on a clear starlight night in a narrow channel about half a mile up the Kanaung to Creek when both vessels were moving on a very strong current. The serang of the launch said that when he entered the Creek he saw cargo boats in it. He blew the launch whistle and proceeded at half speed up the middle of the stream. As he approached Mohr Brothers and Company's Mill, he saw several cargo boats one lying across the stream ahead of his launch about 60 to 70 feet away. He stopped his engines and reversed, but before the launch got stern way on, it struck the boat. He attributed his having run down the boat to his not having seen it before, owning to it not carrying any light, and to the current having carried his launch on forwards in spite of his having reversed the engines. On his own showing he had been doing a thing which he ought not to have done. That was he broke a rule specially laid down for the navigation of the Creek. This rule was not brought to the notice of the learned Judge. It is laid down in Marine and Commerce Department Notification No. 22 of 1905, and it says that from the 1st December to the 31st May, no steam vessel shall navigate this Kanung to Creek, amongst others, at a rate of speed greater than five miles an hour.

Judging from the pilot Mr. Moore's evidence the current alone would carry a vessel from four to five miles at the time in question. Taking the half speed rate of the launch at the lowest computation, the engines would drive her at 4½ miles an hour. Consequently it is clear that the serang was proceeding up the Creek at a speed far in excess of the limit of speed permitted. It was sought to justify his going at the speed he did because if he had gone at a less speed it might be doubtful whether the launch would be under proper steerage control. The plain answer to this is that if the launch could not be kept under proper steerage control on a strong current unless her engines drove her at the rate of 4½ miles an hour, she ought not to have entered the Creek on such a strong current. The speed limit rule must be obeyed under all conditions of the tide. Further it appears to me that the serang was not justified in proceeding up the Creek mid-stream. Although he may not have been likely to meet any other steam vessel coming in the opposite direction against such a strong tide, the ordinary rule for a steam launch is to keep on that side of the fairway or mid channel which lies on her own starboard side, and other less handy craft are entitled to rely on launches doing this. If the serang had done it, he would have had ample room to pass all the plaintiff's cargo boats proceeding up the Creek. The running down occurred in mid-stream. The original cause of his having run down the cargo boat was, in my opinion, the excessive and unlawful speed at which he was proceeding up the Creek.

Although no direct issue was raised as to contributary negligence, the question must be considered. It arises in connection with the question whether the boat had a proper light. That it had a light of some sort is clear from Mr. Vinton's evidence. He only saw it just as the boat was about to sink. This was about 15 to 20 minutes after it had been run into. The light was then very dim, and it was apparently from a lump in a glass lantern whose sides were so blackened with smoke that very little light penetrated through them. As to the state of the lantern and light before and at the time of collision there is only the conflicting evidence of the native witnesses. The probabilities are that the boat had not a proper light conforming to the requirements of rule 8 of the rules under section 50A of the Inland Steam Vessels' Act. Taking this to be the case, the plaintiff can recover unless the want of a proper light was the cause of accident. See *Cayzer* v. *Carron Company* (1). Before a vessel can be held in fault for a collision, negligence contributing to the accident and not negligence merely must be shown. Bevan on Negligence, 2nd Edition page 1327.

No doubt a collision would have been less likely if the boat had had a proper and good light showing, but if the launch had been go-

(1) (1884) L. R. 9 A. C. 873; 54 L. J. Adm. 18; 52 L. T. 361; 33 W. R. 281; 5 Asp. M. C. 371.

ing at a rate within the speed limit and on a course which a cautious man would have taken, no collision could have occurred, even if the boat had no light at all.

For these reasons I do not think it can be held that the negligence of those on the boat contributed to the running down. I would reverse the decree appealed against and would remand the case to the Original Court for a decision on the 2nd issue.

Parlett, J.—I concur.

Decree reversed; case remanded.

(s. c. 3 Bur. L. T. 39.)

LOWER BURMA CHIEF COURT.

CIVIL REVISION No. 181 OF 1908.

July 22, 1909.

Present:—Mr. Justice Parlett.

V. P. PERIASAWMY PILLAY—PLAINTIFF—APPLICANT

versus

HYDER HOOSAIN AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act XIV of 1882), ss. 332 and 622—Revisional jurisdiction when exercised—Ejectment of one not a party to suit.

Where in an application, under section 332 of the Code of Civil Procedure (1882), by one who has been ejected from property of which he was in possession, the Court does not confine itself to the question whether or no applicant was a party to the suit, under the decree in execution of which he was dispossessed, but goes into and decides the question whether the applicant could show a good title to the property, the High Court will interfere in revision, although the person aggrieved may have another remedy by regular suit. The High Court will interfere in revision in such a case because the lower Court "infringed the extrinsic conditions of its legal authority".

Shiva Nathuji v. *Jorna Kashinath*, 7 B. 341, approved.

Bhundal Panda v. *Pandal Pos Patil*, 12 B. 221; *Kashinath Sakharam Kulkarni* v. *Nana*, 21 B. 731; *Sheoraj Singh* v. *Banwari Das*, 6 A. 172; *Ghulam Shabbir* v. *Dwarka Prasad*, 18 A. 163; *Gopal Das* v. *Alaf Khan*, 11 A. 383; *J. J. Guise* v. *Jaisraj*, 15 A. 405, referred to.

Revision against the order of the Sub-Divisonal Court of Pegu, dated the 26th November 1908, passed in Civil Miscellaneous No. 15 of 1908, dismissing the application of the applicant (plaintiff).

Mr. *Chari*, for the Applicant.

Mr. *S. N. Sen*, for the Respondents.

Judgment.—A preliminary objection was taken to the hearing of this application on the ground that an order under section 332 of the Civil Procedure Code, 1882, being provisionally final, is not liable to revisional interference.

Only two authorities are cited in support of the objection. In the first *Bhundal Panda* v. *Pandal Pos Patil* (1), it was held that "in a case like the present where it is still open to the applicants to establish their right by suit, the irregularity is such as to call for the exercise of the powers of the High Court under section 622, Code of Civil Procedure."

In the second *Kashinath Sakharam Kulkarni* v. *Nana* (2), it was held that the conclusion arrived at in a suit, if erroneous, ought to be corrected in a regular suit and by an application under section 622, especially where no substantial injustice appears to result from the decision.

In neither of these cases, was it held that the High Court had no jurisdiction to interfere in revision when the applicant had another remedy by way of regular suit, but merely that under the circumstances of these particular cases it was unnecessary or undesirable to exercise the ordinary power of revision of which the exercise where permissible is always discretionary. On the other side are quoted three rulings.

In *Sheoraj Singh* v. *Banwari Das*(3), it was held by a Bench of two Judges of the Allahabad High Court that an order under section 335 is subject to revision. The wording of the last clause of this section is practically identical with that of the last clause of section 332 and lays down that an order under this section shall, subject to the result of any regular suit, be final. The arguments for and against an order under section 335 being subject to revision, so far as they are based upon the finality of such order, therefore, apply to an order under section 332. In *Ghulam Shabbir* v. *Dwarka Prasad* (4), it was held that an order for delivery of immovable property under section 318 was open to revision and it was there pointed out that the cases of *Gopal Das* v. *Alaf Khan* (5) and *Guise* v. *Jaisraj* (6), relied upon in support of a contrary view did not in fact support it, for they in effect merely laid down that the Court would not as a rule interfere in

(1) 12 B. 221.
(2) 21 B. 731.
(3) 6 A. 172.
(4) 18 A. 163.
(5) 11 A. 383.
(6) 15 A. 405.

revision unless satisfied that the applicant had no other remedy open to him; but though interference might be refused in the exercise of a sound discretion, it was not held that the Court had no jurisdiction to interfere.

In *Shiva Nathuji* v. *Jorna Kashinath* (7), a Full Bench of the Bombay High Court laid down certain principles regarding the exercise of revisional powers under section 622, Civil Procedure Code.

Among them is the following that the High Court "will rectify the proceedings of the inferior Court where the extrinsic conditions of its legal activity have plainly been infringed."

In the present instance there was an application under section 332 by a person dispossessed of the property, on the ground that he was *bona fide* in possession on his own account and that if the property was comprised in the decree, he was not a party to the suit in which the decree was passed. The penultimate clause of section 332 expressly lays down that in hearing applications under this section, the Court shall confine itself to the grounds specified in the first clause of the section. In this instance, therefore, the Court should have confined itself to the question whether or no applicant was a party to the suit under the decree in which he was dispossessed. The Court did not confine itself to this ground. It went into and decided the question whether the applicant could show a good title to the property. In doing so it appears to me that the Court "infringed the extrinsic conditions of its legal authority" under section 332, and, therefore, this is a case which may be considered in revision, notwithstanding that applicant has another remedy by way of regular suit. The law allows a person to whom section 332 applies two remedies—a summary one by means of an application, and a formal one by way of suit. If he selects the former but fails owing to the Court exceeding its jurisdiction, it would often be a hardship to him to be thereby debarred entirely from his summary remedy, and relegated to the lengthy and expensive remedy of a regular suit, when, had the Court exercised its jurisdiction properly, he might have recovered possession, and have been liable to ejectment only by a suit brought by the opposite party.

(7) 7 B. 341.

I, therefore, consider this is a case in which revision is admissible and admit the application for hearing on its merits.

Application admitted.

(s. c. 3 Bur. L. T. 41.)

LOWER BURMA CHIEF COURT.

SECOND CIVIL APPEAL NO. 219 OF 1908.

August 5, 1909.

Present:—Mr. Justice Parlett.

V. N. A. R. KOMERAPPA CHETTY—APPELLANT

versus

BEINDU AND ANOTHER—RESPONDENTS.

Right to sue—Judgment in personam—*Who can get set aside on ground of fraud.*

A person, who is not a party to a suit, cannot sue to have the decree set aside on the ground of fraud or otherwise.

Benjamin Myer v. *Ismail Ariff Nana*, 3 Bur. L. R. followed.

Naranayyan v. *Nageswarayyan*, 17 M. 389; *Gulibai* v. *Jagannath Gulvankar*, 10 B. 659; *Nilmony Mookopadhya* v. *Aimunissa Beebee*, 12 C.156; *Krishnabhubarti* v. *Ramamurti*, 16 M. 193; *Ahmedbhoy Hubibhoy* v. *Valhebhoy Cassumbhoy*, 6 B. 703, referred to.

Appeal against the decree of the Divisional Court of Tenasserim, passed on the 12th September 1908, in Civil Appeal No. 81 of 1908, reversing the decree of the Sub-Divisional Court of Thaton, and dismissing the Suit of the appellant (plaintiff) filed in Civil Suit No. 64 of 1907.

Mr. *Villa*, for the Appellant.

Mr. *Gaunt*, for the Respondents.

Judgment.—Appellant, Komerappa Chetty, sued Maung Shwe Lin, second respondent, and his wife for over Rs. 2,000.

While the suit was pending, Maung Bein Du, first respondent, on the 20th December 1906, instituted a suit against Maung Shwe Lin and his wife for Rs. 2,000 due on two promissory-notes.

The amount was decreed on confession on 18th January 1907.

On 12th March 1907, Komperappa Chetty sued Maung Bein Du and Maung Shwe Lin to set aside the decree obtained by the former against the latter and his wife, on the ground that it was obtained by fraud and collusion between them.

He obtained a decree in the Sub-Divisional Court, but the Divisional Court reversed it, on the ground that the suit was not maintainable.

For the appellant it is argued that unless a third party can maintain a suit to set

aside a decree obtained by fraud and collusion, there is nothing to prevent any person in apprehension of being sued, from colluding with his friends and relatives for the latter to file suits against him in which he confesses judgment, and thereby compelling his genuine creditors to be relegated to a *pro rata* share of his property, that share being capable of indefinite reduction by sufficiently increasing the number or magnitude of the collusive claims. This might be a good argument for amending the law if it is as suggested, but it, in no way, shews what the law really is.

The suggestion that such a suit is maintainable under section 39 of the Specific Relief Act cannot be seriously supported. That section allows any person against whom a written instrument is void or voidable to sue for its cancellation. A decree, it is true, is in writing but it is essentially the formal expression of an adjudication by a Court, and when a decree is set aside it is that adjudication which is annulled, not merely the written form in which it is set forth. This argument also completely begs the question as to whether the decree is void or voidable as against the person suing to have it set aside.

In *Naranayyan* v. *Nageswaryyan* (1), it was held that in a suit brought under section 283, Civil Procedure Code of 1882, a defendant, who is connected with the judgment-debtor as reversionary heir of the judgment-debtor's husband, or as co-parcener, may shew that the decree, in execution of which the property was attached, was collusively obtained. Such a defence, however, would not be available unless the defendant was so interested.

This case is dissented from *Gulibai* v. *Jagannath Gulvankar* (2) where it was held that such a decree could not be impeached by a defendant; but it was noted that, in the case of a judgment *in rem* it might be impeached even by a stranger to the decree.

In *Nilmony Mookhopadya* v. *Aimunissa Bibee* (3), A mortgaged to B who obtained a mortgage-decree, and subsequently to the decree A sold the property to C. B having attached the property in the hands of C, the latter sued A and B for a declaration that the property was not liable to attachment under the decree, as the decree had been obtained by collusion between A and B. It was held that C was entitled to prove the collusion under section 44 of the Evidence Act.

In *Krishnabhubarti* v. *Ramamurti* (4), decrees were passed against plaintiff's father and his agent, and property claimed by plaintiff was attached. He sued to set aside the decrees on the ground that they were obtained by collusion between the decree-holder and his father's agent and it was held that this constituted a good cause of action.

In *Ahmedbhoy Hubibhoy* v. *Vulliebhoy Cassumbhoy* (5), the only points found in any way bearing upon the case appear to be that defendants, in a suit under section 283, Civil Procedure Code, who though not claiming under the parties to the suit in which the decree was passed, were represented by them therein, may, under section 44 of the Evidence Act, object to the decree on the ground that it was obtained by fraud or collusion, but defendants who are strangers to the suit can only so impeach the decree if it be a decree '*in rem*.'

In the present case there was no decree *in rem*, and, therefore, it is unnecessary to consider the rulings bearing on such a decree.

But as regards decree *in personam*, the authorities cited merely go to show that where a person is already a party to a suit under section 283, Civil Procedure Code, it is open to him, under certain circumstances, to prove the fraudulent or collusive nature of the decree: so far, therefore, they are mainly authorities on the admissibility of evidence.

In order to become a party to a suit under section 283, Civil Procedure Code, a person must be either the attaching creditor or must claim to have some interest in or to be possessed of the property at the date of the attachment. In each of the rulings cited this condition is fulfilled, indeed in each instance the person allowed to impeach the decree has an interest in the property, affected by or attached under, the decree. Thus, no authority whatever is cited for allowing strangers to a decree *in personam* to impeach it on the grounds of fraud or collusion, whereas the contrary is several times distinctly implied.

No grounds, therefore, are shown for dissenting from the ruling in *Benjamin*

(1) 17 M. 389.
(2) 10 B. 659.
(3) 12 C. 156.
(4) 16 M. 198.
(5) 6 B. 703.

Meyer v. *Ismail Ariff Nana* (6) that a person who is not a party to a suit cannot sue to have the decree in it set aside on the ground of fraud or otherwise.

The appeal is dismissed with costs.

Appeal dismissed.

(6) 3 Bur. L. R. 226.

(s. c. 12 Bom. L. R. 886.)

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION SUIT NO. 213 OF 1910.

August 18, 1910.

Present:—Mr. Justice Beaman.

SHAVAKSHA RUTTONJI BOMONJI—PLAINTIFF

versus

HUGH HOGARTH AND SONS—DEFENDANTS.

Civil Procedure Code (*Act V of* 1908), *O. IX, r.* 13, *O. XLVII, r.* 1—Ex parte *decree—Review of judgment—Sufficient cause—Summons not served—Application for setting aside* ex parte *decree beyond time.*

Where the defendants, a Glasgow firm, had an *ex parte* decree passed against them without ever having been served with notice, and, therefore, without ever having had an opportunity of defending themselves, and were barred in respect of an application to have the *ex parte* decree set aside:

Held, that there was a sufficient cause for granting an application for review of judgment.

Motee Chand Baboo v. *Radha Madhub Chand*, 2 W. R. Misc. 34; *Bhup Kuar* v. *Muhammadi Begam*, 6 A. 37; *Ghansham Singh* v. *Lal Singh*, 9 A. 61, referred to.

Mr. *Kanga*, for the Plaintiff.

Mr. *Weldon*, for the Defendants.

Judgment.—I am strongly inclined to the view expressed by the Calcutta High Court in *Motee Chand Baboo* v. *Radha Madhab Chund Baboo* (1), that applications for review of judgment cannot be entertained where there has been no contest, and where the plaintiff has obtained an *ex parte* decree. There are special provisions governing applications to have an *ex parte* decree set aside, and a special period of limitation; as there are other special provisions and a different period of limitation for applications for review of judgment. Section 5 of the Limitation Act enables a Court to extend the period allowed for making an application for review of judgment, but confers no such power in respect to an application to have an *ex parte* decree set aside. The law allows an *ex parte* decree to be set aside for two reasons only:—(1) Want of service, (2) Inability for a sufficient cause of the defendant to be present. The reasons for allowing a review of judgment are wholly different, although they include a general reason "for any sufficient cause", which it is contended may include the reasons upon which alone an *ex parte* decree can be set aside. In face of the two Allahabad decisions, one of the Full Bench, in *Bhup Kuar* v. *Muhammadi Begam* (2) and *Ghansham Singh* v. *Lal Singh* (3), it cannot be denied that there is authority for the proposition that the reasons for granting the review of judgment may be extended so as to include the reasons ordinarily peculiar and confined to an application to have an *ex parte* decree set aside. I am very reluctant to adopt or lend any countenance to a view which appears to me, speaking with all respect, opposed to the plain policy of the legislature. For what does the contention founded on that proposition come to? In the present case, admittedly this: The defendants complain that they were not served with summons, and, therefore, would be entitled as of right to have the *ex parte* decree set aside. But as they have not taken steps to make that appropriate application within time, they seek to evade the consequences of their neglect by bringing an admittedly inappropriate application for review of judgment upon the identical ground, which the law of limitation forbids them to take where the application is for setting aside the *ex parte* decree. And there is this inconvenience that, owing to this difficulty, most of the argument has been confined to the legal technicality, while the substantial ground upon which the defendants ask for relief has not been much discussed! Where an application to have an *ex parte* decree is before the Court in proper form, the issue is sharply defined: Was there good service? If there was, was the defendant prevented by any sufficient cause from appearing? Here I have been told that there was no service, because the persons whom the plaintiff believed to be the defendants' agents and served were not so in fact. That probably is so, but the point was almost lost sight of in the legal arguments. Assuming that want of notice is a sufficient cause for reviewing an *ex parte* decree, I still think that the case would need to be very

(1) 2 W. R. Misc. 34.

(2) 6 A. 37.

(3) 9 A. 61,

SHAVAKSHA RUTTONJI *v.* HUGH HOGARTH.

exceptional before I should allow a defendant to have recourse to this way of avoiding a bar of limitation. What is alleged to have happened in the present case, and is not, I think, seriously denied, is that the plaintiff served notice on Turner Morrison and Company who were the defendants' agents for the particular contract. That contract had ended in the previous December, and the defendants deny that after that Turner Morrison and Company were their agents in any sense, either special or general. Their regular agents are Messrs. Graham and Company. On the 24th March, five days before the *ex parte* decree was obtained, the defendants knew that a summons had been served upon their supposed agents, Turner Morrison & Co. Possibly they could not in the time then at their disposal have taken any effective steps to hinder the plaintiff obtaining the *ex parte* decree which was granted on the 29th March. On the 11th May the plaintiff served the defendants with the decree and demanding execution. If the defendants had then even written to their agents to move to have it set aside for want of service, they would have been in ample time, as the vacation did not end till the 10th June. But being Glasgow merchants it may fairly be conceded that they were ignorant of the provisions of the law in this country and might be excused for a little dilatoriness. Unfortunately the law allows no excuse. Within thirty days of becoming aware of the existence of an *ex parte* decree, the party aggrieved must make his application, or submit to the decree. It is contended that the defendants could not have done what was needful in time, as they had no Bombay Attorneys and did not know how to proceed; that they would have been required to make affidavits in support of an application to have the *ex parte* decree set aside, and so forth. I do not think that there is anything really conclusive in this line of argument. It might well be that where owing to rare circumstances a defendant against whom an *ex parte* decree has been obtained cannot apply to have it set aside within thirty days, as to take an extreme case, where he receives information of the decree, in a foreign port, and is shipwrecked before he can communicate with local lawyers the Court might follow the principle of the Allahabad Full Bench case and hold that there was a sufficient cause, notwithstanding the express prohibition of the Limitation Act for reviewing the *ex parte* decree. But here the defendants certainly could, had they been energetic, have made their application in time, and as to the affidavits I do not know why counsel should not have moved to have the decree set aside and, in the special circumstances, have obtained an adjournment for the production of the required affidavits. In fact the defendants let time pass while they communicated with their present local attorneys, with the result that not only is the application for having the *ex parte* decree set aside, but also the application for review, long beyond time. Now if these facts had occurred in the case of an Indian firm, I should have had no hesitation in holding that the defendants were not entitled to come in under the review section to evade the consequences of having been too dilatory to obtain the advantage of the section providing for setting aside an *ex parte* decree. Even as it is, I feel, and have felt, the gravest doubt whether I ought to allow this application. I do not stickle much over extending the time prescribed for presenting an application for review. Were that all the delay might easily be condoned. It is the other point which raises the real difficulty. For, if we adopt the principle generally and without qualification, it will come to this that any party to an *ex parte* decree, who has not followed the right procedure, may still obtain relief by following the wrong procedure. A case would need to be very strong to warrant any Court, in my opinion, stretching the general words of the review section so far and I may add that the case with which the Allahabad Full Bench had to deal was a singular case, the facts of which doubtless weighed heavily with their Lordships and disposed them to take a most liberal view of their powers. What really emerges out of the considerations, which have been suggested to me on both sides, is that the defendants have had an *ex parte* decree passed against them, without ever having been served with notice, and, therefore, without ever having had an opportunity of defending themselves. Had they come in with an application to have that *ex parte* decree set aside on that ground, there can be no doubt that the Court would have granted it unhesitatingly. Ought they to be deprived of this relief owing to

the fact that, being in Glasgow, and presumably unacquainted with our law of procedure they have been in fault, and so have allowed the time, within which they ought to have made that application, to elapse? For, in spite of its new form, this is in substance the same application, and the only ground upon which it could be granted is the ground on which an application to have the *ex parte* decree set aside would have been granted. And this way of putting the case raises again the question of principle, whether, when a party is barred in respect of an application to have an *ex parte* decree set aside, however, strong his case might otherwise have been, he can elude that bar and get over the want of power in the Court to enlarge the period, by taking advantage of another provision of the law directed to the attainment of other purposes? For my own part I doubt still. But I may cover myself under the authority of the Allahabad Full Bench, while with respect reserving my agreement with it, and say that a party is so entitled. Then I think there can be little question, on the merits, that the defendants ought to have an opportunity of being heard. It was said for the plaintiff that even up to the present, the defendants have not disclosed any case on the merits. I have nothing to do with that at this stage. His counsel declares that while it may be correct to say that no such definite disclosure has been made, the defendants really have a very strong case on the merits. But I have frequently had occasion to point out that in dealing with applications to have an *ex parte* decree set aside—and this is in reality such an application though it has been forced into another form—the Court has nothing whatever to do with the merits. If the defendants have not been served, or having been served have been prevented by an adequate cause from appearing to defend themselves, then the Court must set aside the *ex parte* decree without any regard to the alleged merits. And the same I suppose, if we concede that an application for review, may, in special circumstances, be based upon the same ground. I shall, therefore, allow this application for review of judgment, and hold that there was no service on the defendants, that they were, therefore, precluded from laying their defence before the Court, and consequently that the decree ought to be set aside and the case put down for re hearing on a proper array of the parties interested. Costs of this to be costs in the cause.

Attorneys for the Plaintiff: Messrs. *Payne & Co.*

Attorneys for the Defendants: Messrs. *Craigie, Blunt & Caroe.*

(s. c. 12 Bom. L. R. 891.)

BOMBAY HIGH COURT.

ORIGINAL CRIMINAL PROCEEDINGS.

September 8, 1910.

Present:—Mr. Justice Beaman.

ZARA BIBI—APPLICANT

versus

ABDUL RAZZAK NAKSHBANDI—OPPONENT.

Criminal Procedure Code (Act V of 1898), s. 491—Bombay High Court Rules, R. 794—Muhammadan Law—Custody of male children under 7 years—Mother and father, rights of.

Under Muhammadan Law, the mother is, during the subsistence of marriage, entitled to the guardianship or custody of male children up to the age of seven and that right survives even after separation or divorce.

The underlying principle of every writ of *Habeas Corpus* (and proceedings under section 491 of the Criminal Procedure Code have substantially the same character) is to ensure the protection and well-being of the person brought before the Court under that writ, and the real interest and well-being of a person brought up on a writ *of Habeas Corpus* ought to be not only the determining but the sole consideration.

By section 491 of the Criminal Procedure Code, it appears to be left entirely to the discretion of the Court, whether it should or should not direct the person to be brought before it to be dealt with according to law, but Rule 794 of the Bombay High Court Rules deprives the Court of all further discretion and commands that in the absence of cause being shown against the rule, which is a very different thing from allowing the Court to exercise its discretion, even where technically the cause is inadequate, the Court shall pass an order that the person or persons improperly detained shall be delivered to the person entitled to their custody.

Application under clauses (*a*) and (*b*) of section 491 of the Criminal Procedure Code, 1898.

Mr. *Mirza*, for the Applicant.

Mr. *Jinnah*, for the Opponent.

Judgment.—This is an application under section 491 of the Criminal Procedure Code, corresponding in effect with a writ of *Habeas Corpus*, brought by Zarabibi, the mother of the two minor children, against their father Abdul Razzak.

The rule was issued on a petition under

section 491. The words of that section are "any of the High Courts of Judicature..... .....may, whenever it thinks fit, direct that a person, illegally or improperly detained in public or private custody, be set at liberty or that any person within the limits &c be brought before the Court to be dealt with according to law." There the guiding words of that section apparently come to an end, but it is supplemented, I think, perhaps not altogether felicitously, by Rule 794 of the High Court Rules, which, being made under the Civil Procedure Code, have likewise the force of law. And while it appears by section 491 to be left entirely to the discretion of the Court, whether it should or should not direct the person to be brought before it to be dealt with according to law, where the person has so been brought before it, Rule 794 appears to deprive the Court of all further discretion and commands that in the absence of cause being shown against the rule, which, of course, is a very different thing from allowing the Court to exercise its discretion, even where technically the cause is inadequate, the Court shall pass an order that the person or persons improperly detained shall be delivered to the person entitled to their custody. A comparison of Rule 794 with section 491 seems to me to occasion more than one rather serious difficulty. The words which I have just read from Rule 794 seem to be, strictly speaking, applicable only to clause (*b*) of section 491, although in the present case they are sought to be applied to clause (*a*). Now while clause (*a*) does appear to require amplification, clause (*b*) of section 491 seems to require none, because as it stands, the Court already has an indication of the order which it is expected to pass, whereas, as I have pointed out, clause (*a*) leaves the Court as the stage of having the person brought before it to be dealt with according to law, and 'to be dealt with according to law' is a phrase of such wide and general meaning that it is fairly open to many constructions.

I confess the points, which have been raised in the argument of this Rule, have occasioned me very great anxiety, not because of their intrinsic difficulty so much as because of the fact that the well being of the two small minor children must necessarily much depend upon the order which I shall have to make. This is indeed a very unfortunate squabble between the husband and the wife. The more important facts are that indisputably the husband has been living apart from his wife, although in his affidavit he denies desertion, and that he has been living so quite apart from her for a great many years. In her affidavit the wife declares that these children had never even seen their father, meaning that he had deserted her so long ago that if the eldest child had already been born, he was not of an age to recognize or know his father. On the 17th of July of the present year, that is less than two months ago, the father met these children out walking and according to the mother forcibly carried them off. According to himself they ran to him, entered his carriage and went with him of their own accord. Since then they have remained in the father's custody and the mother seeks an order of the Court under a writ of *Habeas Corpus*, directing the restoration of the children to her. The children have been produced in obedience to the order of the Court and they present every appearance of well being. They are neatly dressed, apparently excellently fed, and look well and happy. They are very young and although the expression of their own wishes carries very little weight, (they naturally incline favourably to the person who last treated them with perhaps more than common kindness) it is not altogether surprising when the Court asked them whether they wished to return to their father or their mother, they both said that they desired to return to their father. If I were perfectly certain that the same kind treatment and careful tending would be given them in the future, I should be even more disposed than I have been throughout this argument, to give less than full effect to what seems to me to be a too narrowly expressed rule of law. But it is, of course, barely possible that the father, knowing that the mother, contemplated obtaining a writ of *Habeas Corpus* against him, may have been particularly careful in seeing that the children, when they came to Court, created a favourable impression. However that may be, merely upon the general merits of the case, apart from the law involved in it, we have these little boys both under seven years of age, for, I think, that the opponent, having regard to the date he gives of the marriage, cannot seriously contend that the

eldest boy is yet quite seven years of age, I say these two little children having lived the whole of their lives with their mother up to the 17th of July last and for about a month and a half only with their father much of the credit then for their happy and well tended appearance should at any rate, I think, be given to the mother, for it is quite impossible that if they had not been fairly well looked after they could have been so much improved in so short a time. On the other hand, it is strenuously contended for the opponent that if not wealthy, he is in much easier circumstances than the mother and that if the Court looks only, at the welfare of the minors, it certainly would not take them from him nor restore them to her. For, it is said, she is living with her own father and mother who are virtually paupers and that whatever means the family have existed upon for the last seven or eight years, have been drawn from the opponent the father.

Now, were we in the same position as the English Courts are under writs of *Habeas Corpus* under section 491, I should have had, I think, very little difficulty in acceding to the argument of Mr. Jinnah for the opponent, an argument which has all along had my complete sympathy. But I have felt throughout a very great difficulty arising out of the actual words of section 491 read with Rule 794. I pointed out at the commencement of the argument that the underlying principle of every writ of *Habeas Corpus* (and proceedings under section 491 have substantially the same character) is to ensure the protection and well-being of the person brought before the Court under that writ. But petitions under section 491 are, I am afraid, too often made the pretext of settling disputes between other persons who are at variance as to their legal rights of guardianship. And the words 'to be dealt with according to law' in clause (*a*) of section 491 might possibly, as Mr. Jinnah suggests and I think might not unreasonably, be extended so as to take in what ordinarily happens when the parties have recourse to the Courts under the Guardians and Wards Act instead of under this section. There, no doubt, the policy of the Courts has always been not so much to be nice in defining the legal rights of the disputing parties as to put prominently before it the welfare of the minors as the paramount and determining consideration. *A fortiori*, on principle, the real interest and well-being of a person brought up on a writ of *Habeas Corpus* ought to be not only the determining but I think the sole consideration. And as to clause (*b*), which the petitioner has invoked, the words of that clause are such that she could obtain no real relief under it, for even assuming that these minors are illegally detained, then the section itself provides that the remedy, which the Court gives, goes no further than setting these minors at liberty. Presumably, therefore, we must turn to Rule 794 to see what is to be done under clause (*a*) and, as I have said, the words of that Rule are mandatory and imperative, there is this difficulty, which the ingenuity of counsel for the opponent may well fix upon, that Rule 794 deals merely with cases of those persons improperly detained, whereas clause (*a*) of section 491 does not deal specifically with any such persons at all. Nor does the Rule 794 contain the words "illegally detained" and it is only upon the bare technicality of the Muhammadan Law that the petitioner in this case relies, because if we were restricted by so wide a word as "improperly" only, it would be very hard, I think, to persuade the Court that a father, who was treating his children well and kindly, was detaining them improperly.

However, on the question of law, namely, who is entitled to the custody of these minor children, I think only one answer is possible. All the authorities to which my attention has been drawn, appear to me unanimous on this point. During the subsistence of marriage, the mother is by common consent entitled to the guardianship or custody of male children up to the age of seven and that right survives even separation or divorce. It was strongly argued on behalf of the opponent that in this case there had been no divorce and no separation in the legal sense, so that there was no ground upon which the petitioner could take the guardianship of the children in preference to the opponent. But even assuming that were so, it would merely throw the parties back upon the first unanimously accepted proposition of Muhammadan Law that during the subsistence and continuance of the marriage, the woman was still the legal guardian.

So that in that aspect of the case I think there is no escape whatever from the conclusion which Mr. Mirza has very forcibly pressed upon the Court. Mr. Jinnah arguing upon general considerations, with all of which I have been and am still strongly disposed to agree, has asked the Court not to sanction the capricious and unwifely conduct of the petitioner in withdrawing herself from her husband's home and society and then insisting on adding to that injury done him, the further injury of withholding his children from him. And it has been pointed out that in his affidavit the opponent expresses himself ready and willing to take the petitioner back into his house. Hoping that this might be found an amicable and easy solution, I called the petitioner Zarabibi and asked her whether she was willing to return to her husband. She, however, is evidently absolutely averse from doing so; and I dare say the truth is, as Mr. Jinnah says, she has been instigated in this spirit of opposition by her own father and mother. However that may be, without going into a great deal of evidence, which cannot be taken on a rule of this kind, I can form no judgment that would be of the least value of what has really gone on between the husband and the wife, that is to say, I can form no estimate of the truth of the allegations and counter-allegations made by the petitioner and the opponent.

The petitioner's case is that she has been treated consistently with great cruelty and she even goes so far as to say that her life would be in danger, and this is flatly denied by the opponent and on which side the truth lies I am unable to say. However that may be, there is this consideration at any rate that the woman has had these children with her all their lives and that I think her version of the manner in which they were taken from her is more probably true than the opponent's version, for I find it very hard to believe that these children could possibly have recognized him, as he says they did, and gone to him of their own accord. I pointed out in the course of the argument that the manner in which he became possessed of them really has very little bearing, if any, upon the somewhat difficult questions I have to decide. But it certainly is and will be thought doubtless a great hardship that the mother should be thus unexpectedly deprived of both of her children whom she has brought up apparently carefully and kindly, and if I now restore both of them to the mother, the father at any rate will know that, in a very few months in the case of the eldest and in a very few years in the case of the youngest, he would be entitled in his turn to have charge of them.

Now, taking the section and the rule in their ordinary and apparent sense, the question I have to answer seemingly is, whether the father or the mother is in law entitled to the custody of these children, and although I cannot shut my eyes to what is always a matter of very great importance and necessity before giving effect to the naked law of the case, namely, the welfare of the minors, it still appears that the answer to that legal question is plain, and is not necessarily negatived by other considerations, that is to say, while I do think that the opponent must have treated these children very well and very kindly during the short time they have been with him, I am not in a position to say that the mother has not treated them with at least equal kindness and affection during all the years of their infancy and up bringing and it seems to me that it would be a very real hardship now to allow the opponent to take them away from her so shortly before in the ordinary course and by the aid of law he would have a right to do so. After all general fairness seems to be on the side of the policy of the Muhammadan Law that the mother who has had all the care and anxiety of bringing up her infant children should at least have the satisfaction of retaining them under her control until they are seven years of age and the only sufficient reason against so obvious a rule of fairness would be that if by allowing them to remain with their mother, the interests and the welfare of the minors would likely be seriously jeopardized. In view of the very short time that must elapse before the eldest son may reach the age of seven and so pass under his father's care, I do not think there can be any risk of the kind, and as to the younger the time, no doubt, is longer but it may be hoped that before those years pass away, better relations would be established between the husband and wife and perhaps there will be no need for further proceedings.

I think I must have made it plain with what anxiety and care I have considered

both sides of this case and what serious difficulty it has occasioned me. I think, however, that for the reason I have given, and notwithstanding the very powerful arguments which have been brought against the conclusion I have arrived at, arguments with so many of which I sympathised at the time and do still, I ought to come to that conclusion and make this rule absolute, directing that the minor children be restored to the legal guardianship of their mother.

Parties to bear their own costs.

Rule made absolute.

Attorneys for the Petitiouer: Messrs. *Mirza, Mirza* and *Mangaldas.*

Attorneys for the Opponent: Messrs. *Captain* and *Vaidya.*

(s. c. 12 Bom. L. R 899.)

BOMBAY HIGH COURT.

CRIMINAL REVISION No. 234 OF 1910.

September 8, 1910.

Present:—Mr. Justice Batchelor and Mr. Justice Rao.

EMPEROR—APPLICANT

versus

HARI SINGH GANPAT SINGH—OPPOSITE PARTY.

Evidence Act (I of 1872), s. 25—Confession made to Police officer—Inadmissible even against co-accused.

Under section 25 of the Indian Evidence Act, the confession made to a Police officer by an accused person is inadmissible against him, and it is *a fortiori* inadmissible against another person who may be implicated by it.

Mr. *R R. Desai*, for the Applicant.

Mr. *L. A. Shah*, Acting Government Pleader, for the Crown

Judgment.—This is an application in revision, the applicant having been convicted of abetting the offence of bringing a false charge of an offence, sections 211 and 109 of the Indian Penal Code.

We think that there is no evidence to sustain the conviction. It appears that one Candrabhagabai went by night from one village to another and at the latter village instituted a false complaint that she had been robbed on the way between the villages. It appears also that the present applicant accompanied her on her journey. But that, it seems to us, is all that the learned Sessions Judge has accepted as proved against the applicant, and that, in our opinion, is not enough. There was evidence offered that the applicant had assisted Chandrabhagabai by scattering certain possessions of hers about the road and thereby creating evidence in favour of the false charge. But as we read the lower Court's judgment the evidence of the witnesses who tell this story about the scattering of the pots is disbelieved, or, at least, is not relied upon for the learned Sessions Judge writes of them that they must be regarded with suspicion. If that evidence then is excluded from the case we are unable to see that there is any evidence to show more than this that the applicant accompanied Chandrabhagabai, and this, of course, he may have done in complete ignorance of the offence which in her mind she was about to commit.

It is important to observe that there is no evidence that the applicant had any malice against the persons whom Chandrabhagabai falsely accused, and, though there is evidence that he was on friendly terms with Chandrabhagabai, that evidence would serve the applicant's turn also as explaining why he should innocently volunteer to accompany the woman on her night journey.

It appears to us indeed that the Sessions Judge has really grounded the conviction of the applicant on a certain confessional statement said to have been made by Chandrabhagabai to a Police officer. The Sessions Judge considered that, that statement though not admissible against Chandrabhagabai, under section 25 of the Indian Evidence Act, would be admissible against the applicant.

It appears to us that this is an error of law and it is obvious that if the confession made to the Police officer by Chandrabhagabai is inadmissible against Chandrabhagabai herself who made it, it must *a fortiori* be inadmissible against another person who is implicated by it and behind whose back it was made. We think that the words of section 25 of the Indian Evidence Act confirm this construction, and that it is not opposed to anything that was said in *Imperatrix* v. *Pitamber Jina* (1), upon which the learned Government Pleader has relied. For, in that case the confession made to a Police officer by one accused was allowed to be proved on behalf of, that is, in favour of, another accused, so that section 25 did not apply

(1) 2 B. 61.

Here the object was to prove a confession made by one accused against another accused.

For these reasons we must reverse the conviction and sentence and direct that the accused be acquitted and discharged.

Order accordingly.

(s. c. 12 Bom. L. R. 901.)

BOMBAY HIGH COURT.

CRIMINAL REVISION No. 232 OF 1910.

September 9, 1910.

Present:—Mr. Justice Batchelor and Mr. Justice Rao.

EMPEROR—APPLICANT

versus

FULJI DITYA—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 565—Order for notifying residence—Sentence of whipping.

Section 565 of the Criminal Procedure Code, 1898, must be construed strictly, and it must be taken that the Court's power is limited to the cases there specifically described, and does not extend to cases where the Court, instead of passing sentence of transportation or imprisonment, passes a sentence of whipping.

Mr. *L. A. Shah*, Acting Government Pleader, for the Crown.

Judgment.—In this case one Fulji *wald* Ditya has been convicted of housebreaking under section 454 and of having suffered certain previous convictions which bring his case within section 75 of the Indian Penal Code. The sentence upon him was that he suffer thirty stripes under the Whipping Act IV of 1909 and to that sentence there was added an order under section 565 of the Criminal Procedure Code, directing that the convict should notify his residence or change of residence for a period of five years.

We called for the papers in the case in order to satisfy ourselves whether this order under section 565 could be supported and we have heard the learned Government Pleader in its favour. We are of opinion that the order cannot stand. So far as the plain words of section 565 go it seems to us clear that the order cannot be brought within them. For the section in terms allows of such an order being made only at the time of passing sentences of transportation or imprisonment on the accused and it provides that his residence and change of residence "after release" be notified.

It seems clear that where there is no sentence of transportation or imprisonment and no release of the convict thereafter the section does not justify the making of such an order.

The Government Pleader has, however, called our attention to the fact that the words of section 565 of the Criminal Procedure Code professedly follow the words of section 75 of the Indian Penal Code, and, therefore, are limited to the case of a sentence of transportation or imprisonment as described in section 75 of the Indian Penal Code, and it is urged that the Court convicting the accused person is not deprived of its power to make this order under section 565, merely by reason of the circumstance that instead of passing a sentence of transportation or imprisonment it prefers to pass that alternative sentence of whipping which is a mere substitute for transportation or imprisonment, and in support of this argument it is pointed out that whereas section 565 was added to the Code in 1898, the present Whipping Act did not become law until 1909.

This latter argument, however, which might otherwise have force, seems to us to be met by the fact that when section 565 was enacted in 1898, there was on the Statute Book a Whipping Act, namely, VI of 1864, which, so far as we are concerned with it, was identical with the later Act of 1909. That being so, it seems to us that section 565 must be construed strictly and that when the Legislature says that such an order, as is there described, may be made at the time of passing sentence of transportation or imprisonment so as to provide for a certain notification after the release of the convict, it must be taken that the Court's power is limited to the cases there specifically described, and does not extend to cases where the Court, instead of passing that sentence, passes a sentence of whipping.

For these reasons we set aside the order under section 565 of the Criminal Procedure Code, 1898.

Order set aside.

TALUKDARI SETTLEMENT OFFICER *v.* CHHAGAN LAL.

(s. c. 12 Bom. L. R. 903.)

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 189 OF 1909.

July 28, 1910.

Present:—Sir Basil Scott, KT., Chief Justice, and Mr. Justice Batchelor.

THE TALUKDARI SETTLEMENT OFFICER—APPELLANT

versus

CHHAGAN LAL DWARKADAS—RESPONDENT.

Gujarat Talukdars *Act* (*Bom. Act VI of* 1888), *s.* 31—'Talukdari *estate*,' *meaning of*—Wanta *lands*, *nature of*—*Alienated land.*

Wanta lands are lands held by Rajputs, who after the Muhammadan conquest of Gujarat, received one-fourth of the land of certain villages on condition of keeping order in those villages. The lands are held either rent-free or at a small quit-rent.

Dolsang Bhavsang v. *The Collector of Kaira*, 4 B. 367, referred to.

Where *Wanta* land is entered as alienated land under the Land Revenue Code, it cannot be treated as land held upon *Talukdari* tenure in the strict sense of the word.

The words '*Talukdar's* estate' in section 31 of the Gujarat *Talukdars* Act are used in a technical sense limited to the *Talukdar's* interest in the estate held by him by reason of his status as a *Talukdar*.

Khodabhai v. *Chagandal*, 9 Bom. L. R 1122; *Bichabha* v. *Vela Dhanji*, 11 Bom. L. R. 736; 3 Ind. Cas. 773; 34 B. 55, referred to.

First appeal from the decision of the First Class Subordinate Judge at Ahmedabad, in Miscellaneous Application No. 51 of 1908.

Mr. *R. W. Desai*, for the Appellant.

Mr. *T. R. Desai*, for the Respondent.

Judgment.—On the 8th of August 1899 a decree was passed at a suit of the opponent Chhaganlal against the Thakore of Kerda, in Suit No. 60 of 1899, in the Court of the First Class Subordinate Judge of Ahmedabad.

The defendant had died the day previous to the decree. At the time of his death he was entitled to revenues from three sources: *Toda Giras* allowance of Rs. 1,400, per annum; the income of two *Talukdari* villages; and the income of certain *Wanta* lands in seven different Government villages.

On the 20th of August 1899, the whole of the estate of the deceased defendant was taken under attachment by Government Officers purporting to act under section 144 of the Land Revenue Code (Bombay Act V of 1879), and the *Talukdari* Settlement Officer, who is the appellant in this case, claims to have been in possession of the estate from that date.

On the 19th of June 1905, a sum of Rs.8,516, standing in the books of the Government *Kacheri* of Anand to the credit of the estate of the Thakore, was attached by the judgment-creditor, and on the 13th November 1907, another sum of Rs. 5,200 standing to the credit of the estate of the Thakore, was similarly attached.

The *Talukdari* Settlement Officer instituted these proceedings in 1908 applying that the attached sums should be released from attachment.

In the lower Court a question arose as to the origin of the two sums attached and, upon issues being raised, it was held that the sum of Rs. 8,236-9-0, and Rs. 1,895-9-6, forming part of the sum of Rs. 5,200, were the produce of property not liable to attachment. but that Rs. 3,304-6-6 was income derived from lands other than property consisting of *Toda Giras Hak* and *Talukdari* villages and was, therefore, liable to attachment.

An appeal has been preferred by the *Talukdari* Settlement Officer and a preliminary point was taken on behalf of the opponent that no appeal would lie as the *Talukdari* Settlement Officer was not the representative of the judgment-debtor within the meaning of the Civil Procedure Code.

We thought it advisable, however, not to decide the preliminary point but to hear arguments upon the appeal on its merits.

We have now heard Mr. Ramdatt Desai, who has argued the case very fully on behalf of the *Talukdari* Settlement Officer, and we are of opinion that the decision of the lower Court was right.

It has been proved that the lands from which the sum of Rs. 3,304-6-6 was derived were *Wanta* lands.

There is no question as to the nature of *Wanta* lands. That is made clear by Robertson's and Wilson's Glossaries, by the Ras Mala, and by the judgment of Sir Michael Westropp in *Dolsang Bhavsang* v. *The Collector of Kaira* (1). They are lands held by Rajputs or the representatives of Rajputs who after the Muhammadan conquest of Gujarat received one-fourth of the land of certain villages on condition of keeping order in those villages. The lands are held either rent-free or at a small quit-rent

The first point taken in appeal is that these *Wanta* lands are part of the '*Talukdari* Estate'

(1) 4 B. 367.

in the strict sense of that expression and that consequently the attachment of the income derived from these lands cannot continue in face of the provisions of the section 31 of the Gujarat *Talukdars* Act as amended by Bombay Act II of 1905.

The Head Clerk to the *Talukdari* Settlement Officer gave evidence in the case and was cross-examined as to the nature of *Talukdari* tenure and as to whether the *Wanta* lands in question were held on *Talukdari* tenure. His evidence is as follows:—

"To my knowledge summary settlement is paid for the *Sarsa Wanta* land. There is some difference between the *Talukdari* estate and the *Talukdar's* estate, *Talukdar's* estate means estate of whatever tenure, that is, if a *Talukdar* holds some Government lands they are also called *Talukdar's* estate. The *Talukdari* estate means estate with full proprietary right held by *Talukdar* under what is called *Talukdari* tenure. There is no definition given of the *Talukdari* tenure in any enactment. I cannot give a definition of the *Talukdari* tenure but I can give illustration of it. The Land Revenue Code recognizes two kinds of land, alienated and unalienated. The *Talukdari* does not come under either of these categories because it is of full proprietary right and its origin antedated the British rule. The said two are the chief distingnishing characteristics of the *Talukdari* tenure."

It is proved in this case that the *Sarsa Wanta* land, from which the attached sum is derived, is entered as alienated land under the Land Revenue Code. We may, therefore, assume that it is not land held upon *Talukdari* tenure in the strict sense of the word. That is sufficient, we think, to dispose of the first part of Mr. Ramdatt Desai's argument.

Mr. Ramdatt Desai's second point was that '*Talukdari* Estate', in the section to which we have referred and generally throughout the Gujarat *Talukdars* Act, is not to be interpreted as limited to estate held on *Talukdari* tenure but means the whole of the property of a person who answers to the description of a *Talukdar* whether held by him by reason of his status as *Talukdar* or otherwise.

In dealing with this argument we will assume (without deciding) that income derived from an estate is portion of the estate within the meaning of section 31.

We have the authority of two judgments of this Court to the effect that the words '*Talukdar's* estate' in section 31 are used in a technical sense limited to the *Talukdar's* interest in the estate held by him by reason of his status as a *Talukdar*; see *Khodabhai Sartan Singh* v. *Chaganlal Kishoridas* (2) and *Bichubha* v. *Vela Dhanji* (3). We are bound by the decision in each of these cases.

We have, however, permitted full argument from Mr. Ramdatt Desai, based upon the various enactments relating to *Talukdars* and the different sections of the Gujarat *Talukdars* Act, and we entirely agree with the conclusion arrived at in those cases.

For these reasons, we affirm the decision of the lower Court and dismiss the appeal with costs.

Appeal dismissed; Decree confirmed.

(2) 9 Bom. L. R. 1122.

(3) 11 Bom. L. R. 736; 3 Ind. Cas. 773; 34 B. 55.

(s. c. 12 Bom. L. R. 910.)

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL NO. 169 OF 1907.

August 12, 1910.

Present:—Sir N. G. Chandavarkar, KT., Judge, and Mr. Justice Heaton.

Shri SITARAM PANDIT—DEFENDANT—APPELLANT

versus

Shri HARIHAR PANDIT—PLAINTIFF—RESPONDENT.

Hindu Law—Adoption—Agreement by expectant heir—Payment of money to adoptive mother to induce her to adopt—Illegal—Debts incurred for such payment not binding on sons—Liability of adopted son to pay the debts of natural father—Father incompetent to gift or sell immovable joint ancestral property—Gift, revocation of—Texts relating to revocation of gift.

An agreement by an expectant heir with reference to property which he hopes to get after his adoption is invalid and inoperative according to Hindu Law.

Sham Sunder Lal v. *Achhan Kunwar*, 25 I. A. 183 at p. 189; 21 A. 71; 2 C. W. N. 729; *Samsudin* v. *Abdul Hussein*, 31 B. 165 at p. 174; 8 Bom. L. R. 781, referred to.

Where on a Hindu's death, adoption is made by his widow, it must be made by her, without any coercion, free from any corrupt motive, and with an eye solely to the fitness of the boy to be adopted to fulfil the religious and secular duties binding on a son. That object is likely to be frustrated, if she is induced to adopt a boy out of greed for money and for pecuniary benefit to herself If she is so induced, the money paid to her is a bribe, which is condemned by all *Smriti* writers as an illegal payment. If the money so paid is borrowed by the natural father of the

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adopted boy, the debt contracted as it is for an illegal purpose, will not bind the sons of the borrower.

An adopted son is under no pious obligation to satisfy the debts of his natural father, whose son he ceases to be by his adoption.

A Hindu father is not competent to make a gift of property, which is immovable and is joint ancestral estate.

The texts of Hindu Law, showing that a gift once made cannot be resumed, if it is to a benefactor or to a father, apply as between the donor and the donee and relate to property which it was competent for the donor to give away. They cannot affect the joint ancestral estate of a Hindu and his sons.

A Hindu father is not competent to sell joint ancestral property to the detriment of his sons, except for an *antecedent* debt, which had been contracted by him for a purpose, neither illegal nor immoral.

First appeal from the decision of the First Class Subordinate Judge, at Belgaum, in Suit No. 64 of 1903.

Mr. *G. S. Rao*, for the Appellant.

Mr. *Jayakar*, with Mr. *M. R. Bodas*, for the Respondent.

Judgment.

Chandavarkar, J.—The appellant is the son of Chimna Maharaj, deceased, and the respondents are the sons of Nana Maharaj, also deceased. This Nana Maharaj was the natural born son of Chimna Maharaj but was given in adoption on the 24th of April, 1879, to Bhavanibai, widow of one Bala Maharaj. Nana Maharaj made a gift of certain lands, belonging to him in virtue of the adoption, to the appellant on the 29th of March 1888. The respondents brought the suit, which has led to this appeal, to recover possession of those lands, on the ground that they were part of the joint ancestral property of their father and themselves, of which it was not competent for the father to make gift.

The claim was resisted by the appellant on the ground that the gift had been made in consideration of the benefit conferred on Nana Maharaj by the fact of his having been given in adoption by Chimna Maharaj, father of the appellant, into the family to which the lands belonged, and also of the trouble which the said Chimna Maharaj had to undergo and the expenses he had to incur in persuading Bhavanibai to make the adoption by giving her Rs. 8,000.

The Subordinate Judge, who tried the suit, disbelieved the story as to the trouble and the expenses, and held that, even if the story were true, the consideration for the deed of gift in dispute was opposed to public policy. He, accordingly, allowed the claim.

Certain facts in the case relating to the adoption are admitted by both parties. The *pant pratinidhi* of Aundh had a daughter, whom he was anxious to give in marriage to Nana Maharaj. But as this Nana Maharaj belonged to a poor family, the *pant* conceived the idea of arranging for his adoption into the more well-to-do family of the deceased Bala Maharaj, whose widow Bhavanibai was under his (the *pant's*) influence. In the months of March and April, 1869, an arrangement, evidenced by Exhibits 184 and 185, was arrived at to that effect between the *pant* and Bhavanibai. In the month of November of the same year, mutual agreements (Exhibits 74 and 186) passed between her and Chimna Maharaj that the former should take and the latter give in adoption his son, Nana Maharaj. The marriage of Nana Maharaj with the *pant's* daughter followed soon after the arrangement and agreements of 1869; nevertheless, the adoption itself was delayed for ten years and took place so late as the 24th of April, 1879.

The cause of this long delay is accounted for by each party according to his own version. The appellant's case is that Bhavanibai procrastinated, because she wanted money from Chimna Maharaj before making the adoption, and the latter, who was poor, had to borrow and give her Rs. 8,000 and Rs. 1,000 to her *Carcoons* to induce her to adopt his son. On the other hand, the respondents' version is that it was not Bhavanibai but Chimna Maharaj, who was the cause of the delay. They allege that he asked from time to time for the fulfilment of certain conditions before he would give his son in adoption and that it was only after all his conditions had been agreed to that he gave the boy.

The Subordinate Judge has disbelieved the version of the appellant, but on grounds, which, we think, are not satisfactory. The story is supported by the evidence of four witnesses (Exhibits Nos. 57, 64, 131 and 127), who all depose that Bhavanibai received Rs. 8,000 from Chimna Maharaj as a motive for adopting his son. Further the appellant has produced a receipt, dated the 19th of April 1879, purporting to have

been passed by Bhavanibai to Chimna Maharaj acknowledging the payment to her of Rs. 8,000. The Subordinate Judge thinks that the attestations on the receipt and its writing are fabricated. He bas arrived at that conclusion by comparing the handwriting on the receipt with the handwriting of other documents put in for comparison and admitted to be genuine. We are unable to agree with the Subordinate Judge after a careful examination of the handwritings. In our opinion, the receipt is a genuine document.

What appears to have mainly influenced the Subordinate Judge in disbelieving the appellant's story as to the payment of Rs. 8,000 by Chimna Maharaj to Bhavanibai is that the latter was, he thinks, under the "thumb and influence" of the *pant pratinidhi* of Aundh. Therefore, observes the learned Judge, "it appears quite unworthy of reliance that she had a sordid pecuniary motive set up by the defendant and testified to by his witnesses Nos. 56, 57, 61, 63, 64, 127, 137, to screw out Rs. 8,000 from Chimna Maharaj for her adoption of Nana Maharaj." This view of the probabilities of the story overlooks the actual situation of the parties concerned during the period to which the story as to Rs. 8,000 relates. It is true that the person, who was most anxious that Bhavanibai should adopt Nana Maharaj, was the *pant pratinidhi* of Aundh. He desired to give his daughter in marriage to the boy, but as the boy's father was, comparatively speaking, poor, he started the idea of adoption. He agreed to the marriage of Bhavanibai's daughter with his own son. The *pant* was, therefore, able to induce her to adopt Nana Maharaj. So far it may be allowed that she was under what the Subordinate Judge calls "the thumb and influence" of the *paut*. But the situation changed after she had agreed to adopt, the *pant* had given his daughter in marriage to Nana Maharaj, and the *pant's* son had married Bhavanibai's daughter. She was then more or less in a position to hold her own and dictate her own terms. The *pant's* necessity had become all the greater to see the adoption put through, because his daughter had become the boy's wife. No such necessity existed to make Bhavanibai anxious in the matter. The adoption, if made, would have deprived her of her widow's estate in her husband's property. She would have relegated herself by her own act to the position of a woman entitled to no more than maintenance out of the estate. She had agreed to adopt to oblige the *pant*. It was only natural that, when the *pant's* daughter had been married to the boy, and the adoption had become to him a matter of urgent necessity, she should take advange of the situation and delay the adoption till at least something was given to compensate her for the sacrifices she would have to make by the adoption. There is, therefore, nothing improbable in the story that she would not adopt unless and until she had received some pecuniary compensation.

This conclusion derives support from two unimpeachable documents to which the Subordinate Judge has made no reference in his judgment. In a letter (Exhibit 143), dated the 2nd of March 1879, Chimna Maharaj wrote to Gopal Naik, a *karbhari* of the *pant pratinidhi*, that Bhavanibai had agreed to adopt another man by taking from him Rs. 15,000. In that letter Chimna Maharaj asked what was the use of his trying to collect money "for nothing," if the lady had changed her mind. And he requested Gopal Naik "to make arrangements for getting only Nana Maharaj to be adopted." There is a letter (Exhibit 183) from a *karbhari* of the *pant pratinidhi* of Aundh to Bhavanibai, written in April 1879, in which the writer explains to her why the *pant* was anxious to see the adoption hastened. He says that the *pant's* sole object is to see his son-in-law (Nana Maharaj) and his daughter (Nana Maharaj's wife) happy. The writer continues: "There is nothing else in this. And my master has been exerting himself for about ten years to carry out this object." He refers to "a letter of request" to her and to his master's "angry letters" to him. This letter also shows that Bhavanibai was reluctant to adopt and had to be persuaded.

It is true that there is no mention in the deed of gift, executed by Nana Maharaj in favour of the appellant, of the payment of Rs. 8,000 to Bhavanibai by Chimna Maharaj as an inducement to make the adoption. The omission is easily accounted for, if due regard be had to the position of the parties and the nature of the act of payment from the social point of view. Bhavanibai

was the widow of a respectable and well-to-do man; Nana Maharaj had been adopted by her; and for him to have said in the deed that his natural father had given him in adoption by bribing his adoptive mother, and that she had taken him in adoption, not because she had liked him, but because she had been bribed, would have been to cast odium publicly on and lower himself, as well as her and his natural father. Therefore, he seems to have contended himself with the bare recital in the deed of gift (Exhibit 55) that his natural father had "exerted himself greatly in the matter of giving" him "in adoption."

It has been strenuously contended before us for the respondents that the fact that Chimna Maharaj had insisted upon certain conditions and delayed the adoption makes it highly improbable that the long delay of ten years was due to any unwillingness on the part of Bhavanibai. That Chimna Maharaj did ask for certain conditions and that sometime was occupied by negotiations in respect of them is proved by some letters produced in the case. One of those conditions related, to the *garbhadhana i.e.*, the marriage consummation ceremony of Nana Maharaj's wife. Chimna Maharaj wanted money for it and he was paid by the *pant pratinidhi* of Aundh. There is nothing to show that the money was paid to him for his personal benefit or that it came from Bhavanibai. The natural presumption is that it was for Nana Maharaj's wife. Bhavanibai had agreed to take him in adoption; it was on the faith of that agreement that the *pant* had given his daughter in marriage to Nana Maharaj; the girl had come from a chief's family; and she was to be the daughter-in-law of Bhavanibai. All religious and social aspects of the case required that her consummation ceremony should take place with proper regard for her position and her father's and also that of Bhavanibai. If Bhavanibai had refused to do her duty by the girl on such an occasion consistently with her agreement to adopt, the name and position of her deceased husband, Chimna Maharaj, would have suffered in the eyes of his society, because she had treated the boy she had agreed to adopt so indifferently. The fact that Bhavanibai did not pay but that the *pant* paid shows that the former was not ready to hasten the adoption.

As to the other conditions insisted upon by Chimna Maharaj, they all aimed at securing the property of the adoptive family to Nana Maharaj (see Exhibit 108 and Exhibit 114). Such conditions would not have been made if Bhavanibai had raised no dispute and had not tried to have some hold on the property for herself even after adoption.

The fact that Chimna Maharaj delayed the adoption for some time because Bhavanibai would not agree to his conditions renders it highly probable that Bhavanibai delayed because she wanted something for herself before adopting. If she had been all along willing and ready, where was the accasion for Chimna Maharaj to make certain conditions? Where, again was the necessity for the time occupied in settling those conditions through the *Pant Pratinidhi* and his *karbhari*? That shows that there was some reluctance on the part of Bhavanibai. Chimna Maharaj was to gain everything by the adoption; Bhavanibai was to lose almost all from the material point of view. And it is incredible that the adoption would have been delayed for so many as ten years, if all the while Bhavanibai was anxious and ready to adopt.

On the whole of the evidence and the probabilities, then, we have arrived at the conclusion that Chimna Maharaj did pay Rs. 8,000 to Bhavanibai as an inducement to adopt his son. We are not satisfied, however, with the evidence adduced by the appellant to show that the sum of Rs. 13,000, due from the husband of Bhavanibai to the *pant pratinidhi* of Aundh on a mortgage, was remitted by the latter owing to the friendly intercession and at the request of Chimna Maharaj. That the debt was wiped out and the mortgage redeemed without payment is proved. The respondents' *mukhtiar* (Exhibit 182) admits it. But he states that the *pant* extinguished the debt, because Nana Maharaj had refused to send his wife (the *pant's* daughter) to the thread ceremony of her brother unless the mortgage was returned to him. This seems highly probable. The remission took place after Bhavanibai's death. And the *pant* must have remitted the debt mainly because the debtor was his own son-in-law. The story that the debt was remitted at the request of Chimna Maharaj stands upon the interested and uncorroborated testimony of the appellant.

It is also the appellant's case that before his adoption Nana Maharaj had promised to Chimna Maharaj that, after adoption, he would grant to the latter in perpetuity lands yielding an annual income of Rs. 1,000. This is deposed to by the appellant (Exhibit 231), and by his mother (Exhibit 127). Both of them say that the promise was made in writing "for the trouble and expense of the work of adoption." The written agreement is not produced, and the deed of gift makes no reference to it. There are some other witnesses who speak to the promise and it is sought to be proved also by certain letters purporting to be those of Nana Maharaj. Even if there was such an agreement, it is not shown to be supported by any consideration; and, even if it were supported by consideration, it was illegal, because it was made by Nana Maharaj as an expectant heir with reference to property which he *hoped* to get after his adoption by Bhavanibai. Such an agreement is invalid and inoperative according to Hindu Law. *Sham Sunder Lal* v. *Achhan Kunwar* (1); and see *Sumsudin* v. *Abdul Hussein* (2), where other decisions to the same effect are cited. In any case, Nana Maharaj's promise cannot render the deed of gift valid, if it is invalid on other grounds.

The appellant also pleads that the lands conveyed by the deed of gift (Exhibit 55) were given to him by Nana Maharaj in exchange for the lands at Chinchwad, situate in the Native State of Kolhapur, yielding an annual income of Rs. 188 odd, which Bhavanibai had granted by a deed (Exhibit 62) to Chimna Maharaj on the day of the adoption. Chimna Maharaj was not satisfied with the grant and desired instead lands situate in British territory. He never took possession of the lands at Chinchwad. But the grant had been followed by directions to the village officers that they should recognise him as owner, enter the *Khata* in his name, and allow him to appropriate the rents and profits. There is no mention of this exchange in the deed of gift (Exhibit 55); but the probabilities are strongly in favour of the appellant's case on this point.

The established facts, then, relating to the deed of gift, which is in dispute in this case, are shortly these. After she had bound herself by an agreement to adopt Nana Maharaj, Bhavanibai refused to carry it out unless she was paid a sum of money. Nana Maharaj's natural father, Chimna Maharaj, paid Rs. 8,000 as an inducement to her to adopt his son. Then the adoption took place, and Chimna Maharaj, being poor, obtained lands at Chinchwad, yielding an annual income of Rs. 188 odd for parting with his son. In consideration of the payment of Rs 8,000 to Bhavanibai and in exchange for the lands at Chinchwad, and also having regard to the benefit he had derived from the act of his natural father in giving him in adoption into a well-to-do family, Nana Maharaj conveyed by way of gift the lands in the deed (Exhibit 55) to the appellant, his natural brother.

The transaction, under these circumstances, amounts to a mere gift. It was urged before us that it was supported by consideration, because of the payment of Rs. 8,000 made by Chimna Maharaj to Bhavanibai for the benefit of Nana Maharaj, that is to say, to induce her to adopt the latter as her son. The amount, it is said, was paid by Chimna Maharaj by borrowing; Nana Maharaj was then a son of Chimna Maharaj and as such it was his pious duty to pay his father's debt.

But the payment to Bhavanibai was vitiated by the fact that it was in the nature of a bribe, and as such it was unlawful according to Hindu law.

When a Hindu gives his boy in adoption, his act is, according to the Hindu *Shatras*, in the nature of a sacred gift, voluntarily made. It is on that account that Manu requires the gift to be "confirmed by pouring water" [*Vyavahara Mayukha*: Mandlik's Edition, page 50]. A daughter *given* in marriage, which is called *kanyadana* and a son *given* in adoption, which is called *putradana*, stand in this respect on the same footing. Both are gifts for religious and secular purposes. Both acts are attended by religious ceremonies; both require *giving* and *taking*. A boy is adopted by a sonless Hindu for perpetuating his line, paying off his dues to his ancestors, keeping up his name, and securing for him and his ancestors a place in heaven. These are sacred purposes, according to the Hindu *Shastras*. It is not by the mere birth and existence of a son that these purposes are fulfilled. As Vijnaneshwara points out in the *Mitakshara* in the Chapter on "Rituals," the son must be "well-be-

(1) 25 I. A. 183 at p. 189; 21 A. 71; 2 C. W. N. 729.
(2) 31 B. 165 at p. 174; 8 Bom. L. R. 781.

haved," of good qualities.* That applies to the adopted son equally, because he takes the place of a born son; and he has to be "a reflection" of the latter. Where on a Hindu's death the adoption is made by his widow, it must be made by her, without any coercion, free from any corrupt motive, and with an eye solely to the fitness of the boy to be adopted to fulfil the religious and secular duties binding on a son. That object is likely to be frustrated, if she is induced to adopt a boy out of greed for money and for pecuniary benefit to herself. If she is so induced, the money paid to her is a bribe, which is condemned by all *Smriti* writers as an illegal payment, Narada, for instance, says that what has been given as a bribe is "declared as not given (or void)." And he lays down "that *utkocha* (or bribe), which is promised to be given for the accomplishment of any object, should not be given, even if that object be accomplished. But if it has already been actually given, it should be restored by force and a fine equal to eleven times (its value) should be inflicted according to the followers of Garga." [The *Vyavahara Mayukha*, Mandlik's Edition, pages 123 and 124]. Vijnaneshwara in his Chapter on "the Resumption of Gifts" in the *Mitakshara*, quotes Narada to the same effect, and defines "bribe" (*utkocha*) as "something paid to a person, bound to do an act, with the object of removing an obstacle to the performance of his duty."† Judged by this definition, the payment of Rs. 8,000 to Bhavanibai was a bribe. At the date of the payment she had already bound herself to adopt Nana Maharaj. The payment was made to induce her to do what she was under an obligation to perform without any inducement but solely for the spiritual benefit of her deceased husband and herself and the perpetuation of her husband's family.

The payment of Rs. 8,000, illegal in its inception, may have been made by Chimna Maharaj after borrowing the amount from third parties. But even regarded as a debt contracted by him, it could not bind his sons because it was contracted for an illegal purpose, which was its payment as a bribe. And further, Nana Maharaj by his adoption had ceased to be Chimna Maharaj's son at the date of his gift to the appellant. He was at that time under no pious obligation to satisfy Chimna Maharaj's debts.

Nana Maharaj's deed of gift was, it is urged, supported by valuable consideration, *first*, because it was made to his natural brother out of love and affection, in consideration of the benefit conferred on him by his natural father by giving him in adoption, and *secondly*, because it was made in exchange for the lands at Chinchwad.

As to love and affection, the question is whether such a deed relating to joint ancestral property binds the sons of its executant, who, according to Hindu Law, took a vested interest in it by birth. A Hindu father is not competent to make a gift of such property if it is immovable and is joint ancestral estate. Relying on certain texts, Vijnaneshwara says that the texts quoted by him "forbid a gift of immovable property through favour, they both relate to immovables which have descended from the paternal grandfather." [The Mit., Ch. I, section I, pl. 21].

Certain texts of Hindu law have been relied upon by Mr. Rao for the appellant, as showing that a gift once made cannot be resumed, if it is to "a benefactor," (Colebrooke's Dig. Vol. I p. 449), or to a father (Ghose's Hindu Law, 2nd Edn., page 736 and page 748). These texts apply as between the donor and the donee and relate to property which it was competent for the donor to give away. They cannot affect the joint ancestral estate of a Hindu and his sons. Their rights and liabilities are regulated by special texts dealing with that estate; and such of these special texts as relate to gifts form exceptions to the general texts on the subject.

Lastly, if the transaction, evidenced by the deed (Exhibit 55), is to be regarded as one supported by valuable consideration on account of the exchange of lands conveyed by it for the lands at Chinchwad, given to Chimna Maharaj by Bhavanibai on the day that she adopted Nana Maharaj, it can only amount in substance to a sale of the property. But a Hindu father is not competent to sell joint ancestral property to the detriment of his sons, except for an *antecedent* debt, which

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* The *Mitakshara*; Acharadyaya or Rituals, Moghe's 3rd Edn., p. 15 R. 116.

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†The *Mitakshara*, Moghe's 3rd Ed. p. 226.

had been contracted by him for a purpose, neither illegal nor immoral. In the present case, there was no debt of Nana Maharaj at all to entitle him to sell any portion of his ancestral estate, and bind his son. And even if there had been an antecedent debt of Chimna Maharaj, Nana Maharaj had ceased to be his son legally liable to pay it at the time that he entered into the transaction of exchange.

For these reasons, the decree appealed from must be confirmed with costs.

Heaton, J.—I concur.

Decree confirmed.

(s. c. 12 Bom. L. R. 923.)

BOMBAY HIGH COURT.

CRIMINAL REVISION No. 182 OF 1910.

September 23, 1910.

Present:—Mr. Justice Batchelor and Mr. Justice Rao.

In re BAI PARVATI—ACCUSED.

Criminal Procedure Code (Act V of 1898), s. 209—Committing Magistrate—Discretion to discharge—When to be exercised.

Under section 209 of the Criminal Procedure Code, if a Magistrate finds that there are not sufficient grounds for committing the accused person for trial—either because there is no evidence whatever, or because the evidence tendered by the prosecution appears to him to be totally unworthy of credit, it would be his duty to discharge the accused.

Where the Magistrate entertains any real doubt as to the weight or quality of the evidence, the task of resolving that doubt and assessing the evidence should be left to the Court of Sessions.

Emperor v. *Ravji Hari Velyaumkar*, 9 Bom. L. R. 225; 5 Cr. L. J. 213, followed.

In the matter of the petition of Lachman v. *Juala*, 5 A. 161, approved.

Queen-Empress v. *Namdev Satvaji*, 11 B. 372, explained.

Application for revision against an order passed by Joint Judge of Ahmedabad, in Criminal Application No. 18 of 1910, reversing an order passed by the Resident Magistrate of Borsad, in Criminal Case No. 17 of 1910.

Mr. *Branson*, with Mr. *Manmukhram K. Mehta*, for the Applicant.

Mr. *Ramdatt V. Desai*, for the Crown.

Judgment.—This is an application by one Bai Parvati who was accused before the Magistrate of having attempted to commit murder by pushing another woman named Jadav into a well.

Parvati the applicant was the mistress of Jadav's husband. A good deal of evidence was summoned for the prosecution and the Magistrate having heard all the evidence tendered came to the conclusion which he expressed in these words: "After having closely gone through the evidence as a whole I find that it will be a mere waste of the Sessions Court's very valuable time if I commit the accused to it to take her trial there, when I myself see that there are not sufficient grounds for committing her. I, therefore, discharge her under section 209 of the Criminal Procedure Code."

From this order an application was preferred by Jadav to the Sessions Judge who reversing the Magistrate's order, directed the Magistrate to draw up a charge against the accused Parvati and commit her for trial under section 307 of the Indian Penal Code.

The question before us now is whether this order of the Sessions Judge should be sustained.

Upon the facts underlying this application it is not necessary to say more than this, that the First Class Magistrate went into them at some length, that he examined the evidence of the witnesses with great care and in the end found that there were no grounds to commit.

The Sessions Judge, as we read his judgment, does not materially dissent from the Magistrate in this view of the effect of the evidence tendered. He says that "on a small foundation of probabilities an enormous superstructure of untruth has been gradually built up" and he proceeds to show that most of the important witnesses are totally unworthy of credit. But having thus disposed of the witnesses, he says that there still remains the story of Bai Jadav herself, though at the same time, he admits that "having regard to the relation between the two women it is improbable that Bai Parvati should have been allowed to accompany Bai Jadav to the well".

Upon the Sessions Judge's own estimate of the value of the evidence we think that the Magistrate was within his rights in ordering the discharge of Bai Parvati and that she should not be exposed to the expense and harassment of a Sessions trial which is practically foredoomed to failure. No doubt, in a case of this kind the line between the Magistrate's duty and the Sessions Court's prerogative is not easy to draw. We think, however, that it is not difficult to show that in this case the Magistrate did not exceed his authority.